BRB No. 90-1566 BLA

WALTER E. BROWN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CEDAR 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 on Remand of G. Marvin Bober, Administrative Law Judge, United States Department of Labor.

Randy D. Hoover, Beckley, West Virginia, for claimant.

David S. Russo (Robinson & McElwee), Charleston, West Virginia, for employer.

Before: STAGE, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order on Remand (81-BLA-1535) of Administrative Law Judge G. Marvin Bober 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 case is on appeal before the

*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) (Supp. V 1987).

Board for the third time. In his original Decision and Order, Administrative Law Judge Dapper credited claimant with twenty-six years and eleven months of qualifying coal mine employment, and found that claimant established invocation of the interim presumption at 20 C.F.R. §727.203(a)(3). The administrative law judge further found, however, that the evidence of record established rebuttal of that presumption pursuant to 20 C.F.R. §727.203(b)(2), and that claimant failed to establish entitlement pursuant to the provisions at 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's finding that claimant's most recent regular position of substantial duration involved the sedentary duties of a dispatcher, but vacated his finding of rebuttal at Section 727.203(b)(2). The Board remanded this case for the administrative law judge to determine whether significant involuntary overtime as a beltman was required of claimant in his usual coal mine employment as a dispatcher, and if so, whether claimant was capable of performing those duties. Brown v. Cedar Coal Co., 8 BLR 1-86 (1985).

On remand, the administrative law judge found that no involuntary overtime

was legally required of claimant, and that employer established rebuttal at Section 727.203(b)(2). On appeal, the Board again vacated the administrative law judge's finding of subsection (b)(2) rebuttal, and remanded this case for the administrative law judge to re-open the record to allow the parties to respond to four post-hearing affidavits. The Board instructed the administrative law judge to determine whether claimant's usual coal mine employment included the performance of beltman duties during his regular shift and, if not, whether his performance of those duties constituted voluntary or involuntary overtime. The Board further instructed the administrative law judge to determine whether the evidence of record was sufficient to establish rebuttal at Section 727.203(b)(2), (b)(3) or (b)(4), and if so, to consider entitlement pursuant to 20 C.F.R. §410.490 in light of Broyles v. Director, OWCP, 824 F.2d 327, 10 BLR 2-194 (4th Cir. 1987).

On remand, in light of Pittston Coal Group v. Sebben, 488 U.S. 105, 109 S.Ct. 414, 12 BLR 2-89 (1988), Administrative Law Judge Bober adjudicated the claim pursuant to the provisions of Section 410.490 rather than 20 C.F.R. Part 727, and found that claimant established invocation pursuant to Section 410.490(b)(1), and that employer failed to establish rebuttal. Accordingly, benefits were awarded. Employer appeals, challenging the administrative law judge's rebuttal findings pursuant to Section 410.490(c), and contending that the evidence of record supports rebuttal at Section 727.203(b)(2), (b)(3) and (b)(4). Claimant responds, urging

affirmance. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

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

Initially, we note that subsequent to the issuance of the administrative law judge's Decision and Order on Remand, the United States Supreme Court issued Pauley v. Bethenergy Mines, Inc., 111 S.Ct. 2524, 15 BLR 2-155 (1991). In light of Pauley, the Board has held that a claim which is properly adjudicated pursuant to 20 C.F.R. Part 727 is not subject to adjudication pursuant to Section 410.490. See Whiteman v. Boyle Land and Fuel Co., 15 BLR 1-11 (1991)(en banc). Consequently, although we must vacate the administrative law judge's finding of entitlement pursuant to Section 410.490, we may apply his factual findings pursuant to Section 410.490(c) to the appropriate regulations at Section 727.203(b)(2). See generally Campbell v. Director, OWCP, 11 BLR 1-16 (1987); Oggero v. Director, OWCP, 7 BLR 1-860 (1985).

Turning to the issue of claimant's usual coal mine employment, employer contends that the administrative law judge erred in finding that claimant's job as a dispatcher encompassed beltman duties. Specifically, employer maintains that inasmuch as the uncontradicted evidence of record establishes that by contract, claimant could not legally be required to perform any duties other than those of a dispatcher, claimant's performance of beltman duties during his regular shift was the equivalent of voluntary overtime and cannot constitute part of his usual coal mine employment. We disagree. All duties regularly performed over a substantial period of time during the course of claimant's normal 8-hour shift constitute claimant's usual coal mine employment. See generally Shortridge v. Beatrice Pocahontas Coal Co., 4 BLR 1-534 (1982). The administrative law judge properly considered all of the relevant evidence of record and determined that claimant, at employer's request, regularly assisted in overseeing belt moves and firebossing the lines at the beginning of his 8-hour shift as a dispatcher, approximately three to four times per week for an hour each time; and assisted in repairing belt breaks during his shift, which generally took four to five hours and occurred as often as once a week due to sabotage, and otherwise occurred approximately twice a month. Decision and Order on Remand at 5-8; see Claimant's Post-Hearing Exhibits 1, 2, 3; Employer's Post-Hearing Exhibit 1. Consequently, we affirm the administrative law judge's finding that claimant's usual coal mine employment as a dispatcher included the regular

performance of beltman duties, as supported by substantial evidence, and we further affirm his finding that the evidence of record is insufficient to establish that claimant is capable of performing his usual coal mine employment, and thus is insufficient to establish rebuttal pursuant to Section 727.203(b)(2), as unchallenged on appeal. Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983). We must remand this case, however, for the administrative law judge to determine whether the evidence of record is sufficient to establish rebuttal pursuant to Section 727.203(b)(3) and (b)(4). Bethlehem Mines Corp. v. Massey, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); see Pauley, supra.

Accordingly, the Decision and Order on Remand of the administrative law judge awarding benefits is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

JAMES F. BROWN

Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge