BRB No. 98-1379 BLA

WILLARD B. STACY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Willard B. Stacy, Grundy, Virginia, *pro se*.

Barry H. Joyner (Henry L. Solano, 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: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (97-BLA-1305) of Administrative Law Judge Daniel J. Roketenetz 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). The administrative law judge found that claimant established a coal mine employment history of forty years, and that the instant

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services in Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

claim, filed December 6, 1996, Director's Exhibit 1, merged with an earlier claim that was never finally denied. Decision and Order at 4. Turning to the merits, the administrative law judge found that the x-ray evidence of record established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). Decision and Order at 5. The administrative law judge further found that, while the evidence of record failed to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(1), (2), (4), rebuttal of the presumption was established pursuant to 20 C.F.R. §727.203(b)(3). Decision and Order at 5-7. The administrative law judge further concluded that claimant failed to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Decision and Order at 7-8. Accordingly, benefits were denied. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand.[2] The Director asserts that the administrative law judge erred in failing to address claimant's physical limitations noted in Dr. Dino's medical opinion and that, while ultimately benefits should be denied, the failure of the administrative law judge to fully consider the evidence requires remand. The Director makes no further challenges to the administrative law judge's findings.[3]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial

[2] We accept the Director's Motion to Remand as his response brief, and decide the case on its merits.

[3] We affirm, as not adverse to claimant and unchallenged on appeal by the Director, the administrative law judge's length of coal mine employment determination, his determination that the instant claim merged with an earlier claim, and his findings, on the merits, that claimant established invocation of the interim presumption pursuant to Section 727.203(a)(1), and that rebuttal of the interim presumption was not established pursuant to Section 727.203(b)(1), (2), and (4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-361 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held that the party opposing entitlement must rule out any connection between the total disability and coal mine employment. *Bethlehem Mines Corp v. Massey*, 736 F.2d. 120, 7 BLR 2-72 (4th Cir. 1984); *see also Phillips v. Jewell Ridge Coal Co.*, 825 F.d. 408, 10 BLR 2-160 (4th Cir. 1987); *see generally Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993). In considering rebuttal at Section 727.203(b)(3), the administrative law judge considered the opinion of Dr. Forehand, that claimant suffered from no respiratory impairment whatsoever, Director's Exhibit 13, and the opinion of Dr. Cardona, who diagnosed an 80% impairment due to pneumoconiosis, Claimant's Exhibit 2. The administrative law judge, in a permissible exercise of his discretion accorded greater weight to the opinion of Dr. Forehand than to the opinion of Dr. Cardona inasmuch as Dr. Cardona failed to explain the basis of his conclusions, *see York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); *White v. Director, OWCP*, 6 BLR 1-368, 1-371 (1983), and the opinion of Dr. Forehand was better supported by the underlying documentation of record, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). As the Director contends, however, there is a third opinion relevant to subsection (b)(3) rebuttal; specifically, the opinion of Dr. Dino who concluded that claimant did not suffer from cor pulmonale or congestive heart failure, but that claimant had demonstrated diminished activity tolerance for the past five years. In considering the evidence of rebuttal at Section 727.203(b)(2), the administrative law judge noted Dr. Dino's conclusions regarding the absence of cor pulmonale and congestive heart failure.[4] The administrative law judge further noted the physician's conclusions that "the Claimant's subjective symptoms should be corroborated with the x-ray and laboratory testing," and that "whether the Claimant's condition was related to coal mine dust exposure...was not definitely known." Decision and Order at 6. Other than referring to these statements made by Dr. Dino in his consideration of rebuttal at Section 727.203(b)(2), however, the administrative law judge did

[4] The administrative law judge indicated that the signature of the physician who signed this opinion was "illegible." Decision and Order at 6. A review of the opinion indicates that Dr. Dino signed the opinion, Director's Exhibit 23.

not discuss Dr. Dino's opinion in his evaluation of the medical opinions at Section 727.203(b)(3) and failed to address Dr. Dino's conclusions that claimant suffered diminished tolerance to activity over the previous five years. Director's Exhibit 23. Inasmuch as the administrative law judge has failed to consider relevant evidence, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979), we must vacate the administrative law judge's finding of rebuttal at Section 727.203(b)(3), and remand the claim for consideration of the entirety of Dr. Dino's opinion. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *Massey, supra*.

We must further vacate the administrative law judge's determination that claimant has failed to establish entitlement pursuant to Part 718. We have held that, in cases arising within the appellate jurisdiction of the Fourth Circuit, a claim which fails under Part 727, must then be considered under the permanent criteria found at 20 C.F.R. Part 410, Subpart D. *See Muncy v. Wolfe Creek Collieries Coal Co.*, 3 BLR 1-27 (1981). Accordingly, we hold that if, on remand, the administrative law judge again determines that claimant is not entitled to benefits at Part 727, then the administrative law judge must consider entitlement pursuant to the permanent criteria at 20 C.F.R. Part 410, Subpart D.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge