

BRB No. 91-2189 BLA

GLORIA LEE NOWLIN)
(Widow of MALCOLM NOWLIN))

Claimant)

v.)

EASTERN ASSOCIATED COAL)
CORPORATION)

Employer-Petitioner)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Supplemental Decision and Order on Remand of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Karen S. Rapaport (Arter & Hadden), Washington, D.C., for employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Supplemental Decision and Order on Remand (83-BLA-0596) of Administrative Law Judge Charles P. Rippey awarding benefits on a miner's claim and a survivor's 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).¹ This case is on appeal before the Board for the

¹ The miner filed his claim for benefits on January 6, 1976. Director's Exhibit 1. Claimant, the miner's widow, filed a survivor's claim on April 10, 1981. Director's

second time. In his original Decision and Order, Administrative Law Judge Richard L. Sippel credited the miner with six years of qualifying coal mine employment, and found the evidence sufficient

*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).

to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§410.414(a)(1), 410.428 and 410.416(b), and total disability pursuant to 20 C.F.R. §§410.414(c) and 410.426(b). The administrative law judge further found that although the evidence was insufficient to establish that pneumoconiosis was the primary cause of the miner's disability pursuant to 20 C.F.R. §410.426(a), it was sufficient to establish that the miner's pulmonary impairment included pneumoconiosis which arose at least in part out of coal mine employment pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge also found that employer failed to establish rebuttal pursuant to 20 C.F.R. §410.414(b)(2), and consequently awarded benefits.

Exhibit 2.

On appeal, the Board affirmed the administrative law judge's findings regarding the length of coal mine employment and his finding that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 410.414(a)(1), 410.428 and 410.416(b). Inasmuch as it was unclear under which regulations and upon which findings the administrative law judge based his conclusion that the miner was totally disabled due to pneumoconiosis, the Board vacated his remaining findings and remanded this case for the administrative law judge to re-evaluate the evidence under the appropriate regulations. The Board noted that subsequent intervening caselaw mandated consideration of the miner's claim under the interim regulations contained at 20 C.F.R. §410.490, and held that claimant, the miner's widow, had established invocation of the presumption of total disability due to pneumoconiosis at the time of death under 20 C.F.R. §410.490(b), based on the administrative law judge's affirmable finding that the evidence established the existence of pneumoconiosis arising out of coal mine employment. Consequently, the Board instructed the administrative law judge on remand to consider whether the evidence of record was sufficient to establish rebuttal of the presumption pursuant to 20 C.F.R. §410.490(c), and if so, to reconsider his total disability findings under 20 C.F.R. Part 410, Subpart D. If on remand the administrative law judge denied benefits on the miner's claim, he was instructed to consider the survivor's claim under 20 C.F.R. §718.205(b).² *Nowlin v. Eastern Associated Coal Corp.*, BRB No. 86-0624 BLA (June 26, 1990)(unpublished).

On remand, the case was reassigned to Administrative Law Judge Rippey as Administrative Law Judge Sippel was no longer with the Office of Administrative Law Judges. Judge Rippey found that employer failed to establish rebuttal pursuant to Section 410.490(c), and accordingly awarded benefits.

In the instant appeal, employer challenges Administrative Law Judge Rippey's jurisdiction to consider the merits of the miner's claim. Employer further asserts that the evidence is insufficient to establish entitlement on the survivor's claim pursuant to 20 C.F.R. §718.205(b) as a matter of law, and also challenges Administrative Law Judge Sippel's original findings regarding the onset date of total disability pursuant to 20 C.F.R. §725.503. Both claimant and the Director, Office of Workers' Compensation Programs, have not participated in this appeal.

² The Board additionally affirmed the administrative law judge's supplemental award of attorney fees, but declined to address employer's arguments regarding the onset date of total disability inasmuch as the administrative law judge was required to reconsider the issue of entitlement.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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).

Employer initially maintains that since Judge Sippel denied benefits on the miner's claim under Part 410, Subpart D, and claimant did not appeal the denial, the Board did not have jurisdiction to remand this case for the administrative law judge to readjudicate the miner's claim pursuant to the provisions at Section 410.490 and Part 410, Subpart D. Contrary to employer's arguments, however, Judge Sippel did not deny benefits on the miner's claim; rather, he awarded benefits payable from October 1975, a date prior to the filing of the miner's claim, based on his finding that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment pursuant to an admixture of various provisions at Part 718 and Part 410, Subpart D. See Decision and Order at 5-24. We, therefore, reject employer's contention that Judge Rippey lacked jurisdiction to adjudicate the merits of the miner's claim on remand.

Turning to the merits, employer contends that the administrative law judge erred in concluding, without any discussion of the evidence, that employer failed to establish rebuttal of the presumption pursuant to Section 410.490(c) in the miner's claim, and consequently did not address the merits of the survivor's claim. We note that subsequent to the issuance of the administrative law judge's Supplemental Decision and Order on Remand, the Board held that, in light of the Supreme Court decision in *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524, 15 BLR 2-155 (1991), where invocation of the presumption at Section 410.490(b) has been established in cases involving miners with less than ten years of coal mine employment, the party opposing entitlement may establish rebuttal of the presumption by any one of the methods contained at 20 C.F.R. §727.203(b). *Phipps v. Director, OWCP*, 17 BLR 1-39 (1992)(*en banc*)(Smith, J., concurring; McGranery, J., concurring and dissenting). In the instant case, the administrative law judge found that rebuttal pursuant to Section 410.490(c) was not established because the miner's "six years of coal mine employment support the conclusion that his pulmonary disability was caused, at least in part, due to his pneumoconiosis." Supplemental Decision and Order on Remand at 2. Since the administrative law judge did not specifically discuss the relevant evidence in relation to the particular rebuttal subsections of Section 727.203(b), and provide a sufficient explanation of his findings of fact and conclusions of law in compliance with the provisions of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a), we vacate his findings pursuant to Section

410.490(c) and remand this case for the administrative law judge to reconsider the evidence thereunder in light of *Phipps, supra*. If on remand the administrative law judge finds that claimant is not entitled to benefits on the miner's claim under Section 410.490, he must readjudicate the claim pursuant to Part 410, Subpart D, and if he denies benefits thereunder, he must adjudicate the survivor's claim pursuant to Section 718.205(b).

Lastly, employer challenges Administrative Law Judge Sippel's designation of October 1975 as the appropriate date from which benefits commence herein. Since the Board vacated Administrative Law Judge Sippel's total disability findings on the miner's claim, Administrative Law Judge Rippey must address and weigh all relevant evidence pursuant to Section 725.503 and determine the appropriate date for the commencement of benefits if on remand he finds that claimant has established entitlement on either the miner's claim or the survivor's claim. *See generally Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

Accordingly, the Supplemental Decision and Order on Remand of the administrative law judge awarding benefits is vacated, and this case is remanded for further findings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge