

BRB No. 89-0513 BLA

VIOLA BORTZ)
(Widow of HAROLD BORTZ))
)
 Claimant-Respondent)
)
 v.)
)
 BORTZ COAL COMPANY) DATE ISSUED:
)
 and)
)
 THE TRAVELERS INSURANCE)
 COMPANY)
)
 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 and the Decision and Order Denying Employer's Motion for Reconsideration of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Joseph J. Schwab, Mount Pleasant, Pennsylvania, for claimant.

Anne M. Coholan (Faderewski & Herrington), Pittsburgh, Pennsylvania, for employer.

Cathryn Celeste Helm (Thomas S. Williamson, Jr., 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: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Decision and Order Denying Employer's Motion for Reconsideration (86-BLA-3811) of Administrative Law Judge Gerald M. Tierney awarding benefits on a survivor's 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). Pursuant to claimant's request, the administrative law judge issued a decision on the record and adjudicated the claim under 20 C.F.R. Part 727 as it was filed prior to January 1, 1982.¹ The administrative law judge, upon crediting the miner with at least ten years of qualifying coal mine employment, found that a letter from claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(5), and that employer failed to establish rebuttal of that presumption. Accordingly, benefits were awarded. Employer appeals, contending that the administrative law judge erred in finding claimant's unsworn letter sufficient to establish invocation pursuant to Section 727.203(a)(5). The Director, Office of Workers' Compensation Programs (the Director), responds, urging a remand for further consideration of the evidence. Claimant has not participated in this appeal.²

¹ Claimant, the miner's widow, filed a survivor's claim for benefits on May 2, 1978. Director's Exhibit 1.

² The administrative law judge's finding regarding the length of coal mine employment, and his finding that the record contains no medical evidence relevant to invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4), are affirmed as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

Both employer and the Director challenge the sufficiency of claimant's unsworn and undated letter, see Director's Exhibit 7, to establish invocation of the presumption at Section 727.203(a)(5). The United States Court of Appeals for the Third Circuit, wherein appellate jurisdiction of this case lies, has held that where no relevant medical evidence is available, a survivor may establish invocation pursuant to Section 727.203(a)(5) on the basis of hearing testimony and affidavits.³ See *Koppenhaver v. Director, OWCP*, 864 F.2d 287, 12 BLR 2-103 (3d Cir. 1988). The Director further notes that a person's unsworn written statement, which has been dated and subscribed by that person as true under penalty of perjury, may be substituted for an affidavit. See 28 U.S.C. §1746. In the instant case, the administrative law judge found that since the record contained no medical evidence relevant to determining whether the miner suffered a totally disabling respiratory or pulmonary impairment, claimant's letter was sufficient to establish invocation of the interim presumption under Section 727.203(a)(5), as it was credible and permitted the administrative law judge to compare the miner's physical limitations with his usual coal mine employment. Decision and Order at 3, 4; see *Kosack v. Director, OWCP*, 7 BLR 1-248 (1984). The administrative law judge further found that employer had waived any objection to the sufficiency of this evidence by failing to respond to claimant's request for a decision on the record.⁴ Decision and Order at 4; Decision and Order Denying Employer's Motion for Reconsideration at 1, 2. Contrary to the administrative law judge's finding, however, by agreeing to a decision on the record without attempting to exclude claimant's letter from the record, employer merely waived any objection to its admissibility into evidence pursuant to 20 C.F.R. §725.461(a), see *Pendleton v. United States Steel Corp.*, 6 BLR 1-815

³ An affidavit is defined as "[a] written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation." Black's Law Dictionary 54 (5th ed. 1979).

⁴ Employer correctly notes that it did, in fact, respond to and acquiesce in claimant's request for a decision on the record, as evidenced by the administrative law judge's Order issued on October 24, 1988.

(1984), but did not waive its right to dispute the credibility or legal sufficiency of this evidence. See 20 C.F.R. §§725.456; 725.461.

Moreover, employer and the Director correctly maintain that the administrative law judge did not address all relevant evidence herein. See *generally Bowman v. Clinchfield Coal Co.*, 15 BLR 1-22, 1-27 (1991). The claimant's application for survivor benefits, which contains a description of the miner's symptoms and limitations and substantially complies with the requirements of 28 U.S.C. §1746, was not considered by the administrative law judge. See Director's Exhibit 1. Consequently, we vacate the administrative law judge's findings pursuant to Section 727.203(a)(5) and remand this case for the administrative law judge to address this evidence and determine whether it is sufficient, when considered in conjunction with all corroborative evidence, including claimant's letter, and when weighed against all contrary probative evidence, to establish invocation thereunder. See 28 U.S.C. §1746; 30 U.S.C. §923(b); 20 C.F.R. §727.203(a)(5); see also *Kosack, supra*. If on remand the administrative law judge finds that the personal appearance and testimony of any party hereto would assist in ascertaining the facts in issue, he may in his discretion give notice and conduct a hearing despite the parties' previous waiver of the right to appear. 20 C.F.R. §725.461(a).

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. The administrative law judge's Decision and Order Denying Employer's Motion for Reconsideration is vacated.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge