

BRB No. 91-0668 BLA

GRACIE DALTON)
(Widow of HUBERT DALTON))

)
Claimant-Respondent)

v.)

)
DIRECTOR, OFFICE OF WORKERS') Date Issued:
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

)
Petitioner) DECISION and ORDER

Appeal of the Decision and Order of Charles W. Campbell, Administrative Law
Judge, United States Department of Labor.

Albert A. Burchett, Prestonsburg, Kentucky, for claimant.

Gary K. Stearman (Judith E. Kramer, Acting Solicitor of Labor; Donald S.
Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor;
Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation
and Legal Advice), Washington, D.C., for the Director, Office of Workers'
Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director),
appeals the Decision and Order on remand (87-BLA-2908) of Administrative Law
Judge Charles W. Campbell 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). This case is
on appeal to the Board
for the second time. The miner filed a claim for benefits on April 1, 1971, which was
denied on July 11, 1975. The miner then filed a second claim on July 15, 1975. The

miner died on July 15, 1980, and claimant, the miner's widow, filed a survivor's claim on April 7, 1982. Both the miner's and the survivor's claims were denied on April 20, 1982. Claimant then filed a second claim on November 30, 1982. This second survivor's claim was considered by the administrative law judge to be a request for modification of the denial of the first survivor's claim. Further, the administrative

law judge found that the miner's claim had been abandoned. The administrative law judge then found that claimant failed to establish that the miner's death was due to pneumoconiosis. Accordingly, benefits were denied. On appeal, the Board found that as the second survivor's claim was sufficient to constitute a request for modification for both the miner's and survivor's claims, the miner's claim was not abandoned. The Board then affirmed the denial of the survivor's claim and remanded the case to the administrative law judge for consideration of the miner's claim pursuant to 20 C.F.R. Part 727, and if entitlement is not established, then pursuant to 20 C.F.R. §410.490. *Dalton v. Director, OWCP*, BRB No. 88-1295 BLA (Feb. 27, 1990)(unpub.). On remand, the administrative law judge credited the miner with twenty-eight years of coal mine employment and determined that the evidence established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)¹ and the presumption at 20 C.F.R. §410.416(a). The administrative law judge then found that rebuttal was established pursuant to 20 C.F.R. §727.203(b)(3). The administrative law judge also found that the presumption at 20 C.F.R. §410.490 was invoked and that rebuttal was not established. Accordingly, benefits were awarded. On appeal, the Director contends that the administrative law judge erred in failing to apply his finding of rebuttal under 20 C.F.R. §727.203(b)(3) to the presumption at 20 C.F.R. §410.490. Claimant responds in support of the administrative law judge's Decision and Order.²

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

Subsequent to the administrative law judge's Decision and Order on remand, the United States Supreme Court decided the case

¹The Director conceded that claimant established the existence of pneumoconiosis.

²The administrative law judge's findings that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and that employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3) are affirmed as they are not challenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We also note that in finding rebuttal pursuant to 20 C.F.R. §727.203(b)(3), the administrative law judge relied upon Dr. Kress' opinion which is sufficient to rule out coal mine employment as a cause of the miner's disability. See Director's Exhibit 32; *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984).

of *Pauley v. Bethenergy Mines Inc.*, 111 S.Ct. 2524, 15 BLR 2-155 (1991). In light of *Pauley*, the Board has held that a claim which is properly adjudicated pursuant to 20 C.F.R. §727.203 is not subject to adjudication pursuant to 20 C.F.R. §410.490. *Whiteman v. Boyle Land and Fuel Company*, 15 BLR 1-11 (1991). Since the administrative law judge properly adjudicated this claim pursuant to 20 C.F.R. §727.203, the administrative law judge's findings pursuant to 20 C.F.R. §410.490 are vacated. See *Pauley, supra*; see also *Whiteman, supra*. Thus, as the administrative law judge's finding of entitlement under Section 410.490 is vacated, and the administrative law judge permissibly found rebuttal established pursuant to 20 C.F.R. §727.203(b)(3), the award of benefits is reversed as there exists no basis for an award to claimant.³

Accordingly, the administrative law judge's Decision and Order on remand awarding benefits is reversed and benefits are denied.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

³Further it is noted that the miner is not entitled to benefits pursuant to 20 C.F.R. Part 410, Subpart D, because, while the administrative law judge found that the presumption at 20 C.F.R. §410.416(a) had been invoked, the presumption is rebutted by the administrative law judge's finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(3). See *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985).