

BRB No. 91-0455 BLA

HARRY E. BONDS)
)
 Claimant-Respondent)
)
 v.)
)
EASTERN ASSOCIATED COAL)
CORPORATION)
) DATE ISSUED:
 Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: STAGE, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order (86-BLA-3450) of Administrative Law Judge Edward J. Murty, Jr. remanding for payment of benefits 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). Claimant filed for benefits on October 16, 1978 and the administrative law judge considered the claim pursuant to 20

C.F.R. Part 727.¹ The administrative law judge credited claimant with twenty-three years of coal mine employment and determined that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2). The administrative law judge then determined that employer established rebuttal of the presumption pursuant to 20 C.F.R. §727.203(b)(3).

¹Claimant filed a second claim on April 23, 1985 which was merged into the earlier claim. See *Spese v. Peabody Coal Co.*, 11 BLR 1-174, 1-177 (1988).

Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's findings at 20 C.F.R. §727.203(a)(2) and (b)(3), but remanded the case for consideration pursuant to 20 C.F.R. §410.490 and 20 C.F.R. Part 410, Subpart D. *Bonds v. Eastern Associated Coal Corp.*, BRB No. 88-2734 (Mar. 30, 1990)(unpub.). Employer then requested that the matter be held in abeyance while the Supreme Court considered issues relevant to this case. On remand, the administrative law judge denied employer's motion to withhold decision and remanded the case to the district director for payment of benefits. On appeal, employer contends that the administrative law judge erred in remanding the case for payment of benefits and requests that the original denial of benefits be reinstated. Employer also appeals the administrative law judge's Order Awarding Supplemental Benefits-Attorney's Fees. Claimant responds in support of the administrative law judge's order remanding the case for payment of benefits. The Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond in this case.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with law. 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).

In its Decision and Order of March 30, 1990, the Board affirmed the administrative law judge's findings that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2) and that employer established rebuttal pursuant to 20 C.F.R. §727.203(b)(3). The Board also remanded the case for the administrative law judge to consider the claim pursuant to 20 C.F.R. §410.490 and 20 C.F.R. Part 410, Subpart D. See *Bonds, supra*. However, on remand the administrative law judge awarded benefits without making any additional findings in regards to this claim. See Order-Remand to Pay Benefits. The administrative law judge's failure to consider the claim pursuant to 20 C.F.R. §410.490 is harmless as subsequent to the issuance of the Board's Decision and Order, the Supreme Court held that a claim which is properly adjudicated pursuant to 20 C.F.R. §727.203 is not subject to adjudication under 20 C.F.R. §410.490. See *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524, 15 BLR 2-155 (1990); see also *Whiteman v. Boyle Land and Fuel Co.*, 15 BLR 1-11 (1991); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Also, the administrative law judge's failure to consider the claim pursuant to 20 C.F.R. Part 410, Subpart D, is harmless as a finding that the evidence establishes that the total disability did not arise in whole or in part out of coal mine employment, under 20 C.F.R. §727.203(b)(3), precludes entitlement under 20 C.F.R. Part 410, Subpart D. *Pastva v. Youghiogheny and Ohio*

Coal Co., 7 BLR 1-829 (1985); *Larioni, supra*. Thus, as we previously affirmed the administrative law judge's finding of subsection (b)(3) rebuttal, the administrative law judge's Order remanding the claim for payment is reversed.

Accordingly, the administrative law judge's finding that claimant is entitled to benefits is reversed, the Order remanding for payment of benefits is vacated and benefits are denied based on our prior affirmance of the administrative law judge's finding of no entitlement pursuant to 20 C.F.R. Part 727. Moreover, the administrative law judge's Order Awarding Supplemental Benefits-Attorney's Fees is also vacated, as the claim for benefits is denied.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge