

BRB No. 89-5019 BLA

DARRELL D. BEVERLY            ) )  
  ) )  
                  Claimant-Petitioner    ) )  
  ) )  
                  v.                            ) )  
  ) )  
GENERAL TRUCKING CORPORATION    )    DATE ISSUED:  
  ) )  
                  and                            ) )  
  ) )  
ROCKWOOD INSURANCE COMPANY    ) )  
  ) )  
                  Employer/Carrier-    ) )  
                  Respondent            ) )  
  ) )  
DIRECTOR, OFFICE OF WORKERS'    ) )  
COMPENSATION PROGRAMS, UNITED    ) )  
STATES DEPARTMENT OF LABOR    ) )  
  ) )  
                  Party-in-Interest    )    DECISION and ORDER

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

Vernon M. Williams (Wolfe & Farmer), Norton, Virginia, for claimant.

H. Ashby Dickerson (Penn, Stuart, Eskridge & Jones), Abingdon, Virginia, for employer.

Before:    STAGE, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and BONFANTI, Administrative Law Judge.\*

PER CURIAM:

Claimant appeals the Decision and Order (88-BLA-2569) of Administrative Law Judge John S. Patton denying benefits on a \*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).

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 credited claimant with in excess of twenty-eight years of qualifying coal mine employment, and found that claimant established invocation of the interim presumption at 20 C.F.R. §§727.203(a)(1) and 410.490(b)(1)(i), and that his pneumoconiosis arose out of coal mine employment pursuant to Section 410.490(b)(2). The administrative law judge further found, however, that the evidence of record established rebuttal of the presumption that claimant's disability was due to pneumoconiosis pursuant to 20 C.F.R. §727.203(b). Accordingly, benefits were denied. Claimant appeals, challenging the administrative law judge's rebuttal findings pursuant to Sections 727.203(b) and 410.490(c). Employer responds, urging affirmance. The Director, Office of Workers' Compensation

Programs, has not participated in this appeal.<sup>1</sup>

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Initially, we note that in light of the decision of the United States Supreme Court, claims, such as this, which are properly adjudicated pursuant to Section 727.203 are not subject to adjudication pursuant to Section 410.490. See Whiteman v. Boyle Land and Fuel Co., 15 BLR 1-11 (1991); see generally Pauley v. Bethenergy Mines, Inc., 111 S.Ct. 2524, 15 BLR 2-155 (1991). Consequently, we must vacate the administrative law judge's findings pursuant to Section 410.490.

Turning to the merits of this claim, claimant contends that the administrative

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<sup>1</sup> The administrative law judge's finding that claimant established invocation of the interim presumption pursuant to Section 727.203(a)(1), his finding that the evidence of record was insufficient to establish rebuttal pursuant to Section 727.203(b)(1) or (b)(4), and his findings with regard to the length of coal mine employment, are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

law judge failed to clearly explain his rationale or adequately indicate the specific method of rebuttal which he found had been established, and thus his Decision and Order does not comport with the terms of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a). We agree. Although the administrative law judge properly found that rebuttal of the interim presumption was not established pursuant to Section 727.203(b)(1) or (b)(4), his finding that the evidence of record was sufficient to establish rebuttal of the "presumption of disability" is ambiguous and could refer to rebuttal at either Section 727.203(b)(2) or (b)(3). Decision and Order at 8. The United States Court of Appeals for the Fourth Circuit, wherein appellate jurisdiction of this claim lies, has held that rebuttal pursuant to Section 727.203(b)(2) is without regard to cause, and thus rebuttal thereunder cannot be established on the basis of no respiratory impairment. Sykes v. Director, OWCP, 812 F.2d 134, 10 BLR 2-95 (4th Cir. 1987). Additionally, in order to establish rebuttal pursuant to Section 727.203(b)(3), the party opposing entitlement must rule out the causal relationship between the miner's total disability and his coal mine employment. Bethlehem Mines Corporation v. Massey, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). As the administrative law judge did not articulate the applicable standard for establishing rebuttal pursuant to each of these rebuttal methods, and did not evaluate the evidence relevant to the respective methods in light of the proper standard, we must vacate the administrative law judge's finding that rebuttal had

been established and remand this case for the administrative law judge to reconsider the evidence of record and determine whether it is sufficient to establish rebuttal pursuant to Section 727.203(b)(2) or (b)(3).

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.

BETTY J. STAGE, Chief  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

RENO E. BONFANTI  
Administrative Law Judge