BRB No. 89-2636 BLA

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

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Frank C. Mascara, Fairmont, West Virginia, for claimant.

C. William Mangum (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: STAGE, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and NEUSNER, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (88-BLA-2636) of Administrative Law Judge John C. Holmes 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). The administrative law judge credited claimant

*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).

with approximately twenty-six years of qualifying coal mine employment, but found that claimant failed to establish entitlement pursuant to either 20 C.F.R. Part 727 or 20 C.F.R. §410.490.[1] Accordingly, benefits were denied. Claimant appeals, contending that the evidence establishes invocation of the interim presumption pursuant to 20 C.F.R. §727.202(a)(1), (a)(2) and (a)(3) with no rebuttal, as well as entitlement under 20 C.F.R. Part 410.[2] Claimant further contends that the administrative law judge's Decision and Order does not comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as

[1] We agree with the Director that because claimant elected review of his original claim filed with and denied by the Social Security Administration, the original claim merged into the instant claim filed with the Department of Labor on March 18, 1976. Director's Exhibit 36. Therefore, contrary to the findings of the deputy commissioner, this claim never properly came within the purview of Lukman v. Director, OWCP, 11 BLR 1-71 91988), rev'd, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990). See 20 C.F.R. §§725.309, 727.101; Chadwick v. Island Creek Coal Co., 7 BLR 1-883 (1985).

[2] The administrative law judge's findings with regard to length of coal mine employment are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a). The Director, Office of Workers' Compensation Programs (the Director), responds, also arguing that the Decision and Order does not comply with the terms of the APA, and urging a remand.[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).

Initially, we note that this claim arises within the appellate jurisdiction of the United States Court of Appeals for the Fourth Circuit. Consequently, if claimant cannot establish entitlement under Part 727, the administrative law judge must consider entitlement under both 20 C.F.R. Part 410, Subpart D, see Muncy v. Wolfe Creek Collieries Coal Co., Inc. v. Director, OWCP, 3 BLR 1-627 (1981), and 20 C.F.R. §410.490, see Pittston Coal Group v. Sebben, 109 S.Ct. 414, 12 BLR 2-89

[3] The Director has filed a Motion to Remand in this case. The Board accepts the Director's Motion to Remand as his response brief, and herein decides this case on its merits.

(1988); see also 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). The administrative law judge stated that the Supreme Court in Sebben, supra, may have determined that the regulations at Part 727 are invalid, but found that claimant was not entitled to benefits under either Part 727 or Section 410.490 as the weight of the evidence did not establish the existence of pneumoconiosis, and thus any presumption of total disability due to pneumoconiosis would be rebutted. Decision and Order at 4, 5. Both claimant and the Director contend that the administrative law judge erred in failing to discuss the evidence specifically in terms of all applicable regulations governing invocation and rebuttal, as required by the APA. See generally Kurcaba v. Consolidation Coal Co., 9 BLR 1-73 (1986); Shaneyfelt v. Jones & Laughlin Steel Corp., 4 BLR 1-146 (1981). We agree. Consequently, we vacate the administrative law judge's findings under Part 727 and Section 410.490, and remand this case for the administrative law judge to reconsider entitlement under Part 727, Part 410, Subpart D, and Section 410.490, see Taylor, supra, in compliance with the provisions of the APA.

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

FREDERICK D. NEUSNER
Administrative Law Judge