

BRB No. 88-1681 BLA

AVIS BEDNAR)
(Widow of ROLAND CARROLL))

)
Claimant-Petitioner)

)
v.)

)
) DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

)
Respondent) DECISION and ORDER

Appeal of the Decision and Order of Robert J. Feldman, Administrative Law Judge, United States Department of Labor.

Avis Bednar, Fort Myers, Florida, pro se.

Brian E. Peters (Marshall J. Breger, 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: BROWN and DOLDER, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order on Remand (82-BLA-4045) of Administrative Law Judge Robert J. Feldman denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and

*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).

Safety Act of 1969, as amended, 30 U.S.C. §901 et seq. (the Act). Claimant, the miner's widow, filed for benefits on January 5, 1979. On January 29, 1984, the administrative law judge, citing Robinson v. Director, OWCP, 4 BLR 1-597 (1982), issued a Decision and Order dismissing the claim since claimant had remarried after the miner's death. Claimant, however, was not married at the time she filed the claim. On February 28, 1986, the Board issued a Decision and Order remanding the case for consideration of the evidence relevant to the question of entitlement, citing Kuhn v. Director, OWCP, 7 BLR 1-268 (1984)(in which the Board overruled Robinson, supra, and held that a surviving spouse's intervening remarriage does not bar an award of benefits if the surviving spouse is not presently married). Bednar v. Director, OWCP, BRB No. 84-0245 BLA (February 28, 1986)(unpub.). On remand, the administrative law judge considered the evidence pursuant to 20 C.F.R. Part 727, determined that claimant established "at least ten years" of coal mine employment and found that claimant failed to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a). Accordingly, benefits were denied. The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's Decision and Order.

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).

In determining the years of coal mine employment, the administrative law judge considered the evidence, which included some payroll records, coal mine employment affidavits, certificates of training by the Department of Mines, and the testimony of claimant and her two nephews, and properly determined that claimant established at least 10 years of coal mine employment. See Decision and Order at 2; Vickery v. Director, OWCP, 8 BLR 1-430 (1986). Considering the claim pursuant to 20 C.F.R. §727.203, the administrative law judge found that invocation of the interim presumption could not be established pursuant to 20 C.F.R. §727.203(a)(1)-

(a)(4) as the record did not contain any x-ray, biopsy, or lung autopsy evidence, pulmonary function studies, arterial blood gas studies, or medical opinions which addressed the issue of the decedent's respiratory condition. See Decision and Order at 3. The only objective evidence contained in the record are the death certificate and the autopsy report.¹ See Director Exhibits 6, 7. Although the administrative law judge did not consider the autopsy report pursuant to 20 C.F.R. §727.203(a)(1), any error is harmless as the autopsy report does not mention the decedent's respiratory condition. See Larioni v. Director, OWCP, 6 BLR 1-1276 (1984). As the death certificate also fails to address the decedent's respiratory condition, the administrative law judge properly determined that the presumption could not be invoked pursuant to 20 C.F.R. §727.203(a)(1)-(a)(4).

The administrative law judge then considered the lay evidence pursuant to 20 C.F.R. §727.203(a)(5). This evidence includes an affidavit and hearing testimony from claimant that the miner had frequently coughed and was shortwinded a few years before his death and that the miner was unable to play softball and other games with the children. See Director Exhibit 9; Hearing Transcript at 9. There was further hearing testimony that the miner did not see a doctor about this problem and that he did not miss any work due to this problem. See Hearing Transcript at 12. The administrative law judge noted that claimant's usual coal mine employment as a pumper required only limited physical exertion. See Decision and Order at 3. The administrative law judge then permissibly determined that claimant failed to establish invocation pursuant to 20 C.F.R. §727.203(a)(5) as the lay evidence of record failed to establish that the miner suffered from a totally disabling pulmonary or respiratory impairment. See Decision and Order at 3; Kuchwara v. Director, OWCP, 7 BLR 1-167 (1984). As a result, the administrative law judge's determination that claimant failed to establish invocation pursuant to 20 C.F.R. §727.203(a) is supported by substantial evidence and is affirmed.²

¹The miner died on April 11, 1953. The death certificate lists the cause of death as "hemorrhage of brain". See Director's Exhibit 6. The autopsy report of April 12, 1953 only addresses the immediate cause of the miner's death. See Director's Exhibit 7.

²The administrative law judge's finding that the evidence of record is insufficient to establish claimant's entitlement to benefits pursuant to 20 C.F.R. Part 410, Subpart D is also supported by substantial evidence, and is therefore affirmed. See Muncy v. Wolfe Creek Collieries Coal Co., 3 BLR 1-627 (1981); 20 C.F.R. §§410.412; 410.422.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge