

BRB No. 02-0867 BLA

FAYE E. FALIN)	
(Widow of LESLIE FALIN))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WESTMORELAND COAL COMPANY)	DATE ISSUED: 09/22/2003
)	
Employer-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 Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Faye E. Falin, Pound, Virginia, *pro se*.¹

Sarah M. Hurley (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

¹ Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant,² representing herself, appeals the Decision and Order (01-BLA-0785) of Administrative Law Judge Pamela Lakes Wood 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).³ The miner initially filed a claim for benefits with the Social Security Administration on June 29, 1973. Director's Exhibit 29-1. By Decision and Order dated December 5, 1975, Administrative Law Judge John R. Hood denied benefits. Director's Exhibit 29-21.

The miner subsequently filed a claim with the Department of Labor on March 1, 1976. Director's Exhibit 29-1. By Decision and Order dated August 26, 1987, Administrative Law Judge Frederick D. Neusner credited the miner with thirty-two years of coal mine employment and considered entitlement under 20 C.F.R. Part 727. Director's Exhibit 29-38. Judge Neusner found that a single positive x-ray interpretation was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). *Id.* However, Judge Neusner found the evidence sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(2). *Id.* Accordingly, Judge Neusner denied benefits. *Id.* By Decision and Order dated March 31, 1989, the Board noted that the Supreme Court had rejected the single qualifying item of evidence standard in *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988). *Falin v. Director, OWCP*, BRB No. 87-2572 BLA (Mar. 31, 1989) (unpublished). The Board, therefore, vacated Judge Neusner's finding pursuant to 20 C.F.R. §727.203(a)(1) and remanded the case for consideration of whether the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and (a)(4).⁴ *Id.* The Board further held that the medical evidence was insufficient to support a finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(2). *Id.* The Board, therefore, instructed Judge Neusner, on remand, to determine whether the evidence was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3) and (b)(4). *Id.* The Board further instructed Judge Neusner that if he did

² Claimant is the surviving spouse of the deceased miner who died on July 12, 1997. Director's Exhibit 5.

³ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

⁴ The Board held that invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2) and (a)(3) was precluded as a matter of law because there were no qualifying pulmonary function or arterial blood gas studies in the record. *Falin v. Director, OWCP*, BRB No. 87-2572 BLA (Mar. 31, 1989) (unpublished).

not find entitlement established under 20 C.F.R. Part 727, he should consider entitlement pursuant to 20 C.F.R. §410.490. *Id.*

In a Decision and Order on Remand dated October 11, 1989, Judge Neusner found the evidence insufficient to establish invocation pursuant to 20 C.F.R. §727.203(a)(1) and (a)(4). Director's Exhibit 29-41. Judge Neusner, therefore, found that the miner was not entitled to benefits under 20 C.F.R. Part 727. *Id.* Judge Neusner further found that the miner was not entitled to benefits under 20 C.F.R. Part 410, Subpart D, 20 C.F.R. §410.490 or 20 C.F.R. Part 718. *Id.* Accordingly, Judge Neusner denied benefits. *Id.*

The miner filed an appeal with the Board. Director's Exhibit 29-42. By Order dated October 10, 1990, the Board directed the miner to show cause why his appeal should not be dismissed for failure to file a Petition for Review and brief. Director's Exhibit 29-44. By Order dated December 12, 1990, the Board noted that the miner had not responded to the Board's Order. *Falin v. Director OWCP*, BRB No. 89-3845 BLA (Dec. 12, 1990) (Order) (unpublished). The Board, therefore, dismissed the miner's appeal as abandoned. *Id.*

On December 13, 1990, the miner submitted a letter (and a medical report) to the Department of Labor requesting modification of Judge Neusner's Decision and Order on Remand. Director's Exhibit 29-46. By letter dated December 18, 1990, the Department of Labor informed the miner that:

[The miner's] Black Lung claims file is located with the Benefits Review Board. We are forwarding your letter to our Hearings and Appeals Section, Washington, D.C. for necessary action and final reply.

Director's Exhibit 29-47.

There is no record of any additional activity until October 12, 1993, when the Department of Labor sent the miner a letter in response to his request for information on the status of his claim. Director's Exhibit 29-48. The letter stated, *inter alia*, that:

Based on information available to our office, the last action was by the Benefits Review Board in December 1990 affirming the denial by the Office of Administrative Law Judges issued in October 1989.

It appears to further pursue your claim, you must file a new application.

Director's Exhibit 29-48.

The miner died on July 12, 1997. Director's Exhibit 5. Claimant filed a survivor's claim on January 29, 1999. Director's Exhibit 1. By Decision and Order dated June 21, 2000, Administrative Law Judge Jeffrey Tureck found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Director's Exhibit 43. Accordingly, Judge Tureck denied benefits on claimant's survivor claim. *Id.*

Claimant subsequently filed an appeal with the Board regarding Judge Tureck's denial of the survivor's claim. Director's Exhibit 44. In response to claimant's appeal, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion to Remand. Director's Exhibit 48. In support of his motion, the Director noted that the miner's 1990 request for modification had never been adjudicated and was still pending. *Id.* The Director further noted that claimant would be entitled to derivative survivor's benefits if benefits were awarded on the miner's claim. *Id.* The Director, therefore, requested that the Board remand the case to the district director for action on the miner's request for modification. *Id.* By Order dated September 20, 2000, the Board granted the Director's request to dismiss claimant's appeal and remanded the case to the district director for consideration of the miner's request for modification.⁵ *Falin v. Westmoreland Coal Co.*, BRB No. 00-0992 BLA (Sept. 20, 2000) (Order) (unpublished).

After the district director denied the miner's claim, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Administrative Law Judge Pamela Lakes Wood (the administrative law judge) conducted a hearing on November 30, 2001. At the hearing, the administrative law judge determined that the miner's claim was the only claim before her for consideration. Hearing Transcript at 17-21.

In a Decision and Order dated August 30, 2002, the administrative law judge addressed the miner's request for modification of Judge Neusner's Decision and Order on Remand denying benefits. After finding that the record supported Judge Neusner's earlier finding of thirty-two years of coal mine employment, the administrative law judge found that the autopsy and x-ray evidence, when weighed together, were sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). The administrative law judge, thus, found that the evidence was sufficient to establish a

⁵ The Board informed claimant that her appeal of Judge Tureck's Decision and Order denying benefits on her survivor's claim would be reinstated only if claimant requested reinstatement. *Falin v. Westmoreland Coal Co.*, BRB No. 00-0992 BLA (Sept. 20, 2000) (Order) (unpublished). The Board further informed claimant that her request for reinstatement had to be filed with the Board within thirty days from the date the decision on modification was issued and had to be identified by the Board's docket number, BRB No. 00-0992 BLA. *Id.*

change in conditions pursuant to 20 C.F.R. §725.310 (2000).⁶ The administrative law judge, therefore, considered the miner's claim on the merits. The administrative law judge found that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). The administrative law judge also found that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1), (b)(2) and (b)(4). However, the administrative law judge found that the evidence was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). The administrative law judge, therefore, denied benefits under 20 C.F.R. Part 727. The administrative law judge further found that her finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(3) precluded entitlement to benefits under 20 C.F.R. Part 410, Subpart D and 20 C.F.R. §410.490. The administrative law judge also found that the miner was not entitled to benefits under 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.⁷ On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director responds in support of the administrative law judge's denial of benefits.⁸

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).

Section 727.203(b)(3) provides that the presumption "shall be rebutted if...the evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment." 20 C.F.R. §727.203(b)(3). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in order to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3):

⁶ The administrative law judge noted that the autopsy evidence "would also support a finding [that] a mistake in fact was made on the same element of denial...." Decision and Order at 24 n.24.

⁷ The administrative law judge also dismissed Westmoreland Coal Company as a party in the miner's claim.

⁸ Because no party challenges the administrative law judge's findings pursuant to 20 C.F.R. §725.310 (2000) and 20 C.F.R. §727.203(a)(1) and (b)(1), (b)(2) and (b)(4), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[A]n employer must “rule out the causal relationship between the miner’s total disability and his coal mine employment.” *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 123 (4th Cir. 1984). An employer can accomplish this task with evidence that establishes either that the miner has no respiratory or pulmonary impairment of any kind, *see Grigg*, 28 F.3d at 419, or that such impairment was not caused in whole or in part by his coal mine employment, *see Lane Hollow*, 137 F.3d at 804.

Consolidation Coal Co. v. Borda, 171 F.3d 175, 184-185, 21 BLR 2-545, 2-562 (4th Cir. 1999).

In finding the evidence sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3), the administrative law judge credited the opinions of Drs. Castle,⁹ Jarboe¹⁰ and Naeye.¹¹ Decision and Order at 27. Drs. Castle, Jarboe and Naeye each

⁹ In a report dated February 10, 2000, Dr. Castle opined that the miner’s coal workers’ pneumoconiosis was so minimal that it did not cause him any physiologic abnormality. Director’s Exhibit 37. Dr. Castle further opined that:

[The miner] had no significant respiratory impairment whatsoever from any cause. The very mild reduction in the forced vital capacity was due to obesity and did not cause him any disability. He did retain the respiratory capacity to perform his usual coal mining employment duties during life. He was not permanently and totally disabled as a result of any process arising from his coal mine employment.

Director’s Exhibit 37.

Dr. Castle attributed the miner’s very mild degree of hypoxemia to his obesity. Director’s Exhibit 37. During a subsequent deposition on April 25, 2000, Dr. Castle reiterated that the mild reduction in the miner’s FVC was related to his obesity. Director’s Exhibit 40 at 28.

¹⁰ In a report dated February 23, 2000, Dr. Jarboe opined that the miner “may have had a very mild impairment in the form of a mild restrictive defect.” Director’s Exhibit 35. Dr. Jarboe, however, opined that the miner’s mild restrictive defect was not caused by coal dust inhalation or the presence of coal workers’ pneumoconiosis. *Id.* Dr. Jarboe further stated:

I am not clear why [the miner] has a mildly reduced vital capacity. It may be on the basis of his rather marked obesity. Also, a number of physicians have described him as having congestive heart failure. While this does not

opined that the miner's pulmonary impairment was not attributable to his coal workers' pneumoconiosis. Director's Exhibits 25, 35, 37, 40, 41. Drs. Castle and Naeye each attributed the miner's respiratory impairment to his obesity. Director's Exhibits 25, 37, 40, 41. While Dr. Jarboe was less definitive as to the actual cause of claimant's respiratory impairment, speculating that it could be attributable to the miner's marked obesity or congestive heart failure, he clearly opined that the miner's mild restrictive defect was not caused by coal workers' pneumoconiosis or coal dust inhalation. Director's Exhibit 35.

The administrative law judge further found that the remaining post-1997 opinions of record, *i.e.*, those submitted by Drs. Hansbarger, Caffrey and Spagnolo, while not sufficient to satisfy the Fourth Circuit's subsection (b)(3) rebuttal standard, did not contradict or undermine the opinions of Drs. Castle, Jarboe and Naeye.¹² Decision and Order at 29.

seem to be well documented in the record, if indeed he had heart failure this could account for a reduction in vital capacity.

Director's Exhibit 35.

¹¹ In a report dated October 25, 1999, Dr. Naeye stated that the miner's coal workers' pneumoconiosis was so minimal that there was no possibility that the miner's coal workers' pneumoconiosis caused any impairments in lung function or any degree of disability. Director's Exhibit 25. During a subsequent May 2, 2000 deposition, Dr. Naeye reiterated that the miner's coal workers' pneumoconiosis had no effect whatsoever on his lung function. Director's Exhibit 41 at 18, 21. Dr. Naeye opined that the miner's exertional dyspnea was primarily related to his obesity. *Id.* at 22. Dr. Naeye explained that there "certainly wasn't enough lesion of any sort in the lungs to have caused any exertional dyspnea." *Id.*

¹² Dr. Hansbarger opined that "there was no respiratory impairment or pulmonary disability present in [the miner] because of [his] coal workers' pneumoconiosis." Director's Exhibit 23. Dr. Caffrey opined that the miner's coal workers' pneumoconiosis could not have disabled the miner or caused him any respiratory impairment prior to his death. Director's Exhibit 28. Dr. Spagnolo opined, *inter alia*, that the extent of the miner's "pneumoconiosis was too limited to have resulted in any impairment of lung function." Director's Exhibit 36. Dr. Spagnolo further opined that "none of [the miner's] symptoms, complaints, or medical conditions were related to his coal dust exposure or coalmine [sic] employment." *Id.*

The Director, Office of Workers' Compensation Programs (the Director), contends that the administrative law judge erred in consideration of the opinions of Drs.

The administrative law judge, therefore, found that a majority of the physicians who submitted opinions after 1997 “not only emphatically disavowed any causal connection between Miner’s total disability and his simple CWP, but [went] further and establish[ed] that Miner’s pneumoconiosis had no effect whatsoever on his slight respiratory impairment.”¹³ Decision and Order at 27.

The administrative law judge further found that the medical opinion evidence submitted before 1997 did not undermine the opinions of Drs. Castle, Jarboe and Naeye. The administrative law judge discredited Dr. Kanwal’s 1980 opinion¹⁴ due to its “equivocal language” and because of the doctor’s failure to address the possible contribution that his other diagnoses of arteriosclerotic heart disease, congestive heart

Hansbarger, Caffrey and Spagnolo. See Director’s Brief at 23-24. However, since the administrative law judge properly found that these opinions do not “contradict or undermine the conclusions” of Drs. Castle, Jarboe and Naeye,” we need not address the Director’s contentions of error. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

¹³ The administrative law judge noted that Dr. Castle is a “highly qualified specialist in pulmonary disorders.” Decision and Order at 27. Dr. Castle is Board-certified in Internal Medicine and Pulmonary Disease. Director’s Exhibit 37. Dr. Jarboe is also Board-certified in Internal Medicine and Pulmonary Disease. Director’s Exhibit 35. Dr. Naeye is Board-certified in Anatomic and Clinical Pathology. Director’s Exhibit 25.

Although Drs. Castle, Jarboe and Naeye are all non-examining physicians, Dr. Robinette, an examining physician, addressed whether the miner’s pulmonary symptoms were attributable to his obesity. Director’s Exhibit 29. Consequently, the administrative law judge’s reliance upon the opinions of Drs. Castle, Jarboe and Naeye is not contrary to the holding of the Fourth Circuit in *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984) (opinion of non-examining physician on matters not addressed by examining physician cannot establish subsection (b)(3) rebuttal).

¹⁴ In a November 19, 1980 report, Dr. Kanwal opined that:

[The miner] is totally and permanently disabled. He worked 39 years in coal related work (working inside and at face). He never has smoked. He has taken lung medication for 10 years or more. I feel his respiratory symptoms and condition is [sic] related to coal mine exposure. [The miner] is totally and permanently disabled.

Director’s Exhibit 29-46.

failure and diabetes mellitus may have made to the miner's disability. Decision and Order at 30; Director's Exhibit 29-46. The Director concedes that the administrative law judge erred in characterizing Dr. Kanwal's opinion as "equivocal." The administrative law judge, however, acted within her discretion in according less weight to Dr. Kanwal's opinion because Dr. Kanwal did not address why the miner's respiratory condition was attributable to coal dust exposure rather than the other conditions he diagnosed, *i.e.*, heart disease and diabetes. The only explanation provided by Dr. Kanwal for his disability causation finding was the miner's coal mine employment history and his negative smoking history.

The administrative law judge also accorded less weight to Dr. Smiddy's opinion because she found that it was "equivocal."¹⁵ Decision and Order at 30; Director's Exhibit 29-19. Again, the Director concedes that Dr. Smiddy's opinion is not equivocal. Director's Brief at 22 n.6. The administrative law judge, however, also found that Dr. Smiddy's opinion "[fell] short of being a reasoned medical opinion on the issue of etiology." Decision and Order at 30. The administrative law judge noted that Dr. Smiddy, in addition to diagnosing coal workers' pneumoconiosis, diagnosed congestive heart failure and essential hypertension. *Id.* Although Dr. Smiddy found that pneumoconiosis was the only respiratory disease present, he failed to address whether the miner's other conditions could have caused his respiratory impairment. The administrative law judge, therefore, acted within her discretion in finding that Dr. Smiddy's opinion regarding the etiology of the miner's respiratory impairment was not sufficiently reasoned.

The administrative law judge also discredited Dr. Robinette's opinion,¹⁶ finding that:

¹⁵ In a report dated September 24, 1982, Dr. Smiddy opined that:

[The miner] has not been a regular smoker and has no other sources for his respiratory disease and [it] is therefore my conclusion that this patient has sufficient [p]neumoconiosis to produce the arterial hypoxemia to the degree we see and the mild pulmonary function abnormalities as reported and further that this patients [sic] respiratory condition is of a sufficient degree to preclude the type of activity required for [c]oal [m]ine [e]mployment.

Director's Exhibit 29-19.

¹⁶ In a report dated December 31, 1984, Dr. Robinette opined that:

Although concluding that the pneumoconiosis was “symptomatic,” [Dr. Robinette] recognized that the dyspnea on exertion could have other causes, such as exogenous obesity, but he did not “feel, however, that this would account for diminished diffusion capacity or for the decrease in his resting arterial blood gases.” (DX 29-32). Again, this falls short of a reasoned medical opinion on etiology due to its equivocal nature.

Decision and Order at 30.

After noting that the miner’s pneumoconiosis was symptomatic, Dr. Robinette conceded that there could be “other causes of [the miner’s] dyspnea on exertion, specifically his exogenous obesity.” Director’s Exhibit 29-32. Although Dr. Robinette further indicated that he did not “feel” that this would account for the miner’s diminished diffusion capacity or for the decrease in his resting arterial blood gases, Dr. Robinette provided no explanation for his conclusion. *Id.* Consequently, we hold that the administrative law judge permissibly accorded less weight to Dr. Robinette’s opinion based upon its equivocal nature, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987), and because it was not sufficiently reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

The administrative law judge also accorded less weight to Dr. Paranthaman’s opinion.¹⁷ Decision and Order at 30; Director’s Exhibit 29-32. Although Dr.

I feel that [the miner] has coal worker’s pneumoconiosis and is symptomatic from this. He does complain with dyspnea on exertion. It must be realized that there may be other causes of his dyspnea on exertion, specifically his exogenous obesity. I do not feel, however, that this would account for diminished diffusion capacity observed or for the decrease in his resting arterial blood gases. I do not feel he would be able to return to any form of employment which would require significant dust exposure because of his radiographic abnormalities found and because of the abnormality found on his pulmonary function test.

Director’s Exhibit 29-32.

¹⁷ In a report dated May 15, 1986, Dr. Paranthaman opined that:

[The miner] is not diagnosed to have coal workers’ pneumoconiosis as his chest x-ray fails to reveal any parenchymal or pleural changes of coal workers’ pneumoconiosis.

Paranthaman, in his 1986 report, diagnosed a mild to moderate impairment, he did not address the etiology of the impairment. Because Dr. Paranthaman did not address the etiology of the miner's impairment, his opinion does not undermine the opinions of Drs. Castle, Jarboe and Naeye.

Because the administrative law judge's finding that the evidence is sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3) is supported by substantial evidence, it is affirmed. In light of our affirmance of the administrative law judge's finding pursuant to 20 C.F.R. §727.203(b)(3), entitlement is precluded under 20 C.F.R. Part 410, Subpart D.¹⁸ See *Pastva v. The Youghioghny and Ohio Coal Co.*, 7 BLR 1-829 (1985).

The administrative law judge finally addressed the miner's entitlement under 20 C.F.R. Part 718. See Decision and Order at 31-33. However, because the instant claim, arising within the jurisdiction of the Fourth Circuit, was filed before March 31, 1980 and involves a miner with ten or more years of coal mine employment, the miner is not entitled to have his claim considered under 20 C.F.R. Part 718. *Muncy v. Wolfe Creek Collieries Coal Co., Inc.*, 3 BLR 1-627 (1981). Consequently, we need not address the administrative

His symptoms of chronic bronchitis are probably due to coal dust exposure as he is a non smoker. Spirogram shows no evidence of significant airway obstruction. Blood gas abnormalities are mild to moderate with pO₂ at rest being 68.8 and during exercise being 77.3. There is no CO₂ retention. This degree of functional abnormality is considered to be mild to moderate; therefore, per se it does not cause total disability to do the job of a miner.

He has moderately severe uncontrolled hypertension. He is a diabetic dependent on a large dose of insulin (200 units a day). His work performance will be affected by the blood sugar level and blood pressure level. When they are out of control (whether on high or low side) he will have difficulty in performing manual work.

A combination of all medical problems will make it difficult to the job of a miner on a [sic] 8 hour basis.

Director's Exhibit 29-23.

¹⁸ A claim which is properly adjudicated pursuant to 20 C.F.R. §727.203 is not subject to adjudication under 20 C.F.R. §410.490. *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 15 BLR 2-155 (1991); *Whiteman v. Boyle Land and Fuel Co.*, 15 BLR 1-11 (1991)(*en banc*).

law judge's findings under 20 C.F.R. Part 718. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge