

BRB No. 88-2970 BLA

PAUL HUSICK)
)
 Claimant-Respondent)
)
 v.)
)
 WINDSOR POWER HOUSE COAL)
 COMPANY)
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand of Frank J. Marcellino,
Administrative Law Judge, United States Department of Labor.

Virginia K. Mayle (Barkan & Neff), Columbus, Ohio, for claimant.

David L. Yaussy (Robinson & McElwee), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (80-BLA-4265) of
Administrative Law Judge Frank J. Marcellino 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

*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).

et seq. (the Act). This case is on appeal to the Board for the second time. In his original Decision and Order, the administrative law judge credited claimant with forty-four years of qualifying coal mine employment, found that claimant had established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2) and (a)(4), and found that employer had failed to establish rebuttal of this presumption pursuant to 20 C.F.R. §727.203(b). Accordingly, benefits were awarded. On appeal, the Board vacated the administrative law judge's findings under Sections 727.203(b)(2) and 727.203(b)(4), and remanded the case for the administrative law judge to reconsider the evidence relevant to rebuttal under subsections (b)(2) and (b)(4). On remand, the administrative law judge found that the evidence was insufficient to establish rebuttal under subsections (b)(2) and (b)(4), and consequently awarded benefits. Employer appeals, challenging the administrative law judge's findings under subsection (b)(4). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in

this appeal.¹

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).

Employer contends that the evidence is sufficient to establish that claimant does not have pneumoconiosis, thus establishing rebuttal under subsection (b)(4). This method of rebuttal, however, is no longer available in cases, such as this one, arising within the appellate jurisdiction of the United States Court of Appeals for the Fourth Circuit. See Taylor v. Clinchfield Coal Co., 895 F.2d 178, 13 BLR 2-294 (4th Cir. 1990), reh'g denied (1990); Dayton v. Consolidation Coal Co., 895 F.2d 173, 13 BLR 2-307 (4th Cir. 1990). Consequently, we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

¹ The administrative law judge's findings under Section 727.203(b)(2) are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

ERIC FEIRTAG
Administrative Law Judge