

[BLR cite: *Bowman v. Clinchfield Coal Company*, 15 BLR 1-22 (1991)]

BRB No. 88-3238 BLA

LARRY BOWMAN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CLINCHFIELD 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 Giles J. McCarthy, Administrative Law Judge, United States Department of Labor.

Donald P. Earls, Norton, Virginia, for claimant.

Michael F. Blair (Penn, Stuart, Eskridge & Jones), Abingdon, Virginia, for employer.

Patricia Nece (David F. Fortney, Deputy 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, the United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NEUSNER, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (84-BLA-4624) of Administrative

Law Judge Giles J. McCarthy 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

*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).

et seq. (the Act). The administrative law judge found that claimant established 15 years of coal mine employment, and, based on the date of filing, applied the permanent criteria found at 20 C.F.R. Part 718 to this case. Prior to the hearing, claimant's counsel submitted requests to the administrative law judge for issuance of subpoenas requiring several physicians to appear and testify at the hearing.¹ In his Decision and Order, the administrative law judge found that claimant's right to subpoena was limited to a right to request the subpoena, and that the ultimate issuance of the subpoena was a matter of discretion for the administrative law judge.² The administrative law judge further found that claimant failed to provide sufficient reasons to justify the issuance of the subpoenas in this case. Thus, these requests for subpoenas were denied. The administrative law judge then concluded that claimant failed to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202 and 718.204(c), and consequently benefits were denied. Claimant appeals, asserting that the administrative law judge's denial of his requests for subpoenas constituted a violation of his right to due process. Claimant further asserts that the administrative law judge erred by refusing to admit a tape recording into the evidentiary record, and by failing to consider all relevant medical evidence of record in weighing the evidence pursuant to Sections 718.202(a)(4) and 718.204(c)(4). Employer responds to claimant's appeal, requesting affirmance of the decision below. The Director, Office of Workers' Compensation Programs (the Director) also responds, asserting that the administrative law judge acted permissibly within the scope of his discretion in refusing claimant's requests for subpoenas.³

¹Claimant was represented by S. Strother Smith of Abingdon, Virginia, while this case was before the administrative law judge. Currently claimant is represented by Donald P. Earls of Norton, Virginia.

²Claimant attempted to subpoena Dr. Byers, who examined claimant and submitted a medical report on behalf of employer, as well as Drs. Spitz, Felson, Castle, Hippensteel, Wheeler and Scott, who submitted negative x-ray rereadings.

However, the Director further contends that the administrative law judge erred by excluding the tape recording from the evidentiary record, and by failing to consider all the relevant evidence of record in making his determinations pursuant to Sections 718.202(a)(4) and 718.204(c)(4), and thus requests remand of the case for further consideration of the evidence pursuant to these subsections.

³The Director has filed a Motion to Remand in this case. The Board accepts the Director's Motion to Remand as his response brief, and herein decides this case on its merits.

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).

Prior to the hearing before the administrative law judge, claimant's counsel requested that subpoenas be issued requiring Dr. Byers, who submitted a medical report which concluded that the evidence of record did not indicate the presence of coal worker's pneumoconiosis, and several other physicians who submitted negative rereadings of x-ray films, to testify at the hearing. These requests were denied, and, in the Decision and Order, the administrative law judge, citing the holding of the United States Court of Appeals for the Fourth Circuit in Souch v. Califano, 599 F.2d 577 (4th Cir. 1979), found that claimant's right to subpoena was limited to a right to request subpoenas, and that the ultimate issuance of a subpoena was a matter of discretion for the administrative law judge. See also Administrative Procedure Act, (APA) 5 U.S.C. §§ 555, 557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919 and 30 U.S.C. §932(a); 29 C.F.R. §18.24. The administrative law judge further found that claimant was not entitled to the issuance of the subpoenas in this case, as claimant did not supply a sufficient argument in support of his request. See Decision and Order at 4. Claimant contends that this denial of his requests for subpoenas constituted a denial of due process, as the right to subpoena entails an absolute right to the issuance of a subpoena upon request. Claimant further contends that the administrative law judge erred in determining that the reasons provided by claimant for the necessity of the subpoenas were insufficient. Employer and the Director respond contending that the administrative law judge permissibly denied the subpoena requests, and that there has been no violation of due process in this case. We reject claimant's assertion that the right to subpoena is absolute. The United States Court of Appeals for the Fourth Circuit, under whose appellate jurisdiction this claim arises, has specifically held that the right to subpoena is limited to a right to request a subpoena, and that the ultimate issuance of a subpoena is a matter of discretion for the administrative law judge. See Souch, 599 F.2d at 580, n.5; see also APA, supra; 29 C.F.R. §18.24(a). In addition, the administrative law judge, permissibly within the scope of his discretion, found that the reasons advanced by claimant were insufficient to justify the issuance of the subpoena and, contrary to claimant's contention, the administrative law judge was not required to supply any further explanation for his denial of the subpoena requests.⁴ See King v. Consolidation Coal Co., 8 BLR 1-262 (1985). Furthermore,

⁴The only rationale claimant's counsel provided for the subpoenas was in a letter dated August 20, 1987 in which claimant asserted that he needed Dr. Byers to

contrary to claimant's assertions on appeal, the his process rights were not violated by the administrative law judge's consideration of the contested evidence. The Court, in Souch, held that due process requirements were satisfied where a party is provided with an opportunity to inspect and rebut the evidence of record. See Souch, 599 F.2d at 580; see also Owens v. Jewell Smokeless Coal Corp., 14 BLR 1-47 (1990). In this case, there is nothing in the record to suggest that claimant was not provided with an opportunity to inspect and rebut both the medical report of Dr. Byers and the negative x-ray readings at issue. Accordingly, since claimant has not demonstrated that denial of his request for subpoenas constituted a denial of due process, we affirm the administrative law judge's decision to deny claimant's requests for subpoenas.⁵

Claimant and the Director assert that the administrative law judge erred at the hearing by failing to admit a tape recording into the evidentiary record. Claimant asserts that this recording is of a conversation between himself and Dr. Byers which occurred during the course of his physical examination, and that during this conversation Dr. Byers offered a diagnosis which was contrary to that made in his written medical report.⁶ The administrative law judge did not allow the tape recording to be admitted into the evidentiary record, because it was not exchanged with the other parties within twenty days, as mandated by 20 C.F.R. §725.456. As claimant and the Director correctly contend, however, in excluding this recording from the record the administrative law judge did not consider its admissibility pursuant to Section 725.456(b)(4), which permits new evidence to be admitted at the hearing where the evidence is offered for impeachment purposes. 20 C.F.R. §725.456(b)(4). Accordingly, since claimant seeks to use the tape recording to impeach the findings contained in the medical report of Dr. Byers, which the administrative law judge relied upon to find that claimant did not establish the

respond to questioning that was "too extensive" to be handled by interrogatories. No rationale was provided for the request to subpoena the physicians who submitted negative x-ray readings.

⁵Since claimant raises no other allegations of error regarding the administrative law judge's weighing of the x-ray evidence of record, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

⁶Dr. Byers, in his medical report, found that claimant did not suffer with pneumoconiosis. See DX-37. At the hearing, claimant testified that, on the recording, Dr. Byers expressly told claimant that "you have black lung". See Hearing Transcript at 88.

existence of pneumoconiosis pursuant to Section 718.202(a)(4) or total disability pursuant to Section 718.204(c)(4), we vacate the administrative law judge's finding pertaining to the admissibility of the this recording, and we remand this case for further consideration of the admissibility of this recording pursuant to Section 725.456(b)(4).

Claimant and the Director also assert that the administrative law judge did not consider all of the relevant evidence of record in determining that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and total disability pursuant to Section 718.204(c)(4).⁷ The administrative law judge found that claimant failed to establish the existence of pneumoconiosis and total disability by relying upon the opinion of Dr. Byers, who opined that claimant did not suffer with pneumoconiosis and could perform his last coal mine employment from a respiratory standpoint. However, in weighing the medical reports of record pursuant to Section 718.202(a)(4), the administrative law judge did not address the reports of Dr. Robinette, who diagnosed coal workers' pneumoconiosis, chronic bronchitis, and obstructive lung disease, or Dr. Baxter, who determined that claimant suffered from chronic obstructive pulmonary disease with pulmonary emphysema with coal workers' pneumoconiosis. See Director's Exhibit 11, Claimant's Exhibits 11, 12. Similarly, the administrative law judge did not address Dr. Robinette's opinion that claimant was unable to perform his duties as an underground miner in weighing the medical reports pursuant to Section 718.204(c)(4).⁸ Consequently, since the

⁷We affirm the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (a)(3), and total disability pursuant to Section 718.204(c)(1) and (c)(3) as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983). Moreover, we reject claimant's assertion that the administrative law judge erred in rejecting a qualifying study taken at rest on the basis that its values were non-qualifying on exercise. Rather, the administrative law judge permissibly credited the most recent blood gas studies of record to conclude that claimant failed to establish total disability pursuant to Section 718.204(c)(2), and thus this finding is affirmed. See generally Clark, 12 BLR 1-149 (1989).

⁸Employer contends that the administrative law judge's consideration of the objective evidence underlying Dr. Robinette's report was sufficient to constitute proper consideration of Dr. Robinette's medical diagnosis pursuant to Sections 718.202(a)(4) and 718.204(c)(4). However, contrary to employer's contention, the administrative law judge's consideration of the objective evidence underlying Dr. Robinette's report was not sufficient, since the administrative law

administrative law judge must address all relevant evidence in making his findings, see Wojtowicz v. Duquesne Light Company, 12 BLR 1-162 (1989); Tackett v. Director, OWCP, 7 BLR 1-703 (1983), we vacate the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to §718.202(a)(4) or total disability pursuant to §718.204(c)(4), and remand this case to the administrative law judge for further consideration of the evidence pursuant to the provisions.⁹ We further note that if on remand, the administrative law judge determines that there is evidence sufficient to establish total disability pursuant to Section 718.204(c)(4), the administrative law judge must then weigh the totality of the relevant probative evidence, including the contrary evidence, to determine if claimant has established total disability pursuant to Section 718.204(c). Moreover, before benefits may be awarded under Part 718, the administrative law judge must further determine whether claimant's pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203, and whether his total disability is due to pneumoconiosis pursuant to Section 718.204(b). See Trent v. Director, OWCP, 11 BLR 1-26 (1987); Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195 (1986).

judge cannot consider underlying objective evidence separately, and must weigh and consider all medical reports as a whole in weighing the opinions under Sections 718.202(a)(4) and 718.204(c)(4). See Wright v. Director, OWCP, 7 BLR 1-295 (1984).

⁹It should also be noted that if the disputed tape recording of Dr. Byers is admitted into evidence, it may have an impact upon the administrative law judge's weighing of the evidence of record relevant to Sections 718.202(a)(4) and 718.204(c)(4).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

FREDERICK D. NEUSNER
Administrative Law Judge