

BRB No. 90-1006 BLA

ORGIE STANLEY)
)
 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 Virgil M. McElroy,
Administrative Law Judge, United States Department of Labor.

Orgie Stanley, Clinchco, Virginia, pro se.

Jeff S. Goldberg (Marshall J. Breger, 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: STAGE, Chief Administrative Appeals Judge, McGRANERY,
Administrative Appeals Judge, and LIPSON, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order on Remand (84-BLA-8280) of Administrative Law Judge Virgil M. McElroy 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).

*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).

This is the second time this case has been before the Board. In his first Decision and Order, the administrative law judge determined that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), but further found that employer established rebuttal of the presumption pursuant to 20 C.F.R. §727.203(b)(2). Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's findings that claimant failed to establish invocation pursuant to 20 C.F.R. §727.203(a)(2)-(a)(4), but vacated the administrative law judge's findings pursuant to 20 C.F.R. §727.203(a)(1) and (b)(2). The Board then remanded the case for the administrative law judge to weigh the x-ray evidence pursuant to the standard set forth in Mullins Coal Co., Inc. of Virginia v. Director, OWCP, 108 S.Ct. 427, 11 BLR 2-1 (1987), reh'g denied, 108 S.Ct. 787 (1988), and to reconsider rebuttal pursuant to 20 C.F.R. §727.203(b)(2) and (b)(3) if invocation was established. The administrative law judge was further instructed to consider entitlement under 20 C.F.R. §410.490 if rebuttal was found under 20 C.F.R. §727.203(b)(3). See Stanley v. Director, BRB No. 87-2884 BLA (July 27, 1989)(unpub.). On remand, the administrative law judge weighed the evidence and determined that claimant failed to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a) or entitlement pursuant to 20 C.F.R. Part 410, Subpart D and 20 C.F.R. §410.490. Accordingly, benefits were denied. Claimant, now appeals the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs responds in support of the administrative law judge's Decision and Order on Remand.

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).

Upon considering the evidence pursuant to 20 C.F.R. §727.203(a)(1), the administrative law judge considered the x-ray evidence of record which consists of 47 interpretations of 22 x-rays. Of these 47 interpretations, only ten are positive for the existence of pneumoconiosis. The administrative law judge permissibly found the x-ray evidence insufficient to establish invocation of the presumption pursuant to subsection (a)(1), as he found the weight of the evidence to be negative for pneumoconiosis and that the most recent evidence is negative for pneumoconiosis. See Decision and Order on Remand at 2; Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989); Mabe v. Bishop Coal Co., 9 BLR 1-67 (1986); see also Adkins v. Director, OWCP, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). There is no autopsy or

biopsy evidence in the record. 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)(1) is affirmed as it is supported by substantial evidence.¹

The administrative law judge next properly determined that claimant did not meet the qualifications for entitlement under 20 C.F.R. Part 410, Subpart D. See Decision and Order at 2; Lafferty v. Cannelton Industries, Inc., 12 BLR 1-190 (1989). In making this determination, the administrative law judge properly stated that the evidence fails to establish either that claimant has pneumoconiosis or that he has a totally disabling pulmonary or respiratory impairment. See Decision and Order on Remand at 2. As a result, the administrative law judge's finding pursuant to 20 C.F.R. Part 410, Subpart D, is affirmed as supported by substantial evidence.

Regarding the administrative law judge's findings at 20 C.F.R. §410.490, subsequent to the administrative law judge's Decision and Order on Remand, the United States Supreme Court decided the case of Pauley v. Bethenergy Mines Inc., 111 S.Ct. 2524, 15 BLR 2-155 (1991). In light of Pauley, the Board has held that a claim which is properly adjudicated pursuant to 20 C.F.R. §727.203 is not subject to adjudication pursuant to 20 C.F.R. §410.490. Whiteman v. Boyle Land and Fuel Company, 15 BLR 1-11 (1991). Since the administrative law judge properly adjudicated this claim pursuant to 20 C.F.R. §727.203, the administrative law judge's findings pursuant to 20 C.F.R. §410.490 are vacated. See Pauley, supra; see also Whiteman, supra.

¹We note that, although discussed by the administrative law judge in his decision on remand, the administrative law judge's finding at 20 C.F.R. §727.203(a)(3) was previously affirmed by the Board. See Decision and Order at 2; Stanley, supra.

Accordingly, the administrative law judge's Decision and Order on Remand is vacated in part, and the denial of benefits is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

SHELDON R. LIPSON
Administrative Law Judge