

BRB No. 89-2815 BLA

GENO VERONESI)
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 Claimant-Petitioner)
)
 v.)
)
 CONSOLIDATION COAL COMPANY) DATE ISSUED:
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order on Remand of Daniel Goldstein, Administrative Law Judge, United States Department of Labor.

Geno Veronesi, Adena, Ohio, pro se.

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

Before: DOLDER and McGRANERY, Administrative Appeals Judges, and
LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, without legal representation, the Decision and Order and the Decision and Order on Remand (87-BLA-1519) of Administrative Law Judge Daniel Goldstein denying 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

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

et seq. (the Act). This case is on appeal before the Board for the second time. In his original Decision and Order, the administrative law judge credited claimant with forty-seven years of qualifying coal mine employment, and found that claimant established invocation of the interim presumption at 20 C.F.R. §727.203(a), based on employer's concession that the evidence of record established the existence of pneumoconiosis. The administrative law judge further found, however, that the evidence of record established rebuttal of that presumption pursuant to 20 C.F.R. §727.203(b)(2), and that claimant failed to establish entitlement pursuant to the provisions at 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied. On appeal, in light of York v. Benefits Review Board, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987), the Board applied the administrative law judge's factual findings at Section 727.203(b)(2) to the appropriate regulations at Section 727.203(b)(3), and affirmed the administrative law judge's finding of rebuttal. The Board remanded this case, however, for the administrative law judge to consider entitlement pursuant to the provisions of 20 C.F.R. §410.490, in light of Kyle v. Director, OWCP, 819 F.2d

139, 10 BLR 2-112 (6th Cir. 1987). On remand, the administrative law judge found invocation of the interim presumption established pursuant to 20 C.F.R. §410.490(b)(2)(i) and (b)(2), but found rebuttal established pursuant to 20 C.F.R. §410.490(c)(2), and consequently denied benefits. The administrative law judge further ordered claimant to repay all benefits received since June 1979, with interest, to the Black Lung Disability Trust Fund (Trust Fund). Claimant appeals, contending that the evidence of record is sufficient to establish entitlement to benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

In an appeal by a claimant filed without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. Stark v. Director, OWCP, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Supreme Court held that a claim, such as this, which is properly adjudicated pursuant to Section 727.203 is not subject to adjudication pursuant to Section 410.490. Therefore, we must vacate the administrative law judge's Section 410.490 findings. Pauley v. Bethenergy Mines, Inc., 111 S.Ct. 2524,

15 BLR 2-155 (1991); see Whiteman v. Boyle Land and Fuel Co., 15 BLR 1-11 (1991). Moreover, because this claim lies within the appellate jurisdiction of the United States Court of Appeals for the Sixth Circuit and was adjudicated after March 31, 1980, where entitlement is not established pursuant to 20 C.F.R. Part 727, entitlement must be considered pursuant to the provisions at 20 C.F.R. Part 718. See Knuckles v. Director, OWCP, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989). Nevertheless, remand of this case for further findings pursuant to Part 718 is not necessary, as the administrative law judge properly reviewed all of the evidence of record and found that it was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment. As a result of this finding, claimant is precluded from entitlement to benefits under Part 718. Decision and Order at 7, 8; Decision and Order on Remand at 5. See generally Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); Roberts v. Bethlehem Mines Corp., 8 BLR 1-211 (1985). We, therefore, affirm the administrative law judge's denial of benefits.

We cannot affirm, however, the administrative law judge's order directing claimant to repay to the Trust Fund all benefits received by claimant since June 1979, with interest. Decision and Order on Remand at 6. The deputy commissioner has jurisdiction to first determine whether an overpayment exists pursuant to the provisions at 20 C.F.R. §§725.541-542 and 410.560 et seq., and, if so, claimant is entitled to a hearing before an administrative law judge to determine whether or not recovery of the overpayment must be made. See Yamasaki v. Califano, 442 U.S.

682 (1979); Potisek v. Director, OWCP, 14 BLR 1-87 (en banc, Brown, J., dissenting); Jones v. Director, OWCP, 14 BLR 1-80 (1990)(en banc, Brown, J., concurring). Consequently, we hereby vacate the administrative law judge's order directing repayment by claimant to the Trust Fund.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed, and the administrative law judge's Decision and Order on Remand directing repayment of benefits with interest to the Trust Fund is vacated.

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge