

BRB No. 88-1474 BLA

HOWARD HAMILTON        )  
                            )  
Claimant-Petitioner     )  
                            )  
v.                        )  
                            )  
MINK GAP COAL COMPANY   )      DATE ISSUED:  
                            )  
and                        )  
                            )  
OLD REPUBLIC 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 on Remand of Robert J. Feldman,  
Administrative Law Judge, United States Department of Labor.

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

Michael J. Pollack (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (80-BLA-7219) of Administrative Law Judge Robert J. Feldman denying

\*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) (1988).

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 on appeal before the Board for the second time. In his original Decision and Order, the administrative law judge credited claimant with over ten years of qualifying coal mine employment, found that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2), and found that the evidence was insufficient to establish rebuttal of that presumption pursuant to 20 C.F.R. §727.203(b). Accordingly, the administrative law judge awarded benefits.

On appeal, the Board remanded this case for the administrative law judge to address the supplemental opinion of Dr. Abernathy, and to reconsider the evidence of record relevant to rebuttal pursuant to Section 727.203(b)(2). The Board further instructed the administrative law judge to redetermine the date of onset of total disability and to address each of employer's objections to claimant's attorney fee petition if appropriate. Hamilton v. Mink Gap Coal Co., BRB No. 82-1766 BLA (Nov. 18, 1985)(unpublished).

On remand, the administrative law judge found that the evidence of record established rebuttal at Section 727.203(b)(2). Consequently, benefits were denied. In the instant appeal, claimant challenges the administrative law judge's findings regarding claimant's usual coal mine employment as well as his finding of subsection (b)(2) rebuttal. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

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).

Claimant maintains that his usual coal mine employment consisted of the duties he performed as a foreman, repairman, operator of equipment and general laborer between July of 1970, when he co-founded his company, and the date of his third heart attack in 1976. Claimant therefore contends that the administrative law judge erred in finding that his usual coal mine employment consisted of the supervisory and close-out duties claimant performed between the date of his 1976 heart attack and the sale of his company in July of 1977, which involved virtually no physical exertion. Decision and Order at 2; Decision and Order on Remand at 3, 4. We agree. An administrative law judge may not consider a miner's lighter, less

strenuous job to be his usual coal mine work when it was received as a result of his inability to perform his prior, more demanding job. Mazgaj v. Valley Camp Coal Co., 9 BLR 1-201 (1986); Fazio v. Consolidation Coal Co., 8 BLR 1-223 (1985). As the record reflects that claimant performed some manual labor prior to his 1976 heart attack, see Hearing Transcript at 15, 16, but was subsequently unable to perform his usual activities and was advised by his physician to quit working, see Hearing Transcript at 19, 24-26, we vacate the administrative law judge's finding of rebuttal at subsection (b)(2), and remand this case for the administrative law judge to redetermine claimant's usual coal mine employment and then compare its exertional requirements with the medical assessments of physical limitations and reconsider whether the evidence of record is sufficient to establish rebuttal at 727.203(b)(2) pursuant to Sykes v. Director, OWCP, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987); or rebuttal at Section 727.203(b)(3) pursuant to Bethlehem Mines Corp. v. Massey, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); see also Pauley v. Bethenergy Mines, Inc., 111 S.Ct. 2524, 15 BLR 2-155 (1991). If on remand the administrative law judge finds that claimant is entitled to benefits, he must determine whether the medical evidence of record establishes an onset date of disability, see Green v. Director, OWCP, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); Edmiston v. F & R Coal Co., 14 BLR 1-65 (1990); Gardner v. Consolidation Coal Co., 12 BLR 1-184 (1989); Lykins v. Director, OWCP, 12 BLR 1-181 (1989); and address employer's arguments regarding attorney fees.

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

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

LEONARD N. LAWRENCE  
Administrative Law Judge