

BRB No. 91-0570 BLA

MARY K. SMITH)
(Widow of PAUL F. SMITH))
)
Claimant-Respondent)

v.)

)
CONSOLIDATION COAL COMPANY)
) DATE ISSUED:
Employer-Petitioner)

)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (83-BLA-0548) of Administrative Law Judge Richard K. Malamphy 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). This is the third time that this case has been before the Board.

On January 16, 1985 Administrative Law Judge Richard Sippell considered

the case and determined that claimant had established twenty-one years and eleven months of coal mine employment, and the weight of the x-ray evidence supported invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). The administrative law judge then determined that the employer had rebutted, by a preponderance of the evidence, that the miner was totally disabled or had died as a result of his coal worker's pneumoconiosis. Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's rebuttal findings under Section 727.203(b)(3), attributing the miner's disability to cancer of the bladder, and the administrative law judge's finding that the miner's death was not caused by pneumoconiosis. The Board, however, remanded the case pursuant to Broyles v. Director, OWCP, 824 F.2d 327, 10 BLR 2-194 (4th Cir. 1987), for the administrative law judge to determine whether rebuttal was established pursuant to Section 410.490(c)(2). See Smith v. Consolidation Coal Co., BRB No. 85-0347 BLA (Oct. 21, 1987)(unpub.). On remand the administrative law judge awarded benefits after determining that employer failed to establish rebuttal pursuant to Section 410.490(c). The case was again appealed to the Board, who remanded the case on March 30, 1990 for the administrative law judge to reconsider rebuttal under Section 410.490 and under 20 C.F.R. §410.416 in light of Taylor v. Clinchfield Coal Company, 895 F.2d 178, 13 BLR 2-295 (4th Cir. 1990). Smith v. Consolidation Coal Co., BRB No. 88-1482 BLA (March 30, 1990)(unpub.). On remand the administrative law judge issued the Decision and Order awarding benefits which is the subject of this appeal.

On appeal, employer contends that the administrative law judge erred in awarding benefits under Section 410.490 in light of the previous finding of rebuttal under Section 727.203(b)(3). Employer further asserts that the administrative law judge erred in finding that rebuttal was not established under Section 410.490(c)(2). Neither claimant nor the Director, Office of Workers' Compensation Programs (the Director), has chosen 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).

With regard to the administrative law judge's finding of entitlement under Section 410.490, the Supreme Court has held that a claim which is properly adjudicated pursuant to Section 727.203 is not subject to adjudication under Section 410.490. See Pauley v. Bethenergy Mines, Inc., 111 S.Ct. 2524, 15 BLR 2-155 (1990); see also Whiteman v. Boyle Land and Fuel Co., 15 BLR 1-11 (1991). Accordingly, since the administrative law judge properly considered the claim

pursuant to Section 727.203, the administrative law judge's finding of entitlement pursuant to 20 C.F.R §410.490 is not necessary and is therefore vacated. See Pauley, supra.

Furthermore, inasmuch as the Board previously affirmed the administrative law judge's finding that employer established rebuttal pursuant to 20 C.F.R. §727.203(b)(3), and as no exception to the law of the case doctrine has been demonstrated, the Board holds that the law of the case doctrine is controlling on this issue and rebuttal pursuant to Section 727.203(b)(3) has been established. See Brinkley v. Peabody Coal Co., 14 BLR 1-147 (1990).

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated and the January 16, 1985 Decision and Order denying benefits is reinstated.

SO ORDERED.

ROY P. SMITH,
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge