

BRB No. 88-2397 BLA

RUSSELL EDWARDS)
)
 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 Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Randy D. Hoover, Beckley, West Virginia, for claimant.

Richard A. Seid and Edward O. Falkowski (Marshall J. Breger, 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: STAGE, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (84-BLA-8131) of Administrative Law Judge

Frederick D. Neusner 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). The administrative law judge credited claimant with at least ten years of qualifying coal mine employment, and found that claimant established invocation of the interim presumption at 20 C.F.R. §727.203(a)(1), and that the evidence was insufficient to establish rebuttal of that presumption pursuant to 20 C.F.R. §727.203(b)(1) or (b)(2). The administrative law judge further found that the rebuttal provisions at 20 C.F.R. §727.203(b)(3) and (b)(4) were not available, as the Director had not controverted the issues of the etiology of the miner's disability or the existence of pneumoconiosis. Consequently, benefits were awarded. The Director then filed a Motion for Reconsideration, challenging the administrative law judge's findings regarding the issues of the onset date of disability and interest payable, and in an Order on Reconsideration issued on June 13, 1988, the administrative law judge granted the relief requested and modified his Decision and Order accordingly.

On appeal, the Director contends that since the cause of claimant's total disability was a contested issue, the administrative law judge erred in failing to consider whether the evidence of record was sufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3). Claimant responds, urging affirmance, and further argues that the Director waived his right to raise the issue of subsection (b)(3) rebuttal on appeal to the Board since he neglected to raise it in his

Motion for Reconsideration to the administrative law judge.¹

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

Turning first to the procedural issue, we reject claimant's argument that the provisions at 20 C.F.R. §725.479 limit the Director's appeal to those issues either raised in its Motion for Reconsideration, or raised within thirty days of the filing of the administrative law judge's Decision and Order. Rather, the time for appeal to the Board is suspended during the consideration of a request for reconsideration. See 20 C.F.R. §§725.479, 725.481. As the Director's appeal to the Board was timely filed herein, the Director may raise any issue on appeal which was properly before the administrative law judge for adjudication.² See generally 20 C.F.R. §§725.463,

¹ The administrative law judge's findings pursuant to Section 727.203(a)(1), (b)(1), (b)(2) and (b)(4), and with regard to the length of coal mine employment, are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

² The Director correctly notes that the cases cited in support of claimant's waiver argument are not on point, as the Board declined to address the issues raised therein because they were raised for the first time on appeal. See Kincell v. Consolidation Coal Co., 9 BLR 1-221 (1986); Micheletto v. Peabody Coal Co., 4 BLR 1-758 (1982).

725.479, 725.481; DeFore v. Alabama By-Products Corp., 12 BLR 1-27 (1988); Lyon v. Pittsburgh & Midway Coal Co., 7 BLR 1-199 (1984).

The Director contends that the cause of claimant's total disability was a controverted issue, and thus the administrative law judge erred in finding that the rebuttal provisions at Section 727.203(b)(3) were not available. We agree. The administrative law judge acknowledged that the issues presented for adjudication were whether claimant was totally disabled and whether claimant's total disability was due to pneumoconiosis. The administrative law judge then referenced the deputy commissioner's list of contested issues, Department of Labor Form CM-1025, which included "causation." See Decision and Order at 2; Director's Exhibit 50. Consequently, as the record indicates that causation was in issue, we must remand this case for the administrative law judge to determine whether the evidence of record is sufficient to establish rebuttal of the interim presumption at Section 727.203(b)(3), pursuant to the standard enunciated by the United States Court of Appeals for the Fourth Circuit, wherein appellate jurisdiction of this claim lies, in Bethlehem Mines Corp. v. Massey, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984).

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge