BRB No. 93-2267 BLA

FLORENCE P. RILEY)
Widow of JOHN W. RILEY))
)
Claimant-Petitioner)
)
v.)
) DATE ISSUED: _____)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

William Z. Cullen (Cooper, Mitch, Crawford, Kuykendall & Whatley), Birmingham, Alabama, for claimant.

Gary K. Stearman (Thomas S. Williamson, Jr., 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: , Acting Chief Administrative Appeals Judge, and , Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (92-BLA-1328) of Administrative Law Judge Lee J. Romero, Jr. 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). This case involves duplicate survivor's claims. The miner filed a claim for benefits on December 26, 1972, which was finally denied on August 24, 1981. Memo to: Benefits Review Board

From: B. Kevin Cardwell

Re: *Tennant v. Director, OWCP*

BRB No. 93-2267 (4th Cir.)

Claimant appeals the alj's D&O on Remand denying benefits. Claimant filed claims for benefits on May 8, 1973 and February 4, 1976. Claimant's second claim was merged with his prior claim. The alj considered the claims pursuant to Part 727 and determined that claimant established over twenty years of cme. The alj then determined that claimant failed to establish invocation of the interim presumption pursuant to §727.203(a). Accordingly, benefits were denied. On appeal, the Board affirmed the alj's findings pursuant to §727.203(a)(2)-(4), vacated the alj's findings pursuant to §727.203(a)(1), and remanded the case for reconsideration of the evidence pursuant to §727.203(a)(1), §727.203(b) if necessary, and Part 410, Subpart D. *See Tennant v. Director, OWCP*, BRB No. 88-3751 BLA (Nov. 25, 1992)(unpub.). On remand, the alj determined that claimant established invocation of the interim presumption pursuant to §727.203(a)(1) and that employer established rebuttal pursuant to §727.203(b)(3). The alj further found that claimant failed to establish entitlement pursuant to Part 410, Subpart D. Accordingly, benefits were again denied. On appeal, claimant contends that the alj erred in weighing the

opinion of Dr. Berlotte pursuant to §727.203(b)(3). The Director, OWCP, has chosen not to respond to this appeal.

Specifically, claimant contends that the alj erred in relying on Dr. Berlotte's opinion to find subsection (b)(3) rebuttal established as Dr. Berlotte failed to rule out that claimant's bronchial asthma was caused by claimant's exposure to coal dust. Dr. Berlotte, in an opinion dated February 23, 1988, stated:

> I can state with a reasonable degree of medical certainty, that I don't feel that any pulmonary impairment which may be present, is related to exposure to dust, resulting from his coal mine employment.
>
> I have no diagnosed condition, which I can relate to his coal dust exposure. The chest x-ray does not show any coal worker's pneumoconiosis definitely. The patient has multiple non-respiratory conditions which can produce pulmonary symptoms.
>
> It is my impression that he is totally and permanently disabled to perform his last coal mine employment, however, this disability is related to his cardiac condition...

See DX 28. Upon considering this opinion, the alj permissibly found that Dr. Berlotte's statements that claimant has no condition which he can relate to his coal dust exposure and that claimant is totally and permanently disabled due to his cardiac condition are sufficient to rule out any causal relationship between the miner's disability and his coal mine employment. *See Phillips v. Jewell Ridge Coal Co.*, 825 F.2d 408, 10 BLR 2-160 (4th Cir. 1987); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1985); *Spradlin v. Island Creek Coal Co.*, 6 BLR 1-716 (1984). As a result, it is recommended that the alj's finding that employer

established rebuttal pursuant to §727.203(b)(3) be affirmed as it is supported by substantial evidence.