BRB No. 96-0698 BLA

MARY F. RIFFLE (Widow of HERBERT RIFFLE) Claimant-Respondent v. CARBON FUEL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Gregory W. Evers, Charleston, West Virginia, for claimant.

Ann B. Rembrandt (Jackson & Kelly), Charleston, West Virginia, for employer.

Sarah M. Hurley (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (89-BLA-1959) of

Administrative Law Judge John C. Holmes awarding benefits on a claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). Initially, Administrative Law Judge G. Marvin Bober found the autopsy evidence sufficient to invoke the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and found the evidence of record insufficient to establish rebuttal of the presumption pursuant to Section 727.203(b). Accordingly, he awarded benefits.[2]

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding pursuant to Section 727.203(a)(1) and (b)(2), but remanded the case for him to consider all of the relevant rebuttal evidence pursuant to Section 727.203(b)(3).[3] *Riffle v. Carbon Fuel Co*., BRB Nos. 92-2212 BLA/A (Jul. 28, 1994)(unpub.).

On remand, employer moved to reopen the record for the development of new subsection (b)(3) rebuttal evidence in light of the recent decision by the United States Court of Appeals for the Fourth Circuit, wherein appellate jurisdiction of this case arises, in *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994). Administrative Law Judge James Guill denied the motion, and the case was transferred, without objection, to Judge Holmes.

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[1] Claimant is Mary F. Riffle, widow of Herbert Riffle, the miner, whose application for benefits filed on November 7, 1979 was initially awarded on November 25, 1981, and was pending when Mr. Riffle died on October 20, 1988. Director's Exhibits 1, 31, 72. Claimant filed an application for survivor's benefits on November 23, 1988. Director's Exhibit 55.

[2] The administrative law judge found that entitlement on the survivor's claim was not established pursuant to 20 C.F.R. §718.205(c).

[3] The Board also instructed the administrative law judge to apply Part 727 to the survivor's claim, if reached.

The administrative law judge found that rebuttal of the presumption pursuant to Section 727.203(b)(3) was not established. He concluded that, under *Grigg*, the opinions of Drs. Zaldivar, Kleinerman, and Naeye merited little or no weight because they did not contain a diagnosis of pneumoconiosis. Accordingly, he awarded benefits.

On appeal, employer contends that the administrative law judge failed to consider all of the relevant evidence. Employer further asserts that the administrative law judge failed to apply the proper rebuttal standard and erred by automatically rejecting the opinions of Drs. Zaldivar, Naeye, and Kleinerman. Employer also argues that Judge Guill erred by failing to reopen the record. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of Judge Guill's order denying employer's motion to reopen the record.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 727.203(b)(3), employer contends that the administrative law judge failed to comply with the Board's instruction to consider the opinion of Dr. Crisalli. Employer's Brief at 7-8. Employer's contention has merit. The Board instructed the administrative law judge to consider Dr. Crisalli's opinion at Section 727.203(b)(3) under *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), because the physician opined that the miner's total disability was not related to his coal mine employment but rather was due to his smoking-related cancer and bronchitis. Director's Exhibit 49; *Riffle*, slip op. at 5. Because the administrative law judge failed to consider this opinion, we must vacate his finding pursuant to Section 727.203(b)(3).

Employer further contends that the administrative law judge erred by automatically rejecting the opinions of Drs. Zaldivar, Naeye, and Kleinerman. Employer's Brief at 10-13. In the prior appeal, the Board held that the opinions of these three physicians were legally sufficient, if credited, to meet the *Massey* rebuttal standard and instructed the administrative law judge to consider them on remand. *Riffle*, slip op. at 5. In so doing, the Board also noted that none of these physicians diagnosed pneumoconiosis. *Riffle*, slip op. at 5 n.6. On remand, the administrative law judge found that:

> *Grigg* is binding on me. The Board's findings . . . leave[ ] me no alternative but to uphold Judge Bober's finding that benefits should be granted. Simply stated, all three of the physicians'

> reports . . . find no pneumoconiosis; their opinions thus cannot be the basis for rebuttal under (b)(3).

[1996] Decision and Order at 2.

Employer's argument has merit. The administrative law judge mistakenly believed that the lack of a diagnosis of pneumoconiosis rendered the opinions of Drs. Zaldivar, Naeye, and Kleinerman legally insufficient to establish rebuttal under *Massey* and therefore, erroneously concluded that, under *Grigg*, he was prohibited from weighing them. In *Grigg* and in subsequent cases construing *Grigg, see Hobbs v. Clinchfield Coal Co., 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); Dehue Coal Co. v. Ballard, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995),* the Fourth Circuit court has indicated that the administrative law judge must assess the probative value of medical opinions regarding the cause of the miner's respiratory impairment or disability. Here, the administrative law judge made no such findings. Therefore, we must remand this case for the administrative law judge to weigh the opinions of Drs. Zaldivar, Kleinerman, Naeye,[4] and Crisalli to determine whether they establish

[4] Although Dr. Zaldivar did not diagnose pneumoconiosis, he acknowledged a "moderate obstructive impairment" which he tied to "chronic cigarette smoking." Director's Exhibit 38. He also found a "marked impairment of diffusing capacity" due to smoking-related emphysema and fibrosis caused by the miner's chemotherapy. *Id*. He concluded that the miner was "severely impaired" as a result of smoking-related lung cancer and emphysema, treatment fibrosis, and hepatitis, none of which was related to coal mine work in his view. *Id.* In his written report, Dr. Kleinerman simply stated that, "since simple coal workers' pneumoconiosis is not present . . . it did not contribute to his respiratory . . . impairment or disability." Director's Exhibit 63. However, in his deposition testimony, not discussed by the administrative law judge, he acknowledged a diffusing capacity impairment but tied it to radiation therapy fibrosis. Employer's Exhibit 2 at 33-35. He also opined that the miner had a "severe lung impairment" due to fibrosis and bronchopneumonia, but stated that he could rule out coal dust exposure with respect to these conditions. *Id.* In his written report, Dr. Naeye stated that, "since coal workers' pneumoconiosis is absent it could not have caused any impairments in lung function." Director's Exhibit 59. However, in his deposition testimony, which the administrative law judge did not discuss, he stated that he could rule out coal dust exposure as playing any role in the miner's disability. Employer's Exhibit 3 at 15. In one portion of his testimony he explained that the miner's lung cancer and emphysema were due to many years of smoking, and that his extensive fibrosis was caused by radiation therapy. Employer's Exhibit 3 at 9. In another portion of his testimony, however, he stated that he could rule out coal dust exposure because "the postmortem material . . . was of high quality and . . . there was no pneumoconiosis in it . . . ." Employer's Exhibit 3 at 15.

subsection (b)(3) rebuttal under *Massey* in light of *Grigg*, *Hobbs*, and *Ballard*, *supra*. In addition, as employer contends, Employer's Brief 8-10, on remand the administrative law judge must apply the *Massey* rebuttal test, which is whether the medical opinions rule out a causal connection between the miner's total disability and his coal mine employment. *See Massey*, *supra*. It will not be sufficient to state, as the administrative law judge did below, [1996] Decision and Order at 2, that employer's evidence fails because the physicians did not opine that the miner suffers from no respiratory impairment of any kind.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is vacated, and the case is remanded for further consideration consistent with this opinion.[5]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[5] On remand, employer may wish to renew its motion to reopen the record before the administrative law judge, if necessary. Employer's Brief at 14-17.