

GUSTIA ARMES, o/b/o COLEMAN)	
ARMES (Disabled child of)	
GENERAL GRANT ARMES))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Glenn Robert Lawrence, Administrative Law Judge, United States Department of Labor.

Janet F. Gerske, Chicago, Illinois, for claimant.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (83-BLA-5784) of Administrative Law Judge Glenn Robert Lawrence denying benefits on a survivor's 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). This case is

¹ The miner, General Grant Armes, died on July 31, 1969, of "pulmonary tuberculosis, far advanced." Director's Exhibit 5. Claimant, Coleman Armes, is the disabled child of the miner who filed a claim for survivor's benefits on October 3, 1973, and elected review of this claim on March 28, 1978, through his appointed guardian, Gustia Armes, the miner's sister. Director's Exhibits 1, 15.

*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).

on appeal to the Board for the second time. In his original Decision and Order, the administrative law judge credited the miner with 11.8 years of coal mine employment, but found the evidence of record insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a). The administrative law judge then adjudicated the claim pursuant to the permanent criteria of 20 C.F.R. Part 410, Subpart D, and awarded benefits, finding the evidence sufficient to establish invocation of the presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(2) of the Act, 30 U.S.C. §921(c)(2), as implemented by 20 C.F.R. §410.462, and insufficient to establish rebuttal of that presumption.

On appeal, the Board remanded this case for the administrative law judge to redetermine the length of the miner's qualifying coal mine employment. The Board further instructed the administrative law judge to reconsider the evidence of record relevant to invocation of the presumption at Section 410.462, and to determine whether the medical evidence suggests a reasonable possibility of death due to pneumoconiosis as required pursuant to Tackett v. Benefits Review Board, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986). Finally, the Board instructed the administrative law judge to consider entitlement pursuant to 20 C.F.R. §410.490 if, on remand, he found the evidence insufficient to establish ten years of coal mine employment.

On remand, the administrative law judge did not recalculate the length of the miner's coal mine employment, but found the evidence of record insufficient to establish death due to

pneumoconiosis pursuant to either Section 410.462 or Section 410.490. Accordingly, benefits were denied. Claimant appeals, challenging the administrative law judge's findings pursuant to Section 410.462. Claimant additionally maintains that the regulations at 20 C.F.R. Part 718 are applicable to this claim, and that the evidence of record is sufficient to establish invocation of the Section 411(c)(2) presumption of death due to pneumoconiosis, as implemented by 20 C.F.R. §718.303.² The Director, Office of Workers' Compensation Programs, has not participated in this appeal.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

² Claimant correctly notes that, contrary to the provisions of Section 410.462, claimant is not required to establish a reasonable possibility that the miner's death was due to pneumoconiosis in order to establish invocation of the presumption at Section 718.303. See Beard v. Director, OWCP, 10 BLR 1-82 (1987); see also Marx v. Director, OWCP, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989).

³ The administrative law judge's finding that the evidence of record is insufficient to establish entitlement pursuant to 20 C.F.R. §410.490 is affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Claimant first challenges the administrative law judge's findings pursuant to Section 410.462. However, inasmuch as we agree with claimant that the regulations at 20 C.F.R. Part 718 are applicable to this claim, we need not address claimant's arguments with regard to invocation at Section 410.462. The United States Court of Appeals for the Sixth Circuit, wherein appellate jurisdiction of this claim lies, has held that all claims, such as this one, filed before March 31, 1980, but adjudicated after that date, must be reviewed under Part 718 rather than Part 410, Subpart D, where claimant fails to establish eligibility pursuant to 20 C.F.R. Part 727. See Knuckles v. Director, OWCP, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989). Consequently, we must vacate the administrative law judge's findings pursuant to Part 410, Subpart D, and remand this case for the administrative law judge to first determine the length of the miner's coal mine employment in order to ascertain the applicable regulatory presumptions, and then to consider entitlement pursuant to Part 718. Knuckles, supra; see also Pauley v. Bethenergy Mines, Inc., 111 S.Ct. 2524, 15 BLR 2-155 (1991); Phipps v. Director, OWCP, BLR , BRB No. 89-3919 BLA

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(Nov. 13, 1992) (en banc) (J. Smith, concurring, J. McGranery, concurring and dissenting).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge

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