

BRB No. 03-0396 BLA

DONALD BENNETT o/b/o)	
(SID BENNETT, Jr., Deceased))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 12/16/2003
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Donald Bennett, Detroit, Michigan, *pro se*.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (2002-BLA-0052) of Administrative Law Judge Gerald M. Tierney 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).¹ This case is before the Board for a

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726. All citations to

second time.² The administrative law judge determined that claimant's October 1982 application for benefits had been erroneously considered as a duplicate claim pursuant to 20 C.F.R. §725.309, rather than as a petition for modification pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge determined that claimant's two previously denied claims were still pending, and that the present claim was subject to adjudication pursuant to 20 C.F.R. Part 727, as the later claims merged with claimant's August 1976 claim. The parties' stipulated that claimant established forty-eight years of coal mine employment, Hearing Transcript at 6; Director's Exhibits 2, 3, 23, 37, and the administrative law judge found the newly submitted evidence sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2), but also sufficient to establish rebuttal of the presumption pursuant to 20 C.F.R. §727.203(b)(3),(4). The administrative law judge then determined that the finding of rebuttal precluded entitlement pursuant to 20 C.F.R. Part 410, and that the record evidence was also insufficient to establish the presence of pneumoconiosis at 20 C.F.R. §718.202(a), or total disability at 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.

the regulations, unless otherwise noted, refer to the amended regulations, except for citations to the regulations at 20 C.F.R. Part 727. The Part 727 criteria may be found at 43 Fed. Reg. 36818 (1978), or at 20 C.F.R. Parts 500 to end, edition revised as of April 1, 1999. *See* 20 C.F.R. §725.4.

²The record indicates that the miner filed an initial application for benefits on August 23, 1976. Director's Exhibit 23. In a Decision and Order issued on February 5, 1982, Administrative Law Judge A.A. Simpson, Jr. found that the miner was unable to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a), and benefits were denied. Director's Exhibit 23. On October 7, 1982, the miner filed a second application for benefits which was denied by Judge Simpson on July 1, 1986, after determining that the miner was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000), or total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000). Director's Exhibit 23. On appeal, the Board affirmed the denial of benefits. *Bennett v. Black Diamond Coal Mining Company*, BRB No. 86-2058 BLA (April 21, 1988)(unpub.). The miner filed the present claim on August 31, 1994, and subsequently died although the date of his death is not contained in the record. Director's Exhibit 1. The miner's son, Donald Bennett, is pursuing the living miner's claim herein.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's determination that claimant failed to establish entitlement pursuant to the provisions of the Act is supported by substantial evidence. The administrative law judge accurately considered the uniformly negative x-ray readings submitted since the initial denial of the claim, Director's Exhibits 8, 9, 23, 26, the four pulmonary function studies, two of which produced non-qualifying values, Director's Exhibit 23, and two of which produced qualifying values but were not interpreted as indicating a respiratory disability by either administering physician. Director's Exhibits 7, 26.³ The administrative law judge also considered the newly submitted medical reports of Drs. Hasson and Branscomb, neither of whom found any evidence of pneumoconiosis, or any disability arising out of coal mine employment. Director's Exhibits 5, 26; Decision and Order at 3-5. The administrative law judge then acted within his discretion in determining that this evidence established that claimant did not suffer from pneumoconiosis, or a total respiratory disability arising, in whole or in part, out of coal mine employment, thereby establishing rebuttal of the interim presumption pursuant to Section 727.203(b)(3),(4), and precluding entitlement pursuant to 20 C.F.R. Part 410. Decision and Order at 3-5; *McClendon v. Drummond Coal Co.*, 861 F.2d 1512, 12 BLR 2-108 (11th Cir. 1988);⁴ *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987); *Dockins v. McWane Coal Co.*, 9 BLR 1-57 (1986); *Preston v. Director, OWCP*, 6 BLR 1-1229 (1984); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984).

³A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the appropriate values set forth in the tables appearing at Section 727.203(a)(2),(3). A "non-qualifying" study exceeds those values. 20 C.F.R. §727.203(a)(2),(3).

⁴The instant case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit inasmuch as claimant's coal mine employment occurred in the State of Alabama. Director's Exhibit 2; see *Shupe v. Director, OWCP*, 12 BLR 1-200 ((1989)(*en banc*)).

In addition, since none of claimant's newly submitted evidence indicated the presence of pneumoconiosis, and the medical reports failed to include diagnoses of a totally disabling respiratory impairment, the administrative law judge rationally determined that claimant could not establish these elements pursuant to Sections 718.202(a) or 718.204(b). Decision and Order at 5; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990); *Short*, 10 BLR 1-127, 129. As claimant failed to establish any element of entitlement previously adjudicated against him, the administrative law judge also rationally found that claimant had not established a change in conditions or a mistake of fact pursuant to Section 725.310. Decision and Order at 5; *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Accordingly, we hold that substantial evidence supports the administrative law judge's findings and affirm the denial of benefits.⁵

⁵Any error by the administrative law judge in considering this claim pursuant to Section 725.310 and 20 C.F.R. Part 727 is harmless since the administrative law judge considered all the relevant evidence of record, and substantial evidence supports his determination that the evidence was insufficient to establish any required element of entitlement. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge