BRB No. 02-0833 BLA

VIOLET E. KING (Widow of JERRY F. KING)	)	
Claimant-Petitioner	)	
v.	)	
	)	DATE ISSUED: 07/31/2003
DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Violet E. King, Phoenix, Arizona, *pro se*.

Jeffrey S. Goldberg (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2001-BLA-0696) of Administrative Law Judge Rudolf L. Jansen denying benefits on a survivor=s claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

[1]Claimant is Violet E. King, the miner=s widow. The miner, Jerry F. King, died on December 19, 1974. Director=s Exhibit 8. Claimant filed her survivor=s claim, the subject of the instant appeal, on November 12, 1975, which was denied by the district director on June 2, 1980. Director=s Exhibits 2, 14. Claimant requested a hearing and the case was transferred to the Office of Administrative Law Judges on July 10, 1980.

Act of 1969, as amended, 30 U.S.C. ' 901 *et seq*. (the Act).[2] The administrative law judge found twenty-three years of qualifying coal mine employment. Decision and Order at 3. Considering entitlement in this survivor=s claim, filed on November 12, 1975, pursuant to the provisions of 20 C.F.R. Part 727, the administrative law judge determined that claimant failed to establish invocation of the interim presumption pursuant to 20 C.F.R. ' 727.203(a).

Director=s Exhibit 15. After several postponements, the case was remanded on January 16, 1986 to the district director, who was ordered not to return the case until claimant was able to provide a physician=s report stating that she was able to proceed with the hearing. Director=s Exhibits 19, 25, 32, 43, 48, 51, 57, 60. No further action was taken until January 27, 1999, when claimant wrote a letter to the district director concerning her case. Director=s Exhibit 63. Claimant provided proof that she was able to attend a hearing on January 14, 2000. Director=s Exhibit 72. The district director denied the claim on October 25, 2000, and claimant requested a formal hearing on November 27, 2000. Director=s Exhibits 78, 82.

[2]The Department of Labor (DOL) has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations except for citations to the regulations at 20 C.F.R. 727. DOL has discontinued publication of the regulations at 20 C.F.R. Part 727, and the Part 727 criteria may be found at 43 Fed. Reg. 36818 (1978) or at 20 C.F.R. parts 500 to end, edition revised as of April 1, 1999. *See* 20 C.F.R. 725.4.

Decision and Order at 4-5. The administrative law judge further determined that claimant failed to establish that the miner suffered from pneumoconiosis or that the miner=s death was due to pneumoconiosis pursuant to the provisions of 20 C.F.R. Part 718. Decision and Order at 5-7. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. The Director, Office of Workers= Compensation Programs (the Director), has filed a motion to remand asserting that the administrative law judge failed to properly consider the lay evidence of record.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge 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).[3]

Initially, the administrative law judge rationally concluded that claimant established that the miner had twenty-three years of qualifying coal mine employment. Claimant bears the burden of proof to establish the number of years the miner actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1985); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983). Since the Act fails to provide any specific guidelines for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge=s determination if it is based on a reasonable method and supported by substantial evidence in the record considered as a whole. *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Smith*, 7 BLR 1-803; *Miller*, 7 BLR 1-693; *Maggard*, 6 BLR 1-285. The administrative law judge, in the instant case, relied upon the Director=s stipulation of seventeen years of coal mine employment, the Social Security Administration and employment records as well as claimant=s testimony in determining the length of qualifying coal mine employment. Decision and Order at 3. We, therefore, affirm the administrative law judge=s finding of twenty-three years of coal mine employment as it is reasonable and supported by substantial evidence. *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992); *Vickery*, 8 BLR 1-430; *Hutnick v. Director, OWCP*, 7

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner was employed in the coal mine industry in the State of West Virginia. *See* Director=s Exhibits 3, 4; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

BLR 1-326 (1984); *Niccoli v. Director, OWCP*, 6 BLR 1-910 (1984).

With respect to 20 C.F.R. '727.203(a), the administrative law judge properly determined that the record does not contain any autopsy or biopsy evidence. Decision and Order at 4. Additionally, in addressing whether the x-ray evidence of record was sufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1), the administrative law judge properly noted that the only x-ray evidence of record is from a 1953 shoulder injury. *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh=g denied*, 484 U.S. 1047 (1988). The administrative law judge properly found that this evidence is insufficient to meet claimant=s burden of proof. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Decision and Order at 4; Director's Exhibit 11. We, therefore, affirm the administrative law judge=s finding that the evidence was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1).

Furthermore, the administrative law judge, noting that the record contains no pulmonary function studies or blood gas studies, properly found that invocation of the interim presumption pursuant to Section 727.203(a)(2)-(3) could not be established. Decision and Order at 4. Consequently, we affirm the administrative law judge=s finding that claimant failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(2)-(3).

In addition, in weighing the medical opinions of record, the administrative law judge permissibly found that the opinions of Drs. Revercomb and Houck, as well as the death certificate signed by Martin C. Haskett, Justice of the Peace, did not establish the existence of a totally disabling respiratory or pulmonary impairment.[4] *Clark*, 12 BLR 1-149; *Lucostic*, 8 BLR 1-46*; Kuchwara*, 7 BLR 1-167; Decision and Order at 5; Director=s Exhibits 8, 11. Consequently, we affirm the administrative law judge=s finding that the medical opinion evidence was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(4).[5]

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[4]Dr. Revercomb, in a report dated October 23, 1953, noted that he treated the miner for shoulder and neck pain. Director=s Exhibit 11. Dr. Houck, in a report dated January 1, 1952, diagnosed acute epididymitis with associated testicular pain. Director=s Exhibit 11. The death certificate, signed by Martin C. Haskett, Justice of the Peace, noted the cause of death to be circulatory failure, acute cor pulmonale and bronchogenic carcinoma with lobar pneumonia. Director=s Exhibit 8.

[5]As the instant claim was properly adjudicated under 20 C.F.R. Part 727, the presumption at 20 C.F.R. '410.490 is inapplicable. *Whiteman v. Boyle Land and Fuel Co.*, 15 BLR 1-11 (1991); *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524, 15 BLR 2-

The administrative law judge, in the instant case, further found that claimant failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(5), as claimant had not seen her husband since 1966 and the record indicates that the miner was employed until his death in 1974. Decision and Order at 5. In his Motion to Remand, the Director asserts that the administrative law judge failed to consider claimant=s testimony and statements. We agree. This failure to consider the lay evidence requires remand of the case. *See Pendleton v. Director, OWCP*, 8 BLR 1-242 (1984); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *see also Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984); Director=s Exhibits 1, 2, 12; Hearing Transcript at 40-44. Further, a miner=s continued employment until death does not preclude invocation of the interim presumption pursuant to Section 727.203(a)(5). *See Kosack v. Director, OWCP*, 7 BLR 1-248 (1984). In light of the administrative law judge=s failure to consider all of the evidence of record, we vacate the administrative law judge=s denial of benefits and remand the case to the administrative law judge to consider claimant=s testimony and statements pursuant to Section 727.203(a)(5). *Cook v. Director, OWCP*, 901 F.2d 33, 13 BLR 2-427 (4th Cir. 1990).

Finally, we note that the administrative law judge also found that claimant failed to establish entitlement pursuant to 20 C.F.R. Part 718. Decision and Order at 5-7. In this case, which arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit and which involves a miner with over ten years of coal mine employment, the administrative law judge should have considered this claim, filed prior to March 31, 1980, under the permanent criteria of 20 C.F.R. Part 410, Subpart D, instead of 20 C.F.R. Part 718, in light of *Muncy v. Wolfe Creek Collieries Coal Company, Inc.*, 3 BLR 1-627 (1981). Consequently, we vacate the administrative law judge=s findings pursuant to 20 C.F.R. Part 718, and remand the case for the administrative law judge to address entitlement under the permanent criteria of 20 C.F.R. Part 410, Subpart D if entitlement is not established pursuant to 20 C.F.R. Part 727.

Accordingly, the administrative law judge=s Decision and Order denying benefits in this survivor=s claim is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further findings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge