

BRB No. 89-2593 BLA

FRANK DALRYMPLE)
)
 Claimant-Respondent)
)
 v.)
)
 PEABODY COAL COMPANY)
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED:
)
 Employer/Carrier-)
 Petitioners)
)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

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

Eileen S. Goodin (Barkan & Neff Co., L.P.A.), Columbus, Ohio, for claimant.

David J. Millstone (Squire, Sanders & Dempsey), Cleveland, Ohio, for employer.

Before: STAGE, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and LIPSON, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order on Remand (80-BLA-2795) of Administrative Law Judge Rudolf L. Jansen awarding benefits on a claim filed

pursuant to the provisions of Title IV

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act, as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

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 second time. In his first Decision and Order, the administrative law judge determined that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2) and that the presumption was not rebutted pursuant to 20 C.F.R. §727.203(b). Accordingly, benefits were awarded. On appeal, the Board affirmed the administrative law judge's findings that rebuttal of the interim presumption was not established pursuant to Sections 727.203(b)(1), (b)(3), and (b)(4), and vacated the administrative law judge's findings at Section 727.203(b)(2) relative to Dr. Prior's medical report. Further, the case was remanded for the administrative law judge to reevaluate the evidence at Section 727.203(b)(2) pursuant to the holding of the United States Court of Appeals for the Sixth Circuit, wherein jurisdiction for this case arises, in York v. Benefits Review Board, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987). See Dalrymple v. Peabody Coal Company, BRB No. 81-1079 BLA (May 20, 1988)(unpub.). On remand, the administrative law judge reconsidered Dr. Prior's opinion and determined that employer failed to establish rebuttal of the presumption pursuant to Section 727.203(b)(2). Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in finding the evidence of record insufficient to establish rebuttal of the presumption pursuant to Section 727.203(b)(2). Claimant responds in support of the administrative law judge's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs, has chosen not to respond in this case.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with law. 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).

On appeal, employer initially contends that the administrative law judge erred in finding that Dr. Prior's opinion is unreasoned and contrary to the spirit of the Act. In his opinion, Dr. Prior stated that claimant did not have pneumoconiosis and that claimant is not disabled from the performance of gainful work. See Director's Exhibit 33. The administrative law judge permissibly rejected Dr. Prior's opinion as it was not supported by his underlying documentation.¹ See Decision and Order at 6; Fagg

¹In his report, Dr. Prior concluded that the results of claimant's pulmonary function study did not indicate total disability, although the pulmonary function study yielded qualifying values pursuant to Section 727.203(a)(2). See Director's Exhibit 10; Employer's Exhibit 2 at 15.

v. Amax Coal Co., 12 BLR 1-77 (1988). As Dr. Prior's opinion is the only evidence of record supporting rebuttal at 20 C.F.R. §727.203(b)(2), the administrative law judge's finding that employer did not establish rebuttal pursuant to Section 727.203(b)(2) is affirmed as it is supported by substantial evidence.²

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

SHELDON R. LIPSON
Administrative Law Judge

²Employer makes several other contentions of error, however, as the administrative law judge's finding that employer did not establish rebuttal pursuant to Section 727.203(b)(2) is affirmed, any error committed by the administrative law judge on remand would be harmless. See Larioni v. Director, OWCP, 6 BLR 1-1276 (1984); Dalrymple, supra.