BRB No. 88-240 BLA

SOPHIE MARSOL (Widow of JOHN MARSOL)	)	
Claimant-Petitioner	)	
v.	)	
NATIONAL MINES CORPORATION	)	
and	)	
OLD REPUBLIC COMPANIES	)	
Employer/Carrier-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 Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Anne N. John (John & John), Uniontown, Pennsylvania, for claimant.

Christopher Wildfire (Tillman and Thompson), Pittsburgh, Pennsylvania, for employer.

Before: STAGE, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NEUSNER, Administrative Law Judge.*
PER CURIAM:

Claimant, the surviving spouse, appeals the Decision and Order *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) (Supp. V 1987).

(84-BLA-5381) of Administrative Law Judge Daniel A. Sarno, Jr., denying 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. §90l et seq. (the Act). The administrative law judge credited the miner with at least thirty-two years of qualifying coal mine employment as stipulated to by the parties and supported by the record, and found that employer did not contest the existence of pneumoconiosis. The administrative law judge then found that claimant had established invocation of the presumption of entitlement pursuant to Section 411(c)(5) of the Act, 30 U.S.C. §921(c)(5), as implemented by 20 C.F.R. §§727.204 and 718.306, but that employer had established rebuttal of the presumption. The administrative law judge further concluded that Section 411(c)(5) was the most lenient means of establishing eligibility, and thus concluded that since there was no entitlement thereunder, claimant could not prevail under 20 C.F.R. §727.203, 20 C.F.R. Part 410, or 20 C.F.R. Part 718 of the regulations. Accordingly, benefits were denied. Claimant appeals, contending that the administrative law judge erred in finding that employer established rebuttal of the Section 411(c)(5) presumption.

Claimant further contends that the evidence establishes entitlement under 20 C.F.R. Parts 410, 718, and 727. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.[1]

[1] The administrative law judge's findings with regard to the existence of pneumoconiosis, length of coal mine employment and invocation of the presumption at Section 411(c)(5) are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

Initially, claimant contends that both claims should properly be reviewed under the regulations at 20 C.F.R. Parts 410, 727 and 718. These claims, however, in which the miner had more than ten years of coal mine employment, arise within the appellate jurisdiction of the United States Court of Appeals for the Third Circuit, and thus the regulations at Parts 727 and 718 are applicable, and consideration under 20 C.F.R. Part 410, Subpart D and 20 C.F.R. §410.490 is precluded.[2] See Caprini v. Director, OWCP, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987); see also Bethenergy Mines, Inc. v. Director, OWCP, [Pauley], 890 F.2d 1295, 13 BLR 2-162 (3d Cir. 1989).[3] The administrative law judge held that inasmuch as claimant failed to establish entitlement pursuant to Section 411(c)(5), claimant could not prevail under 20 C.F.R. §727.203 or Part 718, and thus denied benefits in both claims. The Section 411(c)(5) standards, however, are inapplicable to the adjudication of a claim

[2] The miner in this case was credited with more than ten years of coal mine employment, and both the miner's and the survivor's claims were filed prior to March 31, 1980, but adjudicated after that date.

[3] We note that because of a significant split in U.S. Circuit Courts of Appeals regarding the proper application of 20 C.F.R. §410.490 and the rebuttal provisions of Section 727.203, the Supreme Court has decided that it must resolve the issues, and therefore has granted certiorari in three cases: Bethenergy Mines v. Director, OWCP and Pauley, 890 F.2d 1295, 13 BLR 2-162 (3d Cir. 1989), petition for rehearing denied (Feb. 6, 1990), cert. granted sub nom. Pauley v. Bethenergy Mines, Inc., No. 89-1714 (Nov. 17, 1990); Taylor v. Clinchfield Coal Co., 895 F.2d 178, 13 BLR 2-294 (4th Cir. 1990), reh'g denied (1990), cert. granted sub nom. Clinchfield Coal Co. v. Director, OWCP, No. 90-113 (Nov. 17, 1990); and Dayton v. Consolidation Coal Co., 895 F.2d 173, 13 LBHR 2-307 (4th Cir. 1990), reh'g denied (April 20, 1990), cert. granted sub nom. Consolidation Coal Co. v. Dayton, No. 90-

filed by a miner prior to his death. See Lefebure v. Barnes & Tucker Co., 7 BLR 1-224 (1984). Consequently, we cannot affirm the denial of entitlement with respect to the claim filed by the miner. Moreover, with respect to the claim filed by the survivor, entitlement to benefits may be established pursuant to 20 C.F.R. §718.205 by proving that the miner's death was due to pneumoconiosis. In the instant case, the administrative law judge did not address the issue of whether the miner's death was due to pneumoconiosis, and a review of the record reveals evidence which, if fully credited, would establish that the cause of death was significantly related to or significantly aggravated by pneumoconiosis. See Claimant's Exhibits 1, 2; Foreman v. Peabody Coal Co., 8 BLR 1-371 (1985). We therefore vacate the denial of entitlement in both claims and we remand this case for the administrative law judge to review the miner's claim under Parts 727 and 718, and to adjudicate the survivor's claim separately thereunder.

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114 (Nov. 17, 1990).

Claimant also challenges the administrative law judge's finding that employer established rebuttal of the Section 411(c)(5) presumption. The administrative law judge determined that the miner was totally disabled at the time of his death, and found that because employer had not controverted the existence of pneumoconiosis, employer could not establish rebuttal of the presumption by showing that the miner did not suffer from pneumoconiosis. The administrative law judge further found, however, that the weight of the medical opinions and the death certificate, which does not list pneumoconiosis as a cause of death, were sufficient to establish rebuttal of the presumption by proving that any disability existing at the time of death was not due to pneumoconiosis.[4] Claimant contends that the administrative law judge failed to review all of the evidence relevant to rebuttal, specifically the lay evidence concerning the miner's respiratory symptoms and the opinion of Dr. Kroh, who determined that the miner was unable to walk without shortness of breath. See Director's Exhibit 12. We agree. As the administrative law judge may not reject relevant evidence without explanation, see Tucker v. Director, OWCP, 10 BLR 1-35, 1-42 (1987), we vacate his rebuttal findings under Section 411(c)(5) and remand this case for the administrative law judge to address all of the relevant evidence of record

[4] Although we agree with claimant that the miner's death certificate which does not list pneumoconiosis as a cause of death is insufficient in and of itself to establish that the miner's disability was not due to pneumoconiosis, see 20 C.F.R. §727.204(d)(4), the administrative law judge may properly consider the death certificate in conjunction with all relevant evidence of record in determining whether rebuttal of the Section 411(c)(5) presumption has been established.

thereunder.[5] Claimant additionally argues that the administrative law judge erred in according any weight to the opinions of Drs. Fisher and Naeye. We disagree. The administrative law judge accorded less weight to the opinions of Drs. Fisher and Naeye because they found no evidence of pneumoconiosis and thus were inconsistent with employer's concession that the miner had pneumoconiosis, but permissibly found that they were still relevant to the issues of disability and causation. See generally Brown v. Director, OWCP, 7 BLR 1-730 (1985); see also Arnoni v. Director, OWCP, 6 BLR 1-423 (1983). However, inasmuch as the administrative law judge failed to specify how the opinions of Drs. Fisher and Naeye supported rebuttal and failed to clearly indicate the weight he assigned to each item of evidence, we direct the administrative law judge to do so on remand.

[5] Claimant further contends that the opinion of Dr. Wecht, combined with the lay evidence and the opinion of Dr. Kroh, establishes that the miner suffered at least a partial pulmonary disability due to pneumoconiosis, and that employer has not met his burden of ruling out pneumoconiosis as a source of disability. Dr. Wecht concluded that pneumoconiosis compromised the miner's pulmonary or respiratory function and had an aggravating effect upon the ultimately fatal disease processes. Claimant's Exhibits
1, 2. The administrative law judge did not credit Dr. Wecht's opinion because he could not determine from the opinion the extent of disability caused by pneumoconiosis. Decision and Order at 10. However, inasmuch as entitlement under Section 411(c)(5) is presumed, the administrative law judge appears to have placed the burden of proving disability due to pneumoconiosis on claimant rather than requiring employer to disprove the same. On remand, therefore, the administrative law judge must reconsider the opinion of Dr. Wecht with the remaining evidence of record relevant to rebuttal of the Section 411(c)(5) presumption.

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

FREDERICK D. NEUSNER
Administrative Law Judge