

BRB No. 89-2971 BLA

ARLINE McROY)
(Widow of JOHN McROY))

)
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 Order of Remand of Charles W. Campbell, Chief Administrative Law Judge, United States Department of Labor.

Joseph H. Kelley, Madisonville, Kentucky, for claimant.
James P. Anasiewicz (Arter & Haden), Washington, D.C., for employer.

Jeffrey S. Goldberg (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, BROWN, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

*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).

Employer appeals the Order of Remand (80-BLA-2928) of Chief Administrative Law Judge Nahum Litt remanding 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 fifth time. The miner filed a claim for benefits on June 6, 1986. The miner died on November 6, 1978. Claimant, the miner's widow, filed a survivor's claim on April 10, 1979. Administrative Law Judge Robert E. Joyner found that claimant established that the miner had thirty years of coal mine employment and that claimant failed to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a). Accordingly, benefits were denied on the survivor's claim. On appeal, the Board found invocation of the interim presumption established as a matter of law 20 C.F.R. §727.203(a)(1) and remanded the case for the administrative law judge to determine whether rebuttal was established pursuant to 20 C.F.R. §727.203(b) and, if necessary, to consider the claim pursuant to 20 C.F.R. Part 410, Subpart D. *McRoy v. Peabody Coal Co.*, BRB No. 81-0661 BLA (Apr. 6, 1984)(unpub.). On remand, Administrative Law Judge Anastasia T. Dunua determined that rebuttal of the interim presumption was not established pursuant to Section 727.203(b) and, accordingly, benefits were awarded. On appeal, the Board first remanded the case for Judge Dunau to explain her

finding that Judge Joyner "is no longer available to this agency". The Board allowed Judge Dunau 60 days to provide this information. See *McRoy v. Peabody Coal Co.* 10 BLR 1-33 (1987). After receiving Judge Dunau's response, the Board ordered oral argument which was held on August 4, 1987. Subsequently, the Board issued its Decision and Order in which it held that the parties were denied their right to due process, as they were not notified of the change in administrative law judges nor given an opportunity to comment on the change. Accordingly, the Board vacated Judge Dunau's award of benefits and remanded the case to the Office of Administrative Law Judges for a hearing *de novo*. *McRoy v. Peabody Coal Co.*, 11 BLR 1-107 (1987)(McGranery, J., dissenting); duplicated at *McRoy*, 11 BLR 1-139 (1987). The Board denied the subsequent Motion for Reconsideration filed by the Director, Office of Workers' Compensation Programs (the Director).

On remand, Chief Administrative Law Judge Litt first issued an Order dated May 19, 1989 for the parties to show cause why the credibility of claimant's witnesses is crucial to the resolution of the disputed facts of case necessitating a *de novo* hearing. After receiving employer's response, Judge Litt determined that as the credibility of the witnesses is not crucial to the disputed facts of the case, there was no need to hold a hearing *de novo*, as ordered by the Board. Judge Litt then reinstated Judge Dunau's award of benefits and remanded the case to the district director for a review of any subsequent changes in claimant's status. Employer appealed the Chief Judge's Order of Remand seeking dismissal as a party to the

claim and, in the alternative, contending that the administrative law judge erred in failing to conduct a hearing *de novo*. The Board declined to grant employer's request to be dismissed as a party and denied claimant's and the Director's Motions to Dismiss employer's appeal. The Board then accepted employer's Petition for Review and brief as part of the record. See *McRoy v. Peabody Coal Co.*, BRB No. 89-2971 BLA (May 27, 1994)(unpub.). On appeal, employer contends that the Board should again order that a hearing *de novo* be conducted. Claimant responds urging that Administrative Law Judge Dunau's Decision and Order awarding benefits be reinstated as the final decision of the Office of Administrative Law Judges in this claim. The Director responds urging the Board to remand the case to the Office of Administrative Law Judges with instructions to convene a formal hearing.

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

Employer contends that the Chief administrative law judge erred in failing to adhere to the Board's remand instructions by reinstating Judge Dunau's Decision and Order awarding benefits. However, in remanding the case to the Office of Administrative Law Judges for a *de novo* hearing our concern was that the adjudication officer who would render the decision be able to make credibility

determinations on a direct basis, based on appearance and demeanor on the part of testifying witnesses. See *McRoy*, 11 BLR 1-107 at 1-109. On remand, Chief Judge Litt addressed our concern by issuing Orders to Show Cause why the credibility of claimant's witnesses is crucial to the resolution of disputed facts in these matters necessitating a *de novo* hearing. See Order to Show Cause dated May 19, 1989. In response, employer stated that the original administrative law judge may have, in part, resolved conflicts in the medical evidence based to a degree on claimant's testimony. Employer further stated that we have no way of knowing whether this was critical to the administrative law judge's reasoning, but it is apparent that Judge Dunau either interpreted Mrs. McRoy's testimony differently or ignored it. See Employer's Response to Second Order to Show Cause. In his Order of Remand, Chief Judge Litt addressed employer's concerns and permissibly determined that nothing in Judge Joyner's discussion of the physician's opinions was in any way affected by claimant's testimony. He further permissibly found that claimant's testimony was not crucial to the resolution of any disputed facts in these matters. See Order of Remand at 3-4; *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). As a result, the Chief Judge's decision not to hold a *de novo* hearing and his Order of Remand reinstating Judge Dunau's Decision and Order and remanding the case to the district director for review of any subsequent changes in claimant's status is affirmed as it is support by substantial evidence.

Accordingly, the Chief Administrative Law Judge's Order of Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge