

BRB No. 03-0123 BLA

EVALENE GULLEY)
(Widow of DENZLE GULLEY))
)
Claimant-Respondent)
)
v.)
)
SAHARA COAL COMPANY)
)
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-In-Interest)

DATE ISSUED:
10/15/2003

DECISION and ORDER

Appeal of the Decision and Order on Remand--Award of Benefits and Order on Reconsideration of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Frederick Turner, Jr., Golconda, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Michelle S. Gerdano (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: McGRANERY, HALL, and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand--Award of Benefits and

Order on Reconsideration (1982-BLA-4450) of Administrative Law Judge Robert L. Hillyard rendered 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).¹ The miner filed this application for benefits on May 2, 1977. Director's Exhibit 1. His claim, which is being pursued by his surviving spouse, is now before the Board for the fifth time. Previously, the Board discussed fully this claim=s procedural history. *Gulley v. Sahara Coal Co.*, BRB No. 98-0665 BLA, slip op. at 1-3 (Feb. 10, 1999)(unpub.). We now focus only on those procedural aspects relevant to the issues raised on appeal of the administrative law judge=s decision to award benefits.

The miner worked as a section foreman until he lost his sight due to an incident at work on October 22, 1976. On May 2, 1977, the miner filed an application for benefits. Director's Exhibit 1. On the application form and at the May 25, 1980 hearing, the miner stated that he was unable to work since the date he became blind. Director's Exhibits 1, 8; 1980 Hearing Transcript (Tr.) at 22-23. The miner testified that he had lost the vision in his right eye on February 26, 1976, and then lost vision in his left eye on or about October 22, 1976, in an incident that occurred when he was tightening bolts on a panel cover on a saw at work. Tr. at 22-26. The record contains medical treatment records and testimony from the miner=s treating physician describing the miner=s visual deterioration due to retinitis and intraocular hemorrhaging, and diagnosing his eventual blindness by October 1976. Employer's Exhibits 1, 2, 8 at 13.

Over the course of several administrative law judge and Board decisions, it was determined that the miner had over eighteen years of coal mine employment and that he established invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. ' 727.203(a)(3), based on a qualifying² arterial blood gas study that was administered on July 9, 1984. Director's Exhibits 34, 41; [1998] Decision and Order--Awarding Benefits; [1999] *Gulley*, slip op. at 3-4. In a Decision and Order on Remand--Awarding Benefits issued on May 11, 2000, Administrative Law Judge Ellin M. O=Shea found that employer did not establish rebuttal of the presumption by any method provided at 20 C.F.R. ' 727.203(b). Accordingly, she awarded benefits.

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² A Aqualifying@ blood gas study yields values that are equal to or less than the values specified in the table at 20 C.F.R. ' 727.203(a)(3).

Upon consideration of employer=s appeal, the Board reversed Judge O=Shea=s finding that employer did not establish rebuttal of the interim presumption pursuant to 20 C.F.R. ' 727.203(b)(3). *Gulley v. Sahara Coal Co.*, BRB No. 00-0910 BLA (Jul. 31, 2001)(unpub.). The Board held that because it was undisputed that the miner was totally disabled due to blindness in 1976, prior to his presumed total disability due to pneumoconiosis, rebuttal pursuant to Section 727.203(b)(3) was established as a matter of law under the rule of *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994).³ [2001] *Gulley*, slip op. at 4-5.

Because claimant did not establish entitlement under Part 727, the Board remanded the case for the administrative law judge to consider whether entitlement was established pursuant to 20 C.F.R. Part 718. [2001] *Gulley*, slip op. at 5-6; *see* 20 C.F.R. ' 727.203(d). The Board did so because, at the time of its decision, revised 20 C.F.R. ' 718.204(a), which makes non-pulmonary disabilities irrelevant to determining whether a miner is totally disabled due to pneumoconiosis, on its face applied to all Part 718 claims that were pending on January 19, 2001. 20 C.F.R. ' ' 718.2, 718.204(a). However, prior to the issuance of the administrative law judge=s decision on remand, the United States Court of Appeals for the District of Columbia Circuit held that revised Section 718.204(a) was impermissibly retroactive as applied to pending claims, and thus could not be applied to Acases that had already been filed when the regulations were promulgated.@ *Nat=l Mining Ass=n v. Dep=t of Labor*, 292 F.3d 849, 864-65, --- BLR --- (D.C. Cir. 2002).

In the ensuing Decision and Order--Award of Benefits that is the subject of this appeal, Administrative Law Judge Robert L. Hillyard found that the miner=s July 9, 1984 blood gas study was qualifying under the tables set forth at 20 C.F.R. Part 718, Appendix C, entitling claimant to the rebuttable presumption that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. ' 718.305(a).⁴ The administrative law judge further found that employer did not establish rebuttal of the presumption. In employer=s brief on remand, it argued that claimant=s entitlement was precluded because the miner=s disability due to blindness preceded his presumed disability due to pneumoconiosis. Remand Brief of Sahara Coal Co., Apr. 29, 2002, at 12, 24, 26. The administrative law judge did not address the issue, and awarded benefits. In an Order issued on September 18, 2002, the administrative law judge granted claimant=s motion for reconsideration and

³ Because the miner=s coal mine employment occurred in Illinois, Director's Exhibit 2, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

⁴ For claims filed prior to January 1, 1982, where the miner had at least fifteen years of coal mine employment, Section 718.305(a) provides a rebuttable presumption that the miner is or was totally disabled due to pneumoconiosis, or died due to pneumoconiosis, if the miner=s chest x-ray was interpreted as negative for complicated pneumoconiosis but other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment. 20 C.F.R. ' 718.305(a),(c),(e).

clarified his decision to state that claimant is entitled to benefits in her own right as the miner=s surviving spouse.

On appeal, employer contends that the administrative law judge erred in awarding benefits because claimant=s entitlement is precluded under the Act. Employer further asserts that the administrative law judge erred in his analysis of the medical evidence pursuant to Section 718.305(a). Additionally, employer contends that administrative delays in the processing of this claim violated its due process rights such that any benefits liability must be transferred to the Black Lung Disability Trust Fund. Claimant responds, urging affirmance. The Director, Office of Workers= Compensation Programs (the Director), has filed a limited response, urging rejection of employer=s argument that its due process rights were violated. Employer has filed a reply brief reiterating its contentions.

The Board=s scope of review is defined by statute. The administrative law judge=s Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. ' 921(b)(3), as incorporated into the Act by 30 U.S.C. ' 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. ' 901; 20 C.F.R. ' ' 718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer contends that the administrative law judge erred in awarding benefits because the miner=s pre-existing total disability due to blindness precludes entitlement Aas a matter of statutory construction@ by the United States Court of Appeals for the Seventh Circuit. Employer's Brief at 17. Employer=s contention has merit. The Seventh Circuit court has held that under Athe plain reading@ of 30 U.S.C. ' 901(a),⁵ the Alimited scope and function@ of the Act is to provide benefits to miners who are totally disabled due to pneumoconiosis. *Vigna*, 22 F.3d at 1395, 18 BLR at 2-226. Thus, the court has held that where a miner is disabled by a condition unrelated to coal mine employment prior to developing disabling pneumoconiosis, the miner is Aoutside the scope of the Act.@ *Id.* Entitlement is precluded because the miner Ais not disabled by pneumoconiosis and is not entitled to benefits under the Black Lung Benefits Act.@ *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 839, 18 BLR 2-329, 2-341 (7th Cir. 1994), *cert. denied*, 514 U.S. 1035 (1995).

⁵ Section 901(a) of the Act provides, in pertinent part, that Athe purpose of this subchapter [is] to provide benefits . . . to coal miners who are totally disabled due to pneumoconiosis@ 30 U.S.C. ' 901(a).

In this case, the record indicates that the miner became totally disabled by blindness on or about October 22, 1976. The record contains no evidence establishing a nexus between the miner's presumed condition as of July 1984 based upon the arterial blood gas study, and his total disability which occurred in 1976. Because the record demonstrates that the miner's total disability was caused by blindness in 1976, prior to his presumed total disability due to pneumoconiosis, entitlement is precluded as a matter of law. *Vigna*, 22 F.3d at 1395, 18 BLR at 2-226; *Foster*, 30 F.3d at 839, 18 BLR at 2-341; *see also Kennellis Energies, Inc. v. Hallmark [Ray]*, 333 F.3d 822, 828-29, --- BLR ---, (7th Cir. 2003)(Requiring proof that the miner's other ailments caused total disability prior to the onset of pneumoconiosis). Therefore, we must reverse the administrative law judge's award of benefits. Claimant's contention that reversal is improper in view of the Board's previous remand order lacks merit because, as we have already noted, the Board's remand instruction was prompted by revised Section 718.204(a), which has since been held inapplicable to claims that were pending on January 19, 2001.⁶ *Natl Mining*, 292 F.3d at 864-65, --- BLR at ---.

Accordingly, the administrative law judge's Decision and Order on Remand--Award of Benefits and Order on Reconsideration are reversed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge

⁶ Because we reverse the administrative law judge's decision to award benefits, we need not address the parties' remaining contentions on appeal.