

BRB No. 89-0995 BLA

ARNOLD MOUNTS)
)
 Claimant-Respondent)
)
 v.)
)
 AMIGO SMOKELESS COAL COMPANY) DATE ISSUED:
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 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 Robert S. Amery, Administrative Law Judge, United States Department of Labor.

Don M. Stacy, Beckley, West Virginia, for claimant.

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

Before: SMITH and BROWN, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order (86-BLA-2170) of Administrative Law Judge Robert S. Amery 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). The administrative law judge credited claimant with five years and ten months of qualifying coal mine

*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) (1988).

employment, and properly adjudicated this claim, filed on October 14, 1976, pursuant to the provisions at 20 C.F.R. Part 410, Subpart D. See Muncy v. Wolfe Creek Collieries Coal Co., 3 BLR 1-627 (1981). The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§410.414(c) and 410.416(b), and total disability pursuant to 20 C.F.R. §410.426(d). Accordingly, benefits were awarded. Employer appeals, challenging the administrative law judge's findings pursuant to Sections 410.414(c) and 410.426(d). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.¹

¹ The administrative law judge's findings regarding the length of coal mine employment, his finding that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §410.414(a) and (b), and his finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §410.426(b) and (c), 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 under 20 C.F.R. Part 410, Subpart D, claimant must establish the existence of pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. 20 C.F.R. §§410.410; 410.450; Shaw v. Cementation Company of America, 10 BLR 1-114 (1987); Powell v. Director, OWCP, 7 BLR 1-364 (1984). Failure to establish any of these elements precludes entitlement. Hall v. Director, OWCP, 2 BLR 1-998 (1980).

Employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 410.414(c) based on various physicians' diagnoses of pneumoconiosis rather than a finding that other relevant evidence established the existence of a totally disabling chronic respiratory or pulmonary impairment arising out of coal mine employment, as required by the regulation. See Harrell v. Pittsburg & Midway Coal Co., 6 BLR 1-961 (1984); Powell, supra. We agree. As the administrative law judge did not determine whether claimant suffers a totally disabling respiratory impairment pursuant to Section

410.414(c), we must vacate his findings thereunder and remand this case for the administrative law judge to re-evaluate the evidence and render further findings.

Employer also challenges the administrative law judge's finding that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §410.426(d). The administrative law judge found that although the objective test results of record were insufficient to establish total disability pursuant to 20 C.F.R. §410.426(b) and (c), Drs. Richmond, Santos, Fino and Zaldivar opined that claimant would be unable to return to his work in the coal mines. Decision and Order at 9, 10. The administrative law judge further noted that while Drs. Fino and Zaldivar attributed claimant's disability to smoking and factors other than pneumoconiosis, this case arises within the appellate jurisdiction of the United States Court of Appeals for the Fourth Circuit, where the court indicated in Sykes v. Director, OWCP, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987), that "the question of a claimant's incapacity to perform his regular duties as a coal miner should not be restricted to consideration from a respiratory standpoint alone." Decision and Order at 10. The administrative law judge's reliance on Sykes was misplaced, however, as the referenced holding is only applicable to employer's burden on rebuttal at 20 C.F.R. §727.203(b)(2), and thus is not relevant to the issue of total disability under Part 410, Subpart D, where claimant has the burden of establishing the existence of a totally disabling respiratory impairment arising out of coal mine employment. See 20 C.F.R.

§410.426(a). The central inquiry is the medical severity of claimant's pneumoconiosis, which must be sufficiently severe as to constitute an independent cause of total disability pursuant to 20 C.F.R. §§410.422 and 410.426. See Matney v. Jones & Laughlin Coal Co., 3 BLR 1-332 (1981); Burks v. Hawley Coal Mining Corp., 2 BLR 1-323 (1979); Gomola v. Manor Mining & Contracting Corp., 2 BLR 1-130 (1979). As the administrative law judge did not resolve the conflicts in the medical opinions of record on this issue, we vacate his findings pursuant to Section 410.426(d), and instruct the administrative law judge on remand to reconsider the relevant evidence of record thereunder. If on remand claimant fails to establish entitlement pursuant to Part 410, Subpart D, the administrative law judge must consider entitlement pursuant to 20 C.F.R. §410.490. Pittston Coal Group v. Sebben, 109 S.Ct. 414, 12 BLR 2-89 (1988); see Pauley v. Bethenergy Mines, Inc., 111 S.Ct. 2524, 15 BLR 2-155 (1991); Phipps v. Director, OWCP, BLR , BRB No. 899-3919 BLA (Nov. 13, 1992)(en banc)(J. Smith, concurring, J. McGranery, concurring and dissenting).

Accordingly, the administrative law judge's Decision and Order awarding benefits 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

JAMES F. BROWN
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge