

BRB No. 92-1986 BLA

GENEVIEVE LEWIS )  
(Widow of HARVEY LEWIS) )  
)  
Claimant-Petitioner )  
)

v.

) DATE ISSUED: \_\_\_\_\_ )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
)  
Party-in-Interest )

DECISION and ORDER

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

Genevieve Lewis, Albright, West Virginia, *pro se*.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order on Remand (84-BLA-7234) of Administrative Law Judge Stuart A. Levin 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 *et seq.* (the Act). This case is before the Board for the third time. The miner filed a claim on January 15, 1976.<sup>1</sup> In the first Decision and Order, the administrative law judge found that

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<sup>1</sup>While there is no indication of the miner's death in the record, the miner's widow submitted a letter requesting an appeal of the administrative law judge's Decision and Order on Remand of April 22, 1992. Both the Board's most recent Decision and Order and the administrative law judge's most recent Decision and Order list the miner as claimant. There is no indication that a survivor's claim has been filed in this

claimant established at least twenty-four years of coal mine employment and invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and (2). The administrative law judge then found that the Director, Office of Workers' Compensation Programs (the Director), established rebuttal of the interim presumption pursuant to 20

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case.

C.F.R. §727.203(b)(3) and that entitlement was not established pursuant to 20 C.F.R. Part 410, Subpart D. Accordingly benefits were denied. On appeal, the Board affirmed the administrative law judge's finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(3) and remanded the case for application of 20 C.F.R. §410.490 pursuant to the United States Supreme Court's holding in *Pittson Coal Group v. Sebben*, 109 S.Ct. 414 (1988). See *Lewis v. Director, OWCP*, BRB No. 87-3063 BLA (Apr. 20, 1989)(unpub.). On remand, the administrative law judge found that claimant invoked the presumption pursuant to 20 C.F.R. §410.490(b)(3) and that the Director failed to establish rebuttal. Accordingly, benefits were awarded. In response to a motion for reconsideration filed by the Director, the Board vacated the administrative law judge's denial of benefits pursuant to 20 C.F.R. Part 727 and remanded the case to the administrative law judge for reconsideration of invocation under 20 C.F.R. Part 727 pursuant to the holding of the United States Supreme Court in *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *rev'g Stapleton v. Westmoreland Coal Co.*, 785 F.2d 414, 8 BLR 2-109 (4th Cir. 1986), and, if necessary, for reconsideration of rebuttal pursuant to *Taylor v. Clinchfield Coal Co.*, 895 F.2d 178, 13 BLR 2-294 (4th Cir. 1990). See *Lewis v. Director, OWCP*, BRB No. 87-3063 BLA (Dec. 26, 1990)(unpub.). On remand, the administrative law judge noted that the Supreme Court had reversed *Taylor* by issuing *Clinchfield Coal Co. v. Director, OWCP*, 111 S.Ct. 2524 (1991), and that the Board had previously affirmed the finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(3). The administrative law judge then held that rebuttal under both 20 C.F.R. Part 410 and 20 C.F.R. Part 727 was appropriate. Accordingly, benefits were again denied. Claimant appeals this denial without the assistance of counsel. The Director has chosen not to respond to this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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 findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

The Supreme Court, in *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524, 15 BLR 2-155 (1991) and the Board, in *Whiteman v. Boyle Land and Fuel Co.*, 15 BLR 1-11 (1991), held that 20 C.F.R. §727.203(b)(3) is a valid rebuttal provision. Thus, the administrative law judge's previous finding of subsection (b)(3) rebuttal is controlling, as it was supported by substantial evidence and previously affirmed by the Board. See Decision and Order of September 30, 1987; *Lewis v. Director, OWCP*, BRB No. 87-3063 BLA (Apr. 20, 1989)(unpub.); see also *Brinkley v.*

*Peabody Coal Co.*, 14 BLR 1-147 (1990); *Dean v. Marine Terminals Corp.*, 15 BRBS 394 (1983). Further, as rebuttal was properly established pursuant to subsection (b)(3), entitlement is precluded pursuant to 20 C.F.R. Part 410, Subpart D as well. See *Pastva v. The Youghioghny and Ohio Coal Co.*, 7 BLR 1-829 (1985). Also, a claim which was properly adjudicated pursuant to 20 C.F.R. Part 727 is not entitled to further adjudication pursuant to 20 C.F.R. §410.490. See *Pauley, supra*; *Whiteman, supra*. As a result, the administrative law judge's denial of benefits is affirmed.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge