

BRB Nos. 92-0827 BLA

ROY P. SLONE)
)
 Claimant-Respondent)
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 v.)
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)
 DIRECTOR, OFFICE OF WORKERS') Date Issued:
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Petitioner) DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Elizabeth Lopes (Thomas S. Williamson, 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, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Remand (86-BLA-3607) of Administrative Law Judge Stuart A. Levin 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 on appeal before the Board for the third time. Claimant filed a claim for benefits on November 30,

*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) (1988).

1972 and Administrative Law Judge Roketenetz considered the claim pursuant to 20 C.F.R. Part 727. Administrative Law Judge Roketenetz credited claimant with ten years and six months of coal mine employment and found that claimant established invocation of the interim presumption at 20 C.F.R. §727.203(a)(1). Administrative Law Judge Roketenetz then found that employer established rebuttal pursuant to 20 C.F.R. §727.203(b)(2), and that entitlement was not established pursuant to 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied. Claimant subsequently filed a motion for reconsideration, which was denied on January 7, 1982, and a request for modification, which was denied on October 18, 1982. Claimant then appealed the administrative law judge's Decision and Order denying benefits. On appeal, the Board affirmed the administrative law judge's finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(2), and consequently, his denial of benefits. *Slone v. Director, OWCP*, BRB No. 82-286 BLA (Feb. 27, 1984) (unpub.). Claimant filed a second claim for benefits on January 10, 1985, which Administrative Law Judge Hayes considered to be a request for modification of the earlier claim. Administrative Law Judge Hayes considered the claim *de novo*, and determined that claimant failed to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(a)(4). The administrative law judge further found that employer established rebuttal pursuant to 20 C.F.R. §727.203(b)(4), and that entitlement was not established pursuant to 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were again denied. On appeal, the Board affirmed Administrative Law Judge Hayes' findings at 20 C.F.R. Part 727 as unchallenged on appeal, see *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983), and remanded the case for consideration at 20 C.F.R. Part 718 pursuant to *Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989). The Board further instructed the administrative law judge to weigh all of the relevant evidence, including those physician's reports that were discussed by the previous administrative law judge. *Slone v. Director, OWCP*, BRB No. 88-821 BLA (Mar. 22, 1990)(unpub.). On remand, Administrative Law Judge Levin stated that Administrative Law Judge Roketenetz's finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(1), as affirmed by the Board, is applicable to 20 C.F.R. §718.202(a)(1). The administrative law judge further stated that as the issue of the existence of pneumoconiosis was not before Administrative Law Judge Hayes, he is unable to accept Administrative Law Judge Hayes' finding of no pneumoconiosis. The administrative law judge then found that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) and that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were awarded. On appeal, the Director contends that the administrative law judge erred by refusing to review the evidence concerning the existence of pneumoconiosis. Claimant has chosen not to respond.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are 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).

Inasmuch as the Board previously affirmed the administrative law judge's finding that the evidence of record establishes that claimant does not suffer from pneumoconiosis pursuant to 20 C.F.R. §727.203(b)(4), see *Slone v. Director, OWCP*, BRB No. 88-821 BLA (Mar. 22, 1990)(unpub.), and as no exception to the law of the case doctrine has been demonstrated, the Board holds that the law of the case doctrine is controlling on this issue and rebuttal pursuant to Section 727.203(b)(4) has been established. See *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). Further, as the finding that claimant has not established that he suffers from pneumoconiosis is affirmed, entitlement is precluded pursuant to 20 C.F.R. Part 718 as the administrative law judge properly considered all of the evidence of record relevant to this issue. See 20 C.F.R. §718.202(a); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). As a result, the administrative law judge's finding that claimant established entitlement to benefits pursuant to 20 C.F.R. Part 718 is reversed.

Accordingly, the administrative law judge's Decision and Order awarding benefits is reversed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge