

BRB No. 88-2935 BLA

JUANITA NICKELS (Widow of))
ELMER NICKELS))
)
Claimant-Petitioner)
)
v.)
)
JEWELL RIDGE COAL CORPORATION)
)
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order of John S. Patton, Administrative Law Judge, United States Department of Labor.

Juanita Nickels, Grundy, Virginia, pro se.

Timothy W. Gresham (Penn, Stuart, Eskridge & Jones), Abingdon, Virginia, for employer.

Rita A. Roppolo (Robert P. Davis, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Jeffrey J. Bernstein, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

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

PER CURIAM:

Claimant, the surviving spouse, appeals, without legal

*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).

representation, the Decision and Order (86-BLA-0089) of Administrative Law Judge John S. Patton 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). The administrative law judge determined that the claim filed by the miner was subject to the transfer provisions of 20 C.F.R. §725.496, but that the claim filed by the miner's widow had been finally denied and thus was not before the administrative law judge for consideration. The administrative law judge credited the miner with ten years of qualifying coal mine employment, but found that the evidence was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a), and accordingly denied benefits. Claimant appeals the administrative law judge's denial of entitlement to benefits on both claims. Employer and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance.

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. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Turning first to the procedural issues, the administrative law judge properly determined that the miner's claim was subject to the transfer of liability provisions of Section 725.496, as the claim had been finally denied by the Social Security Administration prior to March 1, 1978, and claimant timely filed a valid election card requesting Section 435 review of the claim. 30 U.S.C. §945; 20 C.F.R. §410.704(d); 20 C.F.R. §725.496. However, we do not agree with the administrative law judge's determination that, based on claimant's failure to timely request either a hearing or reconsideration after notice of denial of the claim on September 4, 1980, the survivor's claim was not viable. Decision and Order at 2. At the hearing, claimant asserted that she never received the notice of denial as she had moved and had not notified the Department of Labor of her new address. Claimant maintained, however, that she was represented by counsel, and that the Department of Labor failed to effect proper service because the notice of denial did not reflect service upon claimant's counsel. See Hearing Transcript at 12-13, 29-32; Director's Exhibits 12, 20. The administrative law judge concluded that the Department of Labor

satisfied its duty by mailing the notice of denial to claimant's last known address. We disagree. Notice given to any party of any administrative action, determination, or decision, or request to any party for the production of evidence must be sent to the duly appointed representative of such party. See 20 C.F.R. §725.364. We therefore hold that the survivor's claim is a viable claim inasmuch as claimant's counsel was not served with a copy of the denial letter. We therefore vacate the administrative law judge's finding that the survivor's claim was not viable and we remand this case for the administrative law judge to consider the merits of this claim.

Turning to the merits of the miner's claim, the administrative law judge, in evaluating the x-ray evidence under 20 C.F.R. §727.203(a)(1), noted that Dr. Cunningham, who provided the only positive x-ray interpretation of record, stated that the lung scarring was hardly sufficient to be diagnostic.¹ Decision and Order at 3, 4; Director's Exhibit 24. The administrative law judge reasonably found the x-ray evidence insufficient to establish invocation of the interim presumption, based on Dr. Cunningham's statement coupled with the negative re-readings of the film by physicians with superior qualifications. See Roberts v. Bethlehem Mines Corp., 8 BLR 1-211 (1985); see also Prater v. Clinchfield Coal Co., 12 BLR 1-121 (1989).

¹ The record contains eleven negative x-ray interpretations of five films, and the only positive interpretation was re-read as negative by seven different physicians.

The administrative law judge's findings under Section 727.203(a)(1) are based on substantial evidence and are affirmed.

See Director's Exhibit 24; Employer's Exhibits 1, 7, 9-16.

We also affirm the administrative law judge's determination that the evidence is insufficient to establish invocation under 20 C.F.R. §727.203(a)(2) or (a)(3), as the only pulmonary function study of record is nonconforming², and the record contains no blood gas studies. Decision and Order at 3, 4; Employer's Exhibit 6.

In assessing the evidence under 20 C.F.R. §727.203(a)(4), the administrative law judge determined that none of the medical reports of record diagnosed pneumoconiosis or any lung disease secondary to coal dust exposure, or any totally disabling respiratory or pulmonary impairment. The administrative law judge therefore rationally found that the medical evidence was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(4), and we affirm his findings thereunder as they are supported by substantial evidence.

² The pulmonary function study of record failed to include MVV values, a statement of the miner's comprehension and cooperation, or any tracings. See Employer's Exhibit 6.

Finally, we note that this claim arises within the appellate jurisdiction of the United States Court of Appeals for the Fourth Circuit, which requires the administrative law judge to additionally consider the lay evidence of record under 20 C.F.R. §727.203(a)(5) where the medical evidence relevant to the deceased miner's respiratory or pulmonary condition is insufficient to establish invocation under Section 727.203(a)(1) - (a)(4). See Cook v. Director, OWCP, 901 F.2d 33, 13 BLR 2-427 (4th Cir. 1990). Further, where Section 727.203(a)(5) is available, it is applicable to the claims of deceased miners as well as to the claims of survivors. See DeForno v. Director, OWCP, 14 BLR 1-11 (1990). Thus, on remand, the administrative law judge must consider whether the lay evidence is sufficient, if fully credited, to establish the existence of a totally disabling respiratory impairment under Section 727.203(a)(5) on both the miner's as well as the survivor's claims, and if so must determine the credibility of the evidence and weigh it against any contrary evidence of record. See Kosack v. Director, OWCP, 7 BLR 1-248, 1-251 (1984).³ If on remand the administrative law judge finds invocation of the presumption

³ If on remand the administrative law judge finds entitlement established on the miner's claim, claimant will automatically be entitled to benefits. See Smith v. Camco Mining Inc., 13 BLR 1-17 (1989); 30 U.S.C. §901(a); 20 C.F.R. §725.212(a). If entitlement is separately considered on the claim filed by the survivor, we note that invocation of the interim presumption in the survivor's claim entitles the claimant to two sets of presumed facts: that the deceased miner died due to pneumoconiosis arising out of coal mine employment, and that the miner was totally disabled by pneumoconiosis at the time of death. In order to establish rebuttal on the survivor's claim, both sets of these presumed facts must be rebutted. Vivian v. Director, OWCP, 7 BLR 1-360 (1984).

established under Section 727.203(a)(5), he must then consider the evidence relevant to rebuttal under 20 C.F.R. §727.203(b) in light of Taylor v. Clinchfield Coal Co., 895 F.2d 178, 13 BLR 2-294 (4th Cir. 1990), reh'g denied (1990). On remand, entitlement on the miner's claim need not be considered under 20 C.F.R. Part 410, Subpart D, inasmuch as the administrative law judge's finding that the medical evidence of record failed to establish a totally disabling respiratory or pulmonary impairment precludes entitlement thereunder, and lay evidence alone would be insufficient to establish total disability. See generally Clay v. Director, OWCP, 7 BLR 1-82 (1984); see also Lipka v. Director, OWCP, 8 BLR 1-360 (1985). Further, the administrative law judge's finding that the evidence is insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1) and (a)(2) precludes entitlement under Section 410.490 on both the miner's and the survivor's claims. See Slone v. Director, OWCP, 12 BLR 1-92 (1988); DeForno, supra.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge