BRB Nos. 89-5097 BLA
and
89-5097 BLA-A

FRELIN BROOKS )
)
Claimant-Petitioner )
)
v. )
)
CLINCHFIELD COAL COMPANY )
Employer-Respondent ) DATE ISSUED:
)
DIRECTOR, OFFICE OF WORKERS' )
COMPENSATION PROGRAMS, UNITED )
STATES DEPARTMENT OF LABOR )
)
Respondent ) DECISION and ORDER

Appeal of the Decision and Order of Virgil M. McElroy, Administrative Law Judge, United States Department of Labor.

Jon L. Duncan (UMWA, Legal Department), Castlewood, Virginia, for claimant.

Michael F. Blair (Penn, Stuart, Eskridge & Jones), Abingdon, Virginia, for employer.

Priscilla Anne Schwab (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: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals the Decision and Order on Remand (83-BLA-6762) of Administrative Law Judge Virgil M. McElroy 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). This case is before the Board for the second time. Claimant filed for benefits on April 19, 1978 and the administrative law judge issued a Decision and Order denying benefits on March 18, 1986. In his Decision and Order, the administrative law judge found that claimant established 18 years and 4 months of coal mine employment, that invocation of the interim presumption was established pursuant to 20 C.F.R. §727.203(a)(1), and that employer did not establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1). The administrative law judge then determined that employer established rebuttal pursuant to 20 C.F.R. §727.203(b)(2), and that entitlement was not established pursuant to 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §727.203(a)(1), vacated the finding at 20 C.F.R. §727.203(b)(2) and remanded the case for consideration of the rebuttal provisions at 20 C.F.R. §727.203(b)(3). The Board further ordered the administrative law judge to reweigh all of the medical opinions of record, but found that the administrative law judge was not required to accord the opinion of Dr. Buddington greater weight than that of Dr. Byer's, that the administrative law judge must consider the validation studies of the November 16, 1978 pulmonary function study, that the administrative

law judge properly preferred Dr. Byer's opinion over Dr. Sutherland's, and that the administrative law judge is not to apply 20 C.F.R. §410.490 to this case pursuant to the decision in Whiteman v. Boyle Land and Fuel Coal Company, 15 BLR 1-11 (1991). See Brooks v. Clinchfield Coal Company, BRB No. 86-852 BLA (May 25, 1988)(unpub.) On remand, the administrative law judge considered the claim under 20 C.F.R. §410.490 pursuant to Pittston Coal Group v. Sebben, 109 S.Ct. 414 (1988), and found invocation of the presumption established pursuant to 20 C.F.R. §410.490 (b)(1)(i). The administrative law judge then found that employer established rebuttal of the presumption pursuant to 20 C.F.R. §410.490(c)(2) and that entitlement was not established pursuant to 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were again denied. On appeal, claimant contends that the administrative law judge erred in not considering all relevant evidence on the issue of total disability, that the administrative law judge erred in giving less weight to the most recent blood gas study of record, and that the administrative law judge erred in according greater weight to Dr. Byer's opinion over that of claimant's treating physician, Dr. Sutherland. On cross-appeal, employer contends that the administrative law judge erred in not considering claim pursuant to 20 C.F.R. §727.203(b), and that as the administrative law judge properly found no entitlement pursuant to 20 C.F.R. §410.490, rebuttal can be established pursuant to 20 C.F.R. §727.203(b)(3). The Director, Office of Workers' Compensation Programs (the Director), responds urging that the case be held in abeyance pending the U.S.

Supreme Court's decision on the restrictiveness of the rebuttal methods under 20 C.F.R. §727.203(b).

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).

Employer contends that the administrative law judge erred in failing to consider the claim pursuant to 20 C.F.R. §727.203(b). As claimant has established more than 10 years of coal mine employment, employer's contention that the administrative law judge improperly considered the claim pursuant to 20 C.F.R. §410.490 is valid. See Pauley v. Bethenergy Mines, Inc., 111 S.Ct. 2524, 15 BLR 2-155 (1991). The administrative law judge properly accorded greater weight to the opinion of Dr. Byers as it was better reasoned and documented. Decision and Order at 8; Lafferty v. Cannelton Industries, Inc., 12 BLR 1-190 (1989). The administrative law judge also permissibly concluded that the report of Dr. Byers was sufficient to establish that claimant was not totally disabled from a respiratory standpoint.[1] See Bethlehem Mines Corp. v. Massey, 736 F.2d 120, 13 BLR 2-294 (4th Cir. 1990);

[1]Dr. Byers found claimant to have no respiratory impairment and opined that claimant was not disabled by his respiratory condition. See Director's Exhibit 33. The administrative law judge found this opinion to be better documented as it is supported by the acceptable pulmonary function studies and the arterial blood gas studies of record. See Decision and Order at 8.

Director's Exhibit 33. Thus, although the administrative law judge failed to consider the claim under 20 C.F.R. §727.203(b), remand is not required as the administrative law judge's findings applied to 20 C.F.R. §727.203(b)(3) are sufficient to preclude claimant's entitlement to benefits.[2] See Massey, supra; Campbell v. Director, OWCP, 11 BLR 1-16 (1985); Harmic v. Director, OWCP, 6 BLR 1-1091 (1984). The administrative law judge's finding that claimant has failed to establish entitlement to benefits is therefore affirmed.[3]

Accordingly, the administrative law judge's findings pursuant to 20 C.F.R. §410.490 are vacated and the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[2]It is noted that a finding that the interim presumption is rebutted pursuant to subsection (b)(3) precludes entitlement under 20 C.F.R. Part 410, Subpart D. See Pastva v. The Youghiogheny and Ohio Coal Co., 7 BLR 1-829 (1985).

[3]As we have affirmed the administrative law judge's denial of benefits as supported by substantial evidence, we need not address claimant's contentions of error.

REGINA C. McGRANERY
Administrative Appeals Judge