

BRB No. 94-0666 BLA

DORA IVEY o/b/o)
EARL IVEY (deceased))
)
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 on Remand of E. Earl Thomas,
Administrative Law Judge, United States Department of Labor.

Dora G. Ivey, Jacksboro, Tennessee, *pro se*.

C. William Mangum (J. Davitt McAteer, Acting 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, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and Order

¹Claimant is Earl Ivey, the miner, who filed a claim for benefits on June 29, 1973, Director's Exhibit 1, and died on December 20, 1989, Claimant's Exhibit 14. The miner's widow, Dora G. Ivey, is pursuing the claim on the miner's behalf.

²The Board stated in an Order dated June 17, 1994 that inasmuch as claimant's

on Remand (85-BLA-3201) of Administrative Law Judge E. Earl Thomas denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and

appeal was filed by a lay representative and not an attorney, the Board would apply the general standard of appellate review. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the second time. Initially, the administrative law judge denied the claim because it had been administratively closed and no appeal was taken from that decision. On appeal, the Board vacated the denial of benefits and remanded the case to the Office of Administrative Law Judges for a hearing. *Ivey v. Director, OWCP*, BRB No. 88-0685 BLA (Oct. 19, 1992)(unpub.).

On remand, the administrative law judge found the Black Lung Disability Trust Fund liable for the payment of any benefits because the Director, Office of Workers' Compensation Programs (the Director), did not designate a responsible operator. The administrative law judge credited claimant with fifteen years of qualifying coal mine employment, and found invocation of the interim presumption established pursuant to 20 C.F.R. §727.203(a)(1) and (4). The administrative law judge also found that employer established rebuttal pursuant to Section 727.203(b)(3) and that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), but failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant generally challenges the denial of benefits, and the Director responds, urging the Board to vacate the denial of benefits and remand the case for further findings.³

In an appeal filed by a claimant 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 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

³We affirm the administrative law judge's findings regarding the responsible operator issue and pursuant to Sections 727.203(a)(1), 727.203(b)(1), (2), and (4), 718.202(a)(1), and 718.203(b) as unchallenged on appeal and not adverse to claimant. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to Section 727.203(b)(3), the administrative law judge cited *Gibas v. Saginaw Mining Co.*, 748 F. 2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985), and stated that to rebut the Section 727.203(a) presumption, the party opposing entitlement must prove that the miner's pneumoconiosis played no part in causing disability or death. Decision and Order at 12. The administrative law judge then discussed the opinions of Drs. Naeye and Kleinerman, as well as the miner's death certificate, and concluded: "After a thorough review of the evidence of record relevant to the question of causation, the undersigned finds that a preponderance of the evidence supports the conclusion that pneumoconiosis played no part in the Claimant's death. Accordingly, rebuttal is established pursuant to §727.203(b)(3)." Decision and Order at 13.

We agree with the Director that the administrative law judge erred in finding rebuttal established pursuant to Section 727.203(b)(3). In this case, filed before the miner's death, the administrative law judge must also determine whether the evidence rules out pneumoconiosis as a cause of the miner's total respiratory disability. 20 C.F.R. §727.203(b)(3); see *Sammons v. Wolf Creek Collieries*, 19 BLR 1-24 (1994); *Bates v. Creek Coal Co.*, 18 BLR 1-1 (1993); see also *Youghioghney & Ohio Coal Co. v. Webb*, 49 F.3d 244, 19 BLR 2-123 (6th Cir. 1995); *Gibas, supra*. Thus, we vacate the administrative law judge's finding pursuant to Section 727.203(b)(3) and remand the case for further findings pursuant to this subsection.⁴

Pursuant to Section 718.204(c)(4), the administrative law judge stated that total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in his usual coal mine employment. Upon considering the medical opinions and pathology reports, the administrative law judge stated:

Whereas Dr. Smith noted on December 18, 1981 that Claimant was only disabled to a moderate degree and, further, that Dr. Naeye stated in his consultative pathology report that "[t]his pneumoconiosis was far too mild to have prevented this man from doing any kind of work,

⁴As the Director notes, Dr. Kleinerman's opinion ruling out pneumoconiosis as a cause of the miner's death is entitled to little, if any, weight in this case arising within the appellate jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993).

including hard physical work, in the coal mining industry," the undersigned finds that the Claimant has failed to establish total disability pursuant to §718.204(c)(4).

Decision and Order at 16.

Previously, the administrative law judge found invocation established pursuant to Section 727.203(a)(4), which provides that "other medical evidence including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment."

Decision and Order at 11; 20 C.F.R. §727.203(a)(4). In making his finding, the administrative law judge listed the opinions that he considered but did not discuss their probative value. Decision and Order at 11.

Because the administrative law judge does not explain how his consideration of the same evidence under Sections 718.204(c)(4) and 727.203(a)(4) led to different conclusions when the fact to be proven is the same, we vacate his findings.⁵ If on remand the administrative law judge finds rebuttal established pursuant to Section 727.203(b)(3), he need not consider entitlement under 20 C.F.R. Part 718, inasmuch as subsection (b)(3) rebuttal severs the causal connection between total respiratory disability and pneumoconiosis, a necessary element of entitlement. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); see also *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

⁵The Director further argues that the administrative law judge's findings pursuant to Sections 727.203(a)(1) and 718.202(a)(2) in the miner's claim and pursuant to Section 718.202(a)(2) in the survivor's claim are inconsistent. We will not consider this argument because the survivor's claim is not presently before the Board.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge