PART VII

ESTABLISHING ENTITLEMENT UNDER 20 C.F.R. PART 718

D. TOTAL DISABILITY: SECTION 718.204

5. SECTION 718.204(c)(4)

a. Generally

The use of the phrase "reasoned medical judgment based on medically acceptable clinical and laboratory diagnostic techniques" found at Section 718.204(c)(4) was not intended to depart from the standard of a reasoned and documented medical opinion enunciated in ***Gomola v. Manor Mining & Contracting Corp.***, 2 BLR 1-130 (1979). Therefore, no specific documentation is required or intended; a medical opinion is sufficient to establish total disability where it is both reasoned and documented. ***Fields v. Island Creek Coal Co.***, 10 BLR 1-19 (1987).

A medical opinion need not be phrased in terms of "total disability" before total disability can be established. Instead, it is sufficient to list the impairment that prohibits the claimant from performing his usual coal mine work. ***Black Diamond Coal Mining Co. v. Benefits Review Board***, 758 F.2d 1532, 7 BLR 2-239 (11th Cir. 1985). At the very least, however, the evidence must be sufficient to allow a proper comparison between a miner's usual employment and his impairment. *See* ***Wilburn v. Director, OWCP***, 11 BLR 1-135 (1988); ***Budash v. Bethlehem Mines Corp.***, 9 BLR 1-48 and 13 BLR 1-46 (1986) *aff'd on recon.*, 9 BLR 1-104 (1986)(en banc); ***Mazgaj v. Valley Camp Coal Corp.***, 9 BLR 1-201 (1986); *cf*. ***Hillibush v. United States Department of Labor***, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988). It is claimant's burden of proof to establish the exertional requirements of his usual coal mine employment. *See generally* ***Onderko v. Director, OWCP***, 14 BLR 1-2 (1989); *see also* ***Cregger v. United States Steel Corp.***, 6 BLR 1-1219 (1984). Note, however, that in a case where the miner was deceased and the record did not contain evidence establishing the exertional requirements of the miner's usual coal mine employment, the Board remanded the case to the administrative law judge to consider taking judicial notice of the *Dictionary of Occupational Titles* to determine the exertional requirements of claimant's usual coal mine employment in order to adjudge the issue of the miner's disability. ***Onderko***, ***supra***.

CASE LISTINGS

[diagnosis of chronic obstructive pulmonary disease with shortness of breath insufficient to establish total disability at subsection (c)(4); mere recitation of symptoms not diagnosis of degree or severity of impairment] ***Wright v. Director, OWCP***, 8 BLR 1-245 (1985).

DIGESTS

A medical opinion that fails to diagnosis claimant as totally disabled or to otherwise address the severity of his impairment in such a way as to permit the administrative law judge to infer total disability cannot constitute probative evidence of total disability pursuant to 20 C.F.R. §718.204(c)(4). *See* ***Budash v. Bethlehem Mines Corp.***, 9 BLR 1-48 and 13 BLR 1-46 (1986) *aff'd on recon.*, 9 BLR 1-104 (1986)(en banc); ***Gee v. W.G. Moore and Sons***, 9 BLR 1-4 (1986); ***Wright v. Director, OWCP***, 8 BLR 1-245 (1985).

A medical assessment of "Class II Respiratory impairment, which is 10-20% impairment of the whole man," is relevant to a determination of total disability under Section 718.204(c)(4). The administrative law judge must compare the impairment rating with the exertional requirements of claimant's usual coal mine work. ***Budash v. Bethlehem Mines Corp.***, 9 BLR 1-48 and 13 BLR 1-46 (1986) *aff'd on recon.*, 9 BLR 1-104 (1986)(en banc).

The administrative law judge erred by concluding that a report by the West Virginia Occupational Pneumoconiosis Board finding the miner 30% disabled constituted a finding of total respiratory disability. While the administrative law judge may consider the report, he must compare the findings of that Board with the physical requirements of the miner's usual coal mine employment before determining whether the report is supportive of total respiratory disability under Section 718.204(c). ***Fields v. Island Creek Coal Co.***, 10 BLR 1-19 (1987).

The administrative law judge acted within his discretion by using lay testimony to discredit medical opinions pursuant to Section 718.204(c)(4). The administrative law judge could properly consider lay testimony when assessing the credibility of medical reports. ***Fields v. Island Creek Coal Co.***, 10 BLR 1-19 (1987).

A medical opinion which merely advised against a return to the dusty atmosphere of a coal mine without addressing claimant's physical capability to return to work is insufficient to establish the existence of a totally disabling impairment. ***Taylor v. Evans and Gambrel Company, Inc.***, 12 BLR 1-83 (1988).

The Eleventh Circuit held that the administrative law judge's finding that a physician failed to specify whether the medical assessment was his own or claimant's recitation of

symptoms was an insufficient basis to reject the miner's claim. ***Jordan v. Benefits Review Board***, 876 F.2d 1455, 12 BLR 2-371 (11th Cir. 1989).
A medical conclusion that the miner "should not return to underground coal mining because of his silicosis" is not equivalent to a finding of total disability. The Court stated that such a conclusion was a recommendation against further exposure at the coal mine, not a finding that claimant cannot do the work there, and not a finding that any disability suffered by miner was caused by his silicosis. ***Zimmerman v. Director, OWCP***, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989).

Section 718.204 embodies two essential elements which a claimant must establish in order to qualify for benefits under the Act: (1) The claimant must establish that he has a total pulmonary disability according to the criteria of Section 718.204(c); and (2) the claimant must establish that his total pulmonary disability is in some sense caused by or "due to" his pneumoconiosis. Each of these elements must be established by a preponderance of the evidence. *See* 20 C.F.R. §718.403. Once a total pulmonary disability is established, such unrelated disabilities obviously are irrelevant to the causation of the pulmonary disability. So long as total pulmonary disability is properly established, a claimant is not disqualified simply because he also suffers from other debilitating or disabling conditions. ***Lollar v. Alabama By-Products Corp.***, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990).

The Board will interpret Section 718.204(c) as requiring a claimant to establish the existence of a totally disabling respiratory or pulmonary impairment and that non-respiratory and non-pulmonary impairments are irrelevant to establishing total disability under Section 718.204(c). *See* ***Beatty v. Danri Corp.***, 16 BLR 1-11 (1991).

In order to establish total disability pursuant to Section 718.204(c), "a claimant must establish that the miner's respiratory or pulmonary impairment is totally disabling and that non-respiratory and non-pulmonary impairments have no bearing on establishing total disability under this provision." ***Carson v. Westmoreland Coal Co.***, 19 BLR 1-16, 1-21 (1994); *see* ***Beatty v. Danri Corp.***, 16 BLR 1-11, 1-15 (1991); *see also* ***Jewell Smokeless Coal Corp. v. Street***, 42 F.3d 241, BLR (4th Cir. 1994); *see also* ***Tussey v. Island Creek Coal Co.***, 982 F.2d 1036, 1040, 17 BLR 2-16, 2-21 (6th Cir. 1993); ***Lollar v. Alabama By-Products Corp.***, 893 F.2d 1258, 1262-63, 13 BLR 2-277, 2-280 (11th Cir. 1990). The disabling loss of lung function due to extrinsic factors, *e.g.*, loss of muscle function due to a stoke, does not constitute respiratory or pulmonary disability pursuant to Section 718.204(c). ***Carson v. Westmoreland Coal Co.***, 19 BLR 1-16 (1994), *modified on recon.*, 20 BLR 1-64 (1996).

The Board agreed to grant the Director's Motion for Reconsideration and the relief requested, and strike the sentence "The disabling loss of lung function due to extrinsic factors, e.g., loss of muscle function due to a stroke, does not constitute respiratory or pulmonary disability pursuant to Section 718.204(c)," ***Carson***, 19 BLR at 1-21 (footnote omitted), from its decision. ***Carson v. Westmoreland Coal Co.***, 20 BLR 1-64 (1996),

modifying on recon., 19 BLR 1-16 (1994).

The Sixth Circuit held that the Director, as a respondent, has authority to file a pro-petitioner brief, and thus denied employer's motion to strike the Director's brief. At 20 C.F.R. §718.202(a)(4), the court held that substantial evidence did not support the ALJ's finding that two physicians' opinions diagnosing pneumoconiosis were merely restatements of positive x-rays. The court also held that the ALJ erred in discounting these reports because the physicians opined that claimant's obstructive defect could have been caused by either smoking or coal dust exposure. The court reasoned that both physicians were nevertheless unequivocal that coal dust exposure aggravated claimant's pulmonary problems, thus expressing opinions supportive of a finding of legal pneumoconiosis. The court further held that the ALJ did not consider whether employer's physicians were using the more restrictive medical definition of pneumoconiosis when they opined that claimant's respiratory problems were related to his smoking only. In this regard, the court noted that only Dr. Fino discussed his rationale for excluding coal dust exposure as an aggravating factor; the court noted that Dr. Fino's apparent requirement that fibrosis be present for a diagnosis of simple coal workers' pneumoconiosis, is not a requirement for a finding of legal pneumoconiosis. At 20 C.F.R. §718.204(c)(4), the court held that the ALJ erred when he gave little weight to Dr. Vaezy's finding of total disability because the physician relied, in part, on a non-qualifying pulmonary function study. The court also held that the ALJ erred in failing to compare Dr. Baker's diagnosis of a mild impairment with the exertional requirements of claimant's usual coal mine employment. The court added that the ALJ improperly credited medical opinions that claimant is not totally disabled, without considering whether the rendering physicians had any knowledge of the exertional requirements of claimant's usual coal mine work. The court vacated the Board's decision affirming the ALJ's denial of benefits, and remanded the case to the ALJ. ***Cornett v. Benham Coal, Inc.***, 227 F.3d 569, No. 99-3469, 2000 WL 1262464 (6th Cir., Sept. 7, 2000).

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