BRB No. 88-3995 BLA

CHARLES BELCHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Henry W. Sayrs, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe & Farmer), Norton, Virginia, for claimant.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: STAGE, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and CLARKE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (87-BLA-1022) of Administrative Law Judge Henry W. Sayrs 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

*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).

seq. (the Act). The administrative law judge reviewed this claim pursuant to the provisions of 20 C.F.R. Part 718, and credited claimant with thirty-seven years of qualifying coal mine employment. The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b), but failed to establish total disability pursuant to 20 C.F.R. §718.204(c), and thus failed to establish invocation of the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. Accordingly, benefits were denied. Claimant appeals, challenging the administrative law judge's findings pursuant to Section 718.204(c)(4), and maintaining that the evidence establishes invocation of the presumption at Section 718.305. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.[1]

[1] The administrative law judge's findings pursuant to Sections 718.202(a)(4), 718.203(b), 718.204(c)(1) -(c)(3), and his findings with regard to the length of coal

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

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); Trent v. Director, OWCP, 11 BLR 1-26 (1987).

Claimant contends that the administrative law judge erred in evaluating the medical opinions of record pursuant to Section 718.204(c)(4). Specifically, claimant maintains that the administrative law judge did not provide a valid reason for according less weight to the opinions of Drs. Robinette and Baxter, who determined that claimant's respiratory impairment was totally disabling.[2] We agree. The

[2] Claimant additionally maintains that the opinion of Dr. Cox, who concluded that claimant suffered from dyspnea which he suspected was related to claimant's severe lung disease, is well-reasoned and documented, and establishes total disability pursuant to Section 718.204. See Claimant's Exhibit 4. The administrative law judge, however, permissibly determined that the opinion of Dr. Cox did not constitute probative evidence on the issue of total disability, as the physician did not

administrative law judge gave less weight to the opinions of Drs. Robinette and Baxter, as "these physicians do not indicate in their reports that they considered such relevant factors as the claimant's smoking history."[3] Decision and Order at 11. Claimant's smoking history, however, is not relevant to a determination of whether total disability has been established pursuant to the criteria set forth at Section 718.204(c). Rather, the inquiry is concerned with the severity of the respiratory impairment irrespective of its cause. See Turner v. Freeman United Coal Co., 10 BLR 1-85 (1987). Consequently, we must vacate the administrative law judge's findings pursuant to Section 718.204(c)(4), and remand this case for the administrative law judge to re-evaluate the opinions of Drs. Robinette and Baxter, and reweigh all of the probative evidence of record thereunder. If on remand the administrative law judge finds total disability established pursuant to Section 718.204(c), see Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987), Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195 (1986), invocation of the presumption at Section 718.305 will have been established, and the administrative law judge must then determine whether the evidence is sufficient to establish rebuttal pursuant to

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unequivocally state that claimant was unable to perform his usual coal mine employment or comparable work. See Gee v. W.G. Moore and Sons, 9 BLR 1-4 (1986).

[3] Claimant also notes that the administrative law judge mischaracterized the opinion of Dr. Robinette, who explicitly stated that he discussed claimant's smoking history with claimant and advised him that it was exacerbating his airway disease as well as his peripheral vascular disease. See Claimant's Exhibits 3, 6.

Section 718.305(d). See Defore v. Alabama By-Products Corp., 12 BLR 1-27 (1988); Tanner, supra.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part, vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

DAVID A. CLARKE, JR.
Administrative Law Judge