BRB No. 83-1073 BLA

DAVID A. McDONALD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WILLIAMSON SHAFT CONTRACTING COMPANY	)	DATE ISSUED:
	)	
	)	
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 and Supplemental Decision and Order Granting Attorney Fees of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Gregory C. Hook (Hook and Hook), Waynesburg, Pennsylvania, for claimant.

Richard B. Fellows, Jr. (Loomis, Owen, Fellman & Howe), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order and Supplemental Decision and Order Granting Attorney Fees (82-BLA-1657) of Administrative Law Judge James W. Kerr, Jr., awarding 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) (1988).

with sixteen years of qualifying coal mine employment, and found that the evidence of record was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and (a)(3), and insufficient to establish rebuttal of that presumption pursuant to 20 C.F.R. §727.203(b). Accordingly, the administrative law judge awarded benefits and attorney fees. On appeal, employer challenges the administrative law judge's findings regarding the issues of claimant's status as a miner and employer's status as the responsible operator herein; the validity of 20 C.F.R. §725.202(a); the administrative law judge's finding that the evidence was insufficient to establish rebuttal pursuant to Sections 725.202(a)(1)(i) and 727.203(b); the length of coal mine employment; the rate of interest assessed and the date from which it accrues; and the amount of the attorney fee approved. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

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. §921(b)(3), as incorporated by 30 U.S.C. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Employer first contends that the administrative law judge erred in finding that claimant, a construction worker at a mine which was not yet operational, qualified as a "miner" pursuant to Section 725.202(a). We disagree. Contrary to employer's arguments, the administrative law judge properly applied the "situs-function" test, see Ray v. Williamson Shaft Contracting Co., 14 BLR 1-105 (1990), and found that claimant satisfied both prongs of the test, as he participated in the construction of shafts as a driller and top man on land to be used for the extraction of coal, and his duties were integral to the ultimate extraction of coal. Collins v. Director, OWCP, 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986). The administrative law judge thus properly found that claimant qualified as a miner and established invocation of the presumption that he was exposed to coal mine dust during all periods of his employment pursuant to Section 725.202(a).

Employer next contends that the administrative law judge, in finding the evidence insufficient to establish rebuttal pursuant to Section 725.202(a)(1)(i), applied an incorrect rebuttal standard, and failed to resolve the conflicts between claimant's testimony at the hearing, his prior inconsistent statements, and the testimony of Norman Williamson and James R. Emerick concerning the extent of

claimant's exposure to coal dust. Employer asserts that claimant was not regularly exposed to coal dust, since coal removal was incidental to the shaft construction process, and the amount removed was only two to three percent of all materials excavated.[1] Employer further contends that the regulatory definition of a miner contained in Section 725.202, as applied to construction workers, is invalid because it conflicts with Section 402(d) of the Act, 30 U.S.C. §902(d). Employer's arguments lack merit. The Board considered and rejected employer's contention that the regulatory definition of a miner at Section 725.202(a) unconstitutionally expands the statutory definition, 30 U.S.C. §902(d), by referring to "coal mine dust" instead of "coal dust," in Conley v. Roberts and Schaefer Co., 7 BLR 1-309 (1984); see also George v. Williamson Shaft Contracting Co., 8 BLR 1-91 (1985); Williamson Shaft Contracting Co. v. Phillips, 794 F.2d 865, 9 BLR 2-79 (3d Cir. 1986). The Board construes "coal dust" and "coal mine dust" as equivalent terms, which the Board has defined as airborne particulate matter occurring as a result of the extraction or preparation of coal in or around a coal mine, including dust from substances other than coal and not limited to dust generated in the actual extraction or preparation of coal.[2] George, supra; Conley, supra; Ritchey v. Blair Electric Service Co., 6 BLR 1-

[1] Employer additionally contends that since claimant had no regular exposure to coal dust after 1969, when he became a top man, employer does not qualify as the responsible operator herein pursuant to 20 C.F.R. §725.492. Contrary to employer's contention, however, claimant's uncontradicted testimony indicated that between 1969 and 1977, claimant worked approximately 200 days as a driller. See Hearing Transcript at 34, 54, 88, 101, 102; see also Zimmerman v. J. Robert Bazley, Inc., 10 BLR 1-75 (1987).

[2] In support of its position, employer cites to Bridger Coal Co. v. Director, OWCP [Harrop], 927 F.2d 1150, 15 BLR 2-47 (10th Cir. 1991), and William Brothers, Inc. v. Pate, 833 F.2d 261, 10 BLR 2-333 (11th Cir. 1987), urging the Board to apply the holdings therein. See also Director, OWCP v. Zeigler Coal Co. [Wheeler], 853 F.2d 529 (7th Cir. 1988). The instant case, however, lies within the appellate jurisdiction of the United States Court of Appeals for the Fourth Circuit, which has not spoken on the issues of whether "coal dust" and "coal mine dust" are interchangeable terms, or whether the dust must be generated in the actual extraction or preparation of coal, thus case law cited by employer is not controlling. Moreover, we note that the court in Pate approved the reasoning of the United States Court of Appeals for the Third Circuit in Williamson Shaft Contracting Co. v. Phillips, 794 F.2d 865, 9 BLR 2-79 (3d Cir. 1986), and distinguished the factual circumstances of Pate's employment from those of Phillips, whose duties as a driller were substantially similar to those of claimant herein. Inasmuch as published case law is conflicting between the various circuits and the Board, we decline to apply the holdings in Harrop, Wheeler and Pate. See Shaffer v. Consolidation Coal Co., BLR , BRB No. 90-2256 BLA (Nov.

966 (1984); Harriger v. B & G Construction Co., 4 BLR 1-542 (1982). Even though conflicting testimony was elicited at the hearing regarding the regularity and amount of claimant's exposure to coal dust, the administrative law judge rationally found that employer failed to establish rebuttal at Section 725.202(a)(1)(i), based on claimant's uncontradicted testimony that he was regularly and continuously exposed to coal mine dust.[3] Decision and Order at 8-10; see Ray, supra; George, supra. Consequently, we affirm the administrative law judge's findings pursuant to Section 725.202(a), as supported by substantial evidence.

Inasmuch as employer failed to establish rebuttal pursuant to Section 725.202(a)(1)(i), we reject employer's argument that claimant should not receive credit for the nine years he worked as a top man, and we affirm the administrative law judge's finding that claimant established sixteen years of coal mine employment, as it was based on a reasonable method of computation and supported by substantial evidence in the record considered as a whole. Decision and Order at 9; see Vickery v. Director, OWCP, 8 BLR 1-430 (1986). Contrary to employer's arguments, since claimant established more than ten years of coal mine employment, the provisions at Section 727.203(a) were applicable, and we affirm the administrative law judge's finding that the evidence was sufficient to establish invocation pursuant to Sections 727.203(a)(1) and (a)(3), as unchallenged on

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19, 1992); Pershina v. Consolidation Coal Co., 14 BLR 1-55 (1990)(en banc); Ray v. Williamson Shaft Contracting Co., 14 BLR 1-105 (1990).

[3] Although the administrative law judge applied the rebuttal standard found at 20 C.F.R. §725.492(c) to the regulation at 20 C.F.R. §725.202(a), and vice versa, any error is harmless, see Larioni v. Director, OWCP, 6 BLR 1-1276 (1984), since he found the evidence insufficient to establish rebuttal pursuant to either standard. Decision and Order at 8-10; see generally Garrett v. Cowin & Co., Inc., 16 BLR 1-77 (1990); Zimmerman v. J. Robert Bazley, Inc., 10 BLR 1-75 (1987); George v. Williamson Shaft Contracting Co., 8 BLR 1-91 (1985).

appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

Employer next 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 incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a), as the administrative law judge did not provide an adequate rationale for finding that the evidence of record was insufficient to establish rebuttal pursuant to Section 727.203(b). Employer asserts that the opinions of Drs. Huffman, Cho and Morgan, when viewed with the non-qualifying objective tests of record, are sufficient to establish rebuttal. We disagree. The administrative law judge accurately reviewed the medical evidence of record and noted that Dr. Huffman did not mention any pulmonary problems but found claimant totally disabled due to degenerative arthritis and discogenic disease of the lumbar spine; Dr. Cho diagnosed pneumoconiosis but did not assess disability; and Dr. Morgan diagnosed silicosis and opined that claimant could not return to his usual coal mine employment because of cardiopulmonary and orthopedic problems in which his occupation probably played a small but significant part. Decision and Order at 11, 12; Director's Exhibits 10, 11, 25. The administrative law judge thus properly found that the evidence was insufficient to establish rebuttal pursuant to Section 727.203(b), as the issue of whether claimant's disability was due to pneumoconiosis had not been specifically addressed.[4] Decision and Order at 12; 20 C.F.R. §727.203(b)(2), (3); see Sykes v. Director, OWCP, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987); Bethlehem Mines Corp. v. Massey, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). Consequently, we affirm the administrative law judge's findings pursuant to Section 727.203(b), as supported by substantial evidence.

Employer next challenges the administrative law judge's award of interest payable from June 1, 1979, based on the date of filing, at the rate established by Section 6621 of the Internal Revenue Code of 1954. Decision and Order at 13. Employer correctly maintains that interest herein is only payable thirty days after issuance of the deputy commissioner's initial determination of eligibility on November 7, 1980, see Director's Exhibit 31, at the rates set forth in 20 C.F.R. §725.608. Baldwin v. Oakwood Red Ash Coal Corp., 14 BLR 1-23 (1990)(en banc).

[4] Employer cannot establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1), as the record reflects that claimant has not worked since he was injured in 1977, while working for employer. See Decision and Order at 9; Director's Exhibits 2, 6. Additionally, inasmuch as claimant established invocation pursuant to 20 C.F.R. §727.203(a)(1), rebuttal pursuant to 20 C.F.R. §727.203(b)(4) is precluded. Mullins Coal Co., Inc. of Virginia v. Director, OWCP, 108 S.Ct. 427, 11 BLR 2-9 (1987); see also Pauley v. Bethenergy Mines, Inc., 111 S.Ct. 2524, 15 BLR 2-155 (1991).

Accordingly, we modify the administrative law judge's Decision and Order to reflect interest payable from December 7, 1980, at the rates established pursuant to Section 725.608.

Lastly, employer contends that the administrative law judge erred in approving an attorney fee of $1,162.50, as counsel provided insufficient descriptions of the work performed; not all of the work compensated was necessary to the pursuit of the claim; the fee approved was not reasonably commensurate with the necessary work done pursuant to 20 C.F.R. §725.366(b); and the administrative law judge's findings do not comply with the requirements of the APA. Employer's arguments are without merit. The administrative law judge reasonably found that while counsel's descriptions of the work performed were brief, they adequately described the work performed. Supplemental Decision and Order at 1; see 20 C.F.R. §725.366(a). The administrative law judge addressed employer's objections to the fee petition, and acted within his discretion in reducing the time requested for counsel's review with claimant and preparation for the hearing from 9.5 to 5 hours in light of the fact that the only evidence submitted was claimant's testimony at the hearing. Supplemental Decision and Order at 1, 2; see Busbin v. Director, OWCP, 3 BLR 1-374 (1981). The administrative law judge also reduced the time requested for review of employer's briefs from 4 hours to 1 hour, as counsel did not respond. Supplemental Decision and Order at 2. Finally, the administrative law judge properly considered the factors enumerated at Section 725.366(b), and found that the approved fee was fair and reasonable under the facts of this case. Supplemental Decision and Order at 2; see Pritt v. Director, OWCP, 9 BLR 1-159 (1986). We, therefore, affirm the administrative law judge's attorney fee award of $1,162.50, based on 15.5 hours of work at $75 per hour. See Abbott v. Director, OWCP, 13 BLR 1-15 (1989), citing Marcum v. Director, OWCP, 2 BLR 1-894 (1980).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and modified in part, and his Supplemental Decision and Order Granting Attorney Fees is affirmed.

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge