BRB No. 99-1025 BLA

TRAVIS GRIMMETT (Administrator of the Estate of ANNIE MULLINS Widow of WEBB MULLINS)	)	
Claimant-Respondent	)	
v.	)	
BROWNING AND STACY	)	DATE ISSUED:
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Petitioner	)	DECISION and ORDER

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

George L. Partain (Partain & Foster), Logan, West Virginia, for employer.

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, SMITH and McGRANERY, Administrative Appeals Judge.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (1984-BLA-2351) of Administrative Law Judge

Daniel L. Leland 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 before the Board for the third time. In its most recent Decision and Order, the Board held that the administrative law judge improperly applied the 20 C.F.R. Part 718 regulations to the claim, but also held that any error was harmless as the administrative law judge's factual findings could be applied to the 20 C.F.R. Part 727 criteria. The Board then affirmed the administrative law judge's findings that claimant[1] failed to invoke the interim presumption pursuant to 20 C.F.R .§727.203(a)(1)-(5), and the denial of benefits, because the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis, the record contained no objective studies or medical opinions addressing the presence or absence of a totally disabling respiratory impairment, and because the administrative law judge found claimant's testimony to be entitled to little weight. *Mullins v. Browning and Stacy*, BRB No. 92-0208 BLA (Jul. 28, 1995)(unpub.)(McGranery, J., dissenting). On reconsideration, the Board vacated the administrative law judge's finding pursuant to Section 727.203(a)(5) and remanded the case for the administrative law judge to consider the lay testimony pursuant subsection (a)(5) and, if reached, he must consider the rebuttal evidence under Section 727.203(b). In addition, the administrative law judge was also instructed to address the issue of whether the miner's employment with Browning and Stacy (employer) constitutes coal mine employment. *Mullins v. Browning and Stacy*, BRB No. 92-0208 BLA (Apr. 9, 1997)(unpub.).

On remand, the administrative law judge found that employer rebutted the presumption provided at 20 C.F.R. §725.202 by establishing that the miner was not regularly exposed to coal mine dust during his employment and, consequently, that employer is not the responsible operator. The administrative law judge then found that, because the miner had no coal mine employment after 1969, the Trust Fund is liable for the payment of benefits. *See* 20 C.F.R. §725.490. The administrative law

[1]Claimant, Travis Grimmett, is the administrator of the estate of Annie Mullins who is the widow of Webb Mullins, the miner. The miner's widow filed her first survivor's claim for benefits on July 30, 1979, which was denied on May 8, 1980. Director's Exhibit 18. The miner's widow filed the instant survivor's claim for benefits on May 14, 1981. Director's Exhibit 1.

judge further found that claimant established invocation of the interim presumption pursuant to Section 727.203(a)(5) and rebuttal of this presumption was not established pursuant to Section 727.203(b). Accordingly, benefits were awarded as of June 1, 1979, the month in which the miner died, to be paid until February 28, 1989, the last day of the last month before the miner's widow died.

In the instant appeal, the Director contends that the administrative law judge erred in finding that employer rebutted the Section 725.202(a) presumption because employer did not show that the miner was not regularly exposed to coal mine dust. Employer responds, urging affirmance 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Director contends that the administrative law judge erred in defining coal mine dust as only that dust which comes directly from the extraction or preparation of coal as opposed to any dust encountered during construction work at a coal mine. Director's Brief at 5-6. Section 725.202(a) states that a coal mine construction or transportation worker shall be considered a miner to the extent that such individual is or was exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(a). Section 725.202(a) further states that:

> In the case of an individual employed in coal transportation or coal mine construction, there shall be a rebuttable presumption that such individual was exposed to coal mine dust during all periods of such employment occurring in or around a coal mine or coal preparation facility for purposes of ... (3)determining the identity of a coal mine operator liable for the payment of benefits in accordance with Section 725.493. 20 C.F.R. §725.202(a). The presumption may be rebutted by evidence which demonstrates: (I) that; the individual was not regularly exposed to coal mine dust during his or her employment in or around a

[2]We affirm the administrative law judge's finding of entitlement to benefits and the date for commencement of benefits as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

> coal mine or coal preparation facility; or (ii) that the individual was not regularly employed in or around a coal mine or coal preparation facility.

20 C.F.R. §725.202(a). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, held in *The Glem Co. v. McKinney,* 33 F.3d 340, 18 BLR 2-368 (4th Cir. 1994) that the class of miners discussed in Section 725.202 includes coal mine construction workers who work in or around a coal mine and are exposed to coal mine dust as a result of such employment. Further, the terms "coal dust" as found in 30 U.S.C. §902(d), 20 C.F.R. §§725.101(a)(26), 725.491, 725.492, and "coal mine dust", as found in 20 C.F.R. §725.202(a), both refer to airborne particulate matter occurring as a result of the extraction or preparation of coal in or around a coal mine. There is no distinction between the two terms. *See Pershina v. Consolidation Coal Co.*, 14 BLR 1-55 (1990)(*en banc*); *George v. Williamson Shaft Contracting Co.*, 8 BLR 1-91 n.1, 1-93 (1985); *Conley v. Roberts and Schaefer Co.*, 7 BLR 1-309, 1-311 (1984); *see also Morriston-Knudsen Co., Inc. v. Schaechterle*, No. 83-1777 (10th Cir., Oct. 9, 1984)(unpublished); *Tressler v. Allen & Garcia Co.*, 8 BLR 1-365 (1985).

Pursuant to Section 725.202(a), the administrative law judge considered testimony from the miner's son, Floyd Mullins, that the miner was exposed to coal dust when he tore down bath houses at Pigeon Creek mine. Decision and Order at 4; Hearing Transcript at 27. The administrative law judge also considered the testimony of Rex E. Browning, one of the partners in Browning & Stacy, and found that he "credibly testified that Floyd Mullins, not the decedent, worked on this job and that the decedent never dismantled any structures." Decision and Order at 5. The administrative law judge further found that Browning testified that most of the miner's work was performed on job sites that were at least 600 feet from a tipple or coal mine and that he was not exposed to dust emanating from the sites on which he worked. Decision and Order at 5. The administrative law judge concluded that, "[a]ssuming that some of the work the decedent did for [employer] was `in or around a coal mine or coal preparation facility', I find that he was not exposed to coal mine dust during any of this employment. Any dust to which he was exposed was not generated during the extraction or preparation of coal but came from the construction work he was performing." *Id.* The administrative law judge then acted within his discretion in finding that employer rebutted the Section 725.202 presumption by showing that the miner was not regularly exposed to coal mine dust during his employment. Decision and Order at 5-6; 20 C.F.R. §725.202(a)(1)(I); *Ray v. Williamson Shaft Contracting Co.*, 14 BLR 1-105 (1990)(en banc); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Tressler v. Allen & Garcia Co.*, 8 BLR 1-365 (1985). Inasmuch as this finding is supported by substantial evidence, we affirm the administrative law judge's findings that employer rebutted the Section

725.202(a) presumption and that the Trust Fund is liable for the payment of benefits.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge