BRB No. 88-2459 BLA

OLIVER SIZEMORE )
)
Claimant-Petitioner )
)
v. )
)
DIRECTOR, OFFICE OF WORKERS' )
COMPENSATION PROGRAMS, UNITED )
STATES DEPARTMENT OF LABOR )
)
Respondent ) DECISION and ORDER

Appeal of the Decision and Order on Remand of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (United Mine Workers of America, District 29 Benefits Services Fund), Beckley, West Virginia, for claimant.

Brian E. Peters (Robert P. Davis, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Jeffrey J. Bernstein, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order on Remand (84-BLA-958) of Administrative Law Judge Edward J. Murty, Jr., 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 *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).

U.S.C. §90l et seq. (the Act). This is the second appeal of this case before the Board. In his original Decision and Order, the administrative law judge credited claimant with forty-five years of qualifying coal mine employment and found invocation of the interim presumption established pursuant to 20 C.F.R. §727.203(a)(1) based on the stipulation of the Director, Office of Workers' Compensation Programs (the Director). The administrative law judge further found, however, that rebuttal of the presumption was established pursuant to 20 C.F.R. §727.203(b)(2), and consequently denied benefits. On appeal, the Board vacated the administrative law judge's findings under subsection (b)(2), and remanded the case for the administrative law judge to reconsider the evidence thereunder in light of the decision of the United States Court of Appeals for the Fourth Circuit, wherein appellate jurisdiction of this claim lies, in Sykes v. Director, OWCP, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987). The Board further instructed the administrative law judge to consider entitlement under 20 C.F.R. §410.490 on remand unless he again found rebuttal established pursuant to subsection (b)(2). On remand, the administrative law judge found rebuttal established under subsection (b)(2), and did not consider

entitlement under Section 410.490. Accordingly, benefits were denied. Claimant appeals, contending that the evidence is insufficient to establish rebuttal under subsection (b)(2). The Director responds, urging the Board to apply the administrative law judge's findings under subsection (b)(2) to the regulations at 20 C.F.R. §727.203(b)(3), and to hold that subsection (b)(3) rebuttal is established. In the alternative, the Director requests that the Board remand this case for the administrative law judge to reconsider the evidence under subsection (b)(3).

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Both claimant and the Director contend that the administrative law judge erred in finding rebuttal established under Section 727.203(b)(2), based on the opinion of Dr. Daniel. We agree. Although Dr. Daniel concluded that claimant had no pulmonary dysfunction, he did not affirmatively state that claimant had the overall physical capacity to perform his usual coal mine employment. Dr. Daniel's opinion is therefore insufficient to establish subsection (b)(2) rebuttal, which requires proof that claimant is not disabled for any reason. See Director's Exhibit 29; Sykes, supra. Consequently, we reverse the administrative law judge's findings under Section 727.203(b)(2).

Next, the Director urges the Board to apply the administrative law judge's findings of fact to the regulations at Section 727.203(b)(3) and hold that subsection (b)(3) rebuttal is established, as Dr. Daniel's opinion rules out pneumoconiosis as a source of claimant's disability under the standard set forth in Bethlehem Mines Corp. v. Massey, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). In addressing the evidence at rebuttal, the administrative law judge did not specifically discuss whether the evidence of record ruled out pneumoconiosis as a cause of the miner's total disability, nor did the administrative law judge discuss all of the evidence relevant to such an inquiry. See Massey, supra. Consequently, the administrative law judge's findings are not sufficient to indicate that it has been determined that pneumoconiosis has been ruled out as a cause of the total disability. We therefore remand this case for further findings of rebuttal in light of the recent decision of the United States Court of Appeals for the Fourth Circuit in Taylor v. Clinchfield Coal Co., 895 F.2d 178, 13 BLR 2-294 (4th Cir.1990), reh'g denied (1990).

Accordingly, the administrative law judge's Decision and Order on Remand is reversed in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge