BRB No. 96-1405 BLA

GLORIA LEE NOWLIN (Widow of MALCOLM NOWLIN) Claimant-Respondent v. EASTERN ASSOCIATED COAL CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: _____ DECISION and ORDER

Appeal of the Supplemental Decision and Order On Third Remand of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Lawrence C. Renbaum (Arter & Hadden), Washington, D.C., for employer.

Gary K. Stearman (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, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order On Third Remand (83-BLA-0596) of Administrative Law Judge Charles P. Rippey awarding benefits on a claim 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). This case is before the Board for the fourth time. Most recently, the Board held, in *Nowlin v. Eastern Associated Coal Corp.*, BRB Nos. 94-2695 BLA and 94-2695 BLA-A (Aug. 31, 1995)(unpub.), that the

administrative law judge erred in failing to adjudicate the miner's claim.[1] The Board further held that the administrative law judge properly considered the survivor's claim under 20 C.F.R. §410.490, and that the finding of the existence of pneumoconiosis, made by Administrative Law Judge Richard L. Sippel on original consideration and affirmed by the Board, constitutes law of the case. The Board next addressed employer's challenge to the administrative law judge's finding that employer failed to establish rebuttal at 20 C.F.R. §727.203(b)(3). Specifically, the Board held that the administrative law judge rationally discredited Dr. Revercomb's opinion as he failed to diagnose pneumoconiosis, and permissibly found that Dr. DeLara's conclusions were too equivocal to establish rebuttal. The Board next agreed with employer's assertion that the administrative law judge failed to weigh the opinions of Drs. Morgan, Rasmussen, Piccirillo, and Laqueur, upon which employer relied. The Board remanded the case for reconsideration of the opinions of Drs. Morgan, Piccirillo and Laqueur, indicating that Dr. Rasmussen's opinion is, however, insufficient to establish rebuttal at Section 727.203(b)(3) pursuant to *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994) and *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984).

On remand, the administrative law judge found that Dr. Morgan's letter dated May 28, 1976, in which he reported, *inter alia*, nodules typical of pneumoconiosis, Director's Exhibit 14, is insufficient to establish rebuttal. The administrative law judge also found that while the Board indicated that Dr. Morgan stated that the miner's disability was unrelated to his coal mine employment, he was unable to find any such statement in the record. He also agreed with Judge Sippel's determination that Dr. Piccirillo excluded, without explanation, the miner's six years of coal dust exposure as a cause of impairment, and that Dr. Piccirillo's opinion that the miner's inhalation of coal mine dust caused no significant pulmonary problems, is unreasoned. The administrative law judge next noted Dr. Laqueur's finding of no coal workers' pneumoconiosis on the left lung tissue slides taken on autopsy. He ultimately reaffirmed Judge Sippel's finding that Dr. Laqueur's report cannot be accepted in view of Dr. DeLara's more extensive and better reasoned report in which he found pneumoconiosis on autopsy in the left lung and pursuant to claimant's pneumonectomy in the removed right lung. *Id.* The administrative law judge

[1]The Board indicated, "Contrary to the administrative law judge's finding, the miner's claim is still pending as the Board remanded the case for reconsideration of the miner's claim under Section 410.490 and if necessary Parts 410, Subpart D and 718. As the administrative law judge improperly failed to comply with the instructions given on remand and adjudicate the miner's claim, we remand the case for consideration of the miner's claim as previously instructed." Board's Decision and Order dated Aug. 31, 1995 at 4.

thus determined that the evidence does not support a finding of rebuttal of the presumption provided at Section 410.490. He then reaffirmed the finding of entitlement in the survivor's claim and reinstated Judge Sippel's approval of the miner's claim with benefits commencing October 1, 1975.

On appeal, employer challenges the administrative law judge's finding of no rebuttal at Section 727.203(b)(3). The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, taking no position on the administrative law judge's resolution of the evidence or case. Rather, the Director argues that while employer objects to previous procedural rulings made by the Board, namely, that the Board has jurisdiction to hear the miner's claim and that the survivor's claim is properly adjudicated under Section 410.490, these rulings constitute law of the case. The Director also argues that employer relies on inapplicable caselaw in addressing the pertinent issue, namely, whether employer has met its burden at Section 727.203(b)(3) under *Grigg*. In this regard, the Director argues that employer's reliance on *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994) is misplaced as *Grigg* and *Massey* apply and *Vigna* does not. Employer replies, and disagrees with the Director's response.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends[2] that if the miner was disabled when he died, his disability was due to cancer and not to pneumoconiosis or any impairment arising from coal mine employment. Employer also argues that the miner's death was not due to pneumoconiosis and notes that when the original case was before Judge Sippel, claimant did not contend that the miner died due to pneumoconiosis. Employer also contends that the administrative law judge's finding of no rebuttal at Section 727.203(b)(3) fails to comport with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), and that the administrative law judge failed to consider evidence specifically identified by the Board as relevant.

[2]Employer continues to object to the Board's determinations that Judge Sippel actually awarded benefits in the miner's claim and that entitlement in the survivor's claim is determined by review of the miner's claim. The Director correctly argues, however, that these holdings constitute law of the case. *See, e.g., Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

As an initial matter, we note that claimant has the benefit of two presumptions, namely, that the miner was totally disabled due to pneumoconiosis at the time of his death and that his death was due to pneumoconiosis, *see, e.g., Napier v. Bethlehem Steel Corp.,* 5 BLR 1-1 (1982). In the instant case, employer correctly states that the administrative law judge did not consider Dr. Morgan's letter, dated February 15, 1978, Claimant's Exhibit 1(b)[3], or Dr. Laqueur's deposition testimony, Employer's Exhibit 1. However, we reject employer's argument that these errors constitute reversible error requiring a remand of the case. Specifically, with regard to Dr. Morgan's opinion, the administrative law judge considered his May 28, 1976 letter, Claimant's Exhibit 1(a) (also found at Director's Exhibit 14), in which Dr. Morgan found nodules typical of pneumoconiosis, and properly determined that this opinion does not support a finding that the miner's disability did not arise at least in part out of pneumoconiosis. While the administrative law judge did not address Dr. Morgan's finding that the miner's future was guarded since his type of cancer carries a very poor prognosis, *Id.,* he properly found that contrary to the Board's indication, *see* Board's Decision and Order dated Aug. 31, 1995 at n.4, Dr. Morgan did not state that the miner's disability was unrelated to his coal mine employment. Accordingly, considering the totality of Dr. Morgan's findings, we hold that the administrative law judge ultimately reached the correct conclusion, namely, that Dr. Morgan's opinion does not establish rebuttal at Section 727.203(b)(3).

Further, employer correctly contends that the administrative law judge did not consider Dr. Laqueur's deposition testimony wherein he opined that a review of autopsy slides revealed cancer of the larynx involving the diaphragm and stomach, and that there was no evidence of coal workers' pneumoconiosis or fibrosis (in left lung), Employer's Exhibit 1. The administrative law judge properly discredited, however, Dr. Laqueur's written report, Director's Exhibit 35, because he found that the opinion is outweighed by Dr. DeLara's more extensive better reasoned findings of pneumoconiosis both on autopsy in the miner left lung and pursuant to the pneumonectomy in the removed right lung. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Inasmuch as the administrative law judge ultimately considered the import of Dr. Lacquer's opinion, expressed in his written report, his failure to address this same opinion expressed on deposition was harmless.

Employer also argues that the administrative law judge erred in failing to consider part of Dr. Revercomb's deposition testimony. We agree. Dr. Revercomb testified on

[3]Dr. Morgan found that the pathology report regarding the miner's 1976 right lung pneumonectomy confirmed the diagnosis of carcinoma and pneumoconiosis, which Dr. Morgan assumed was present in both lungs. He attributed the miner's pneumoconiosis to his coal mine employment, but did not believe that his carcinoma was related to the pneumoconiosis. Dr. Morgan also opined that the miner should not return to coal mine employment since he probably has pneumoconiosis and should not be subjected to "the irritations that accompanies (sic) coal mining." Claimant's Exhibit 1(b).

deposition that the miner did not have pneumoconiosis and even assuming the existence thereof, the miner had no disability resulting therefrom; that any pulmonary impairment was due to causes totally unrelated to pneumoconiosis. Employer's Exhibit 7-g at 9-12, 15. Employer argues the administrative law judge's prior discrediting of Dr. Revercomb's opinion based on his failure to diagnose pneumoconiosis was erroneous since Dr. Revercomb stated that *even if* the miner did have pneumoconiosis, he had no impairment resulting therefrom. *Id.* Because the administrative law judge did not consider Dr. Revercomb's deposition testimony in this regard, we remand the case for further consideration. On remand, the administrative law judge must determine, what impact, if any, Dr. Revercomb's full opinion has on his finding that employer failed to establish rebuttal at Section 727.203(b)(3).

Employer next argues that the administrative law judge's award of benefits in the survivor's claim is erroneous as the claim was not considered under 20 C.F.R. Part 718, and asserts that the evidence is insufficient to establish entitlement thereunder. Employer's argument lacks merit. The Board previously explained that entitlement in the survivor's claim is derivative and based on a finding of entitlement in the miner's claim. *See* Board's Decision and Order dated Aug. 31, 1995 at 4. Moreover, as previously instructed by the Board, if the administrative law judge denies benefits in the miner's claim, he must consider the survivor's claim under Part 718. *Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (1989).

Employer also contends that Judge Sippel's finding of pneumoconiosis was based on the true doubt rule and is thus contrary to law. This argument lacks merit. The Board has previously considered and rejected this argument, and affirmed Judge Sippel's finding which stands as law of the case, *Id.* at n.3. *See Bridges, supra*.

Lastly, employer contends that if claimant is entitled to benefits, the administrative law judge's award of benefits commencing October 1, 1975 cannot stand because claimant could not be entitled to benefits until March 1981, the month in which the miner died, when, employer argues, the record evidence supports a finding of both pneumoconiosis and disability. In the instant case, the administrative law judge awarded benefits without addressing the evidence relevant to a determination of the date of onset of the miner's total disability. A review of the record reveals that employer has consistently challenged the date of onset issue, and, moreover, that the Board previously instructed the administrative law judge, upon a finding of entitlement, to address and weigh all the relevant evidence pursuant to 20 C.F.R. §725.503. Board's Decision and Order dated Aug. 17, 1993 at 4. We, therefore, vacate the administrative law judge's award of benefits commencing October 1, 1975, and further remand the case for reconsideration. If, on remand, the administrative law judge should award benefits, he or she must determine the appropriate date for the commencement of benefits. *See Rochester & Pittsburgh Coal Co. v. Krekota,* 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP,* 12 BLR 1-181 (1989).

Accordingly, the administrative law judge's Decision and Order On Third Remand is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge