

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2602

ESTATE OF ANN KROFCHECK
(Widow of PAUL KROFCHECK),

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

On Petition for Review of an Order
of the Benefits Review Board
United States Department of Labor
No. BRB-00-0701 BLA

Submitted Under Third Circuit LAR 34.1(a)
February 5, 2002

Before: SLOVITER, and AMBRO, Circuit Judges
POLLAK*, District Judge

(Opinion filed March 12, 2002)

OPINION

*Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.
AMBRO, Circuit Judge

The estate of a deceased miner's widow appeals the Department of Labor Benefits Review Board's affirmance of the denial of miner's and survivor's benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* We affirm.

I.

Paul Krofcheck (the “miner”) worked in underground mines for fifteen and one-half years. A blood gas study performed in 1973 yielded values too high to qualify him for a statutory presumption of pneumoconiosis, or "black lung" disease. He filed a claim for miner’s benefits on May 22, 1978. On August 23, 1978, he was admitted to the hospital with partial paralysis of his right side. Three days later he suffered congestive heart failure. A pulmonary function test administered on September 11, 1978, found results that qualified him for a statutory presumption of pneumoconiosis. At the time of this test the examining doctor concluded that he suffered from "moderately severe obstructive ventilatory pattern, with excellent response to bronchodilators. Compatible with reversible bronchospasm." He was released and readmitted several times during the next months, each time with diagnoses of congestive heart failure. He died on February 24, 1979, with the cause of death listed as “cardiac arrest due to coronary occlusion with myocardial infarction due to arteriosclerotic heart disease.”

The procedural history of this action spans twenty-three years, and is well known

to the parties. We will summarize it briefly. Ann Krofcheck,¹ the miner's widow, filed a claim for survivor's benefits on March 11, 1979. The Department of Labor denied both survivor's benefits and miner's benefits after determining that the evidence did not show that the miner suffered from pneumoconiosis at the time of his death. After a series of hearings, remands, and requests for reconsideration, the Administrative Law Judge ("ALJ") denied benefits once again on March 17, 2000, and the Board affirmed on May 22, 2001. Claimant appealed.

II.

We review the Board's decision for errors of law and to determine if it adhered to its statutory scope of review. Kertesz v. Crescent Hills Coal Co., 788 F.2d 158, 162 (3d Cir. 1986). The ALJ's findings of fact are conclusive if supported by "substantial evidence in the record considered as a whole." 33 U.S.C. § 921(b)(3) (2001), 30 U.S.C. § 932(a) (2001). We must independently review the record to determine if substantial evidence exists to support the ALJ's findings. Lango v. Dir., Office of Workers' Comp. Programs, 104 F.3d 573, 576 (3d Cir. 1997). Substantial evidence is "more than a mere scintilla." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation omitted). It is not "a large or significant amount of evidence, but rather 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Pierce v. Underwood, 487 U.S.

¹ Ann Krofcheck died on November 17, 1994, and her estate continued to press her claim. For simplicity's sake we will refer to both Ann Krofcheck and her estate as the "claimant."

552, 565 (1988) (citation omitted).

III.

On March 2, 2001, the Board requested that the parties brief the question of whether 20 C.F.R. § 718.104(d) (2002) applies to the claim at issue. Revisions to this regulation require the adjudicator of a claim to “give consideration to the relationship between the miner and any treating physician whose report is admitted into the record.” Id. The adjudicator may give controlling weight to the treating physician’s opinion “provided that [the weight assigned] shall also be based on the credibility of the physician’s opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.” Id. The Board held that “[t]he revisions to the regulation at 20 C.F.R. §718.104(d) apply to claims filed after January 19, 2001. Consequently, the provision requiring that special consideration be accorded to the report of a treating physician does not apply to the instant claim.”

The Board did not err in its conclusion that the “treating physician rule” of 20 C.F.R. § 718.104(d) does not apply here. 20 C.F.R. § 718.101(b) reads:

The standards for the administration of clinical tests and examinations contained in this subpart shall apply to all evidence developed by any party after January 19, 2001 in connection with a claim governed by this part . . . These standards shall also apply to claims governed by part 727 [Review of Pending and Denied Claims under the Black Lung Benefits Reform Act of 1977] . . . *but only for clinical tests or examinations conducted after January 19, 2001.*

(emphasis added). Because § 718.101 applies the new standards its subpart sets out only

to examinations conducted after January 19, 2001, § 718.104's treating physician rule does not apply to this case.

Claimant attempts to use §§ 725.2(b) and (c) to justify applying the rule retroactively to her case. As she points out, these sections provide that “this part” applies to claims pending on August 18, 1978 and to claims pending on January 19, 2001. However, it is clear from the context that the words “this part” refer to the provisions of § 725, not to those of § 718. Claimant cannot use § 725's language to justify applying the treating physician rule of § 718.104.

Claimant next argues that the ALJ and Board erred in not invoking the interim presumption in 20 C.F.R. § 727.203 (1999) of death due to pneumoconiosis, established if one of four conditions is met and the miner has worked in a mine for ten years. These conditions are:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis . . . ; (2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease . . . as demonstrated by values which are equal to or less than the values specified in the following table; (3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table; (4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment.

20 C.F.R. § 727.203 (1999). Claimant argues that § 727.203(2)'s presumption is invoked because ventilatory studies establish that the miner had qualifying forced expiratory volume (FEV) values. Claimant also argues that pneumoconiosis is established under §

727.203(4), which invokes the presumption if “[o]ther medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment.”

The ALJ determined that the studies claimant relies upon were not valid and credible, and therefore did not invoke § 203(a)(2)'s interim presumption. Specifically, he pointed to the lack of spirometric tracings and to the absence of a statement of the miner's understanding and cooperation that 20 C.F.R. § 410 requires. Id. Claimant argues that the tracings were destroyed in accordance with regular hospital procedure, and that Dr. C. Vaughn Strimlan's assurances that the miner's effort and cooperation were good should cure any deficiencies. She argues that the ALJ erred in holding that these tracings were mandatory. In fact the ALJ did not so hold, but rather evaluated Dr. Strimlan's assurances that the test results were valid and discounted them.

There was substantial evidence for the ALJ's conclusion. The ALJ faulted Dr. Strimlan for failing to consider the effect of the miner's stroke. He concluded that Dr. Strimlan's statement at the time of the test (that the miner suffered from “moderately severe obstructive ventilatory pattern, with excellent response to bronchodilators. Compatible with reversible bronchospasms”), which is inconsistent with “the progressive and irreversible nature of pneumoconiosis,” was more credible than the statements he made years later. The ALJ gave greater weight to the opinion of Dr. Leon Cander, who concluded that heart failure caused the pulmonary test results, citing the normal results

obtained prior to the miner's heart failure.

The record also provides substantial evidence to support the ALJ's decision not to invoke § 203(a)(4)'s interim presumption, thereby rejecting the opinions of Drs. Strimlan and Allan Freedman, who believed that the miner was disabled by pneumoconiosis, and that it in part caused his death. The ALJ cited the negative X-ray evidence and the fact that the pulmonary function test the doctors relied upon revealed results inconsistent with pneumoconiosis ("excellent response to bronchodilator"). He noted that the miner's arterial blood gas results were normal thirty years after he left the mine, and only became abnormal following his stroke. Coupled with Dr. Cander's analysis, this was substantial evidence for not invoking the interim presumption under § 727.203(a)(4).

Claimant argues that the ALJ erred in holding that even if an interim presumption under § 727.203(a) were invoked, it was rebutted. Appellant's Br. at 20-21. We need not reach this issue because the ALJ relied upon substantial evidence to determine that no such presumption was invoked.

Finally, claimant contends that the ALJ erred in not performing a *de novo* review of the lay evidence under § 727.203(a)(5) and that the Board erred in holding this to be harmless error. Section 727.203(a)(5) provides that "[i]n the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment." The ALJ stated that

“this decision is based upon a complete and thorough *de novo* review of all of the lay and medical evidence.” He “carefully reviewed and weighed the testimony of the miner’s widow . . . and [her] lengthy handwritten letter dated October 26, 1982.” He concluded “although the lay evidence (as well as the medical evidence) indicates that the miner was disabled by health problems (e.g., heart disease, stroke), it fails to establish total disability due to a respiratory or pulmonary condition.” These statements indicate that the ALJ did perform a *de novo* review of the lay evidence; hence we need not decide whether his failure to do so constituted harmless error.

IV.

For the foregoing reasons, the Board's decision is affirmed.

TO THE CLERK:

Please file the foregoing Opinion.

By the Court,

/s/ Thomas L. Ambro
Circuit Judge