

BRB No. 89-3861 BLA

IRVIN H. MALCOLM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GRAFTON 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 Supplemental Decision and Order on Remand of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Thomas R. Michael (Michael & Kupec), Clarksburg, West Virginia, for claimant.

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

Before: STAGE, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order on Remand (85-BLA-3399) of Administrative Law Judge Charles P. Rippey 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 seq. (the Act). This case is on appeal before the Board for the second time. In his original Decision and Order, the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but further found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), and that the lay evidence was inadmissible regarding this issue. Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's denial of benefits as based on substantial evidence, see *Malcolm v. Grafton Coal Company*, BRB No. 87-1005 BLA (Oct. 25, 1988)(unpublished), but the United States Court of Appeals for the Fourth Circuit (Fourth Circuit) reversed the Board's affirmance and remanded this case for clarification and further development of the record. The Fourth Circuit instructed the administrative law judge to permit both parties to submit additional medical evidence on the issue of total disability, and to consider claimant's lay testimony in making his determination. *Malcolm v. Grafton Coal Co.*, No. 88-2980 (4th Cir., July 14, 1989) (unpublished).

On remand, after the parties declined to submit additional evidence, the administrative law judge found that the evidence of record was insufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204, and consequently denied benefits. In the instant appeal, claimant challenges the

administrative law judge's findings pursuant to Section 718.204. Employer responds, urging affirmance of the administrative law judge's denial of benefits. 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).

Claimant maintains that the administrative law judge failed to follow the Fourth Circuit's instructions on remand. We agree. The Fourth Circuit found that since Dr. Petsonk was the only physician of record who addressed the extent of claimant's disability and his conclusions were ambiguous, see Employer's Exhibits 2, 3, the administrative law judge had a duty to clarify the record on the issue of whether claimant's pneumoconiosis precluded him from performing his usual coal mine employment or similar work. Since the parties did not submit additional evidence, the record remains ambiguous regarding said issue. In these circumstances, the Department of Labor has not fulfilled its responsibility of providing claimant with a complete, credible pulmonary evaluation regarding every element of entitlement. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); see *Newman v.*

*Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*). Consequently, we vacate the administrative law judge's findings pursuant to Section 718.204, and remand this case for further development by the deputy director, as well as the parties if they so desire, in compliance with the Fourth Circuit's instructions.

Accordingly, the administrative law judge's Supplemental Decision and Order on Remand denying benefits is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY J. STAGE, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge