

BRB No. 89-1913 BLA

JOHN BABYAK)
)
 Claimant-Petitioner)
)
 v.)
)
 BETHENERGY MINES CORPORATION)
) DATE ISSUED:
 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 Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Creany & Tulowitzki), Edensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe, & Rose), Johnstown, Pennsylvania, for employer.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (86-BLA-2394) of Administrative Law Judge Charles P. Rippey 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). Based on the date of filing, August 23, 1978, the administrative law judge considered the claim pursuant to 20 C.F.R. Part 727. After noting that the parties stipulated to the fact that claimant had 30 years of coal mine employment, the administrative law judge found that claimant

failed to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in his analysis of the blood gas study evidence pursuant to 20 C.F.R. §727.203(a)(3) and in his consideration of Dr. Malhotra's opinion

pursuant to 20 C.F.R. §727.203(a)(4).¹ Employer responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has chosen not to respond to this appeal.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with 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).

Pursuant to 20 C.F.R. §727.203(a)(3), the administrative law judge considered the thirteen blood gas studies of record, which yielded varying non-qualifying and qualifying results, and permissibly determined that the two most recent studies, which are non-qualifying studies performed in 1986 and 1988, were entitled to the most weight. See Decision and Order at 5; Employer's Exhibits 4, 10; Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989). As a result, the administrative law judge's finding that claimant failed to invoke the interim presumption pursuant to 20 C.F.R. §727.203(a)(3) is affirmed as it is supported by substantial evidence.

In regard to the administrative law judge's findings pursuant to 20 C.F.R. §727.203(a)(4), claimant's only contention is that the administrative law judge erred in concluding that Dr. Malhotra's opinion was equivocal and not supportive of invocation. The administrative law judge considered Dr. Malhotra's opinion and determined that, as Dr. Malhotra was "very careful" not to state that claimant has a totally disabling pulmonary impairment, his opinion does not support invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(4). See Decision and Order at 6; Claimant's Exhibit 3. However, in his report, Dr. Malhotra noted that in reaching his conclusion that claimant is totally disabled, he gave careful consideration to claimant's pulmonary symptomatology, among other factors. See Claimant's Exhibit 3. The administrative law judge therefore erred by mischaracterizing Dr. Malhotra's report. See, e.g., Tackett v. Cargo Mining Co., 12 BLR 1-11 (1988). As a result, the administrative law judge's finding that claimant did not establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(4) is vacated and the case is remanded for the administrative law judge

¹The administrative law judge's findings pursuant to 20 C.F.R. §727.203(a)(1) and (a)(2) are affirmed as they are unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

to further consider the evidence pursuant to 20 C.F.R. §727.203(a)(4). Furthermore, if the administrative law judge determines that claimant has established invocation of the interim presumption, he must then consider rebuttal pursuant to 20 C.F.R. §727.203(b). Also, as this claim was filed prior to March 31, 1980, if entitlement is not established under 20 C.F.R. Part 727, then entitlement must be considered under 20 C.F.R. Part 718. See Caprini v. Director, OWCP, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge