

BRB No. 93-0982 BLA

DALLAS POWERS)
)
 Claimant-Petitioner)
)
 v.)
)
 CLINCHFIELD COAL COMPANY)
) 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 Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Dallas Powers, Trammel, Virginia, *pro se*.

Michael F. Blair (Penn, Stuart, Eskridge and Jones), Abingdon, Virginia, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, without the assistance of counsel¹, the Decision and Order

¹On February 2, 1993 claimant's former attorney filed a Notice of Appeal, which was acknowledged by the Board. On March 8, 1993, claimant submitted a letter to the Board stating that his attorney refused to continue with the case and that he

*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).

(79-BLA-0131) of Administrative Law Judge

wished to continue *pro se*. On March 12, 1993, claimant's former attorney filed a brief in which it is generally contended that the administrative law judge erred in weighing the evidence of record. On December 29, 1993, a letter was sent from Rob Cassell of Stone Mountain Health Services stating that he had been appointed as lay-representative for claimant. No further correspondence has been received from the lay-representative. The Board will address this case as a *pro se* appeal.

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Frederick D. Neusner 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). This case is before the Board for the third time. Claimant filed a claim for benefits on December 17, 1973. The administrative law judge credited claimant with at least ten years of coal mine employment and considered the claim pursuant to 20 C.F.R. Part 727. The administrative law judge then found that claimant established invocation of the interim presumption at 20 C.F.R. §727.203(a) and that employer failed to rebut the presumption pursuant to 20 C.F.R. §727.203(b). Accordingly, benefits were awarded. On appeal, the Board affirmed the administrative law judge's findings as to the amount of claimant's coal mine employment and vacated the administrative law judge's findings pursuant to Section 727.203(a), as the administrative law judge failed to discuss the evidence in terms of the applicable methods of invocation and rebuttal. The case was therefore remanded to the administrative law judge for further findings pursuant Section 727.203(a). See *Powers v. Clinchfield Coal Co.*, BRB No. 81-729 BLA (Jan. 18, 1985)(unpub.). On remand, the administrative law judge again found that claimant established invocation of the interim presumption pursuant to Section 727.203(a) and that employer failed to rebut the presumption pursuant to Section 727.203(b). Accordingly, benefits were again awarded. On appeal, the Board vacated the administrative law judge's findings regarding invocation and rebuttal and remanded the case for specific findings pursuant to Section 727.203(a)(1)-(4) and, if necessary, subsections (b)(1)-(4). The administrative law judge was also instructed to consider the claim pursuant to 20 C.F.R. §410.490 and 20 C.F.R. Part 410, Subpart D if benefits were denied under 20 C.F.R. Part 727. See *Powers v. Clinchfield Coal Co.*, BRB No. 86-3306 BLA (Oct. 29, 1990)(unpub.). On remand, the administrative law judge found that claimant failed to establish invocation of the interim presumption pursuant to Section 727.203(a). The administrative law judge also found that entitlement was not established pursuant to Sections 410.490 and Part 410, Subpart D. Accordingly, benefits were denied. Claimant appeals this denial. Employer responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond to this appeal.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Upon considering the x-ray evidence pursuant to Section 727.203(a)(1), the administrative law judge stated that although the 1973 interpretations were positive, the 1974, 1976 and 1979 interpretations were negative. The administrative law judge then concluded that, as pneumoconiosis is a progressive and irreversible disease, claimant failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(1). See Decision and Order at 2. However, the administrative law judge's finding that claimant failed to establish invocation of the interim presumption pursuant Section 727.203(a)(1) is not in accord with the law as the administrative law judge mechanically applied the "later evidence rule" to credit the more recent x-rays. See *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). As a result, the administrative law judge's finding pursuant to Section 727.203(a)(1) is vacated and the case is remanded for reconsideration of the evidence pursuant to Section 727.203(a)(1). Further, the administrative law judge erroneously stated that Dr. Schmidt's opinion was not supportive of invocation pursuant to Section 727.203(a)(4) because Dr. Schmidt concluded that claimant is not disabled for coal mine employment by a coal dust related medical condition. See Decision and Order at 4. Dr. Schmidt stated that claimant was totally disabled in part due to chronic bronchitis and stated that the chronic bronchitis was not caused by coal mine employment. See Employer's Exhibit 1. Contrary to the administrative law judge's findings, this opinion would support invocation pursuant to Section 727.203(a)(4) as Dr. Schmidt diagnosed a totally disabling respiratory or pulmonary impairment. See *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). As a result, the administrative law judge's finding that claimant failed to establish invocation pursuant to Section 727.203(a)(4) is vacated and the case is remanded for the administrative law judge to reconsider the evidence pursuant to Section 727.203(a)(4).²

²The administrative law judge's finding that claimant failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(2) and (3) are affirmed as they are supported by substantial evidence.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge