

BRB Nos. 93-2180 BLA

WILLIE B. OYLER)

)
Claimant-Petitioner)

)
v.)

)
) DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

)
Respondent) DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Fred Cox (McDowell County Black Lung Association), Gary, West Virginia, for claimant.

Karen N. Blank (Thomas S. Williamson, Jr., 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, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, with the assistance of a lay representative, the Decision and Order (92-BLA-1125) of Administrative Law Judge John C. Holmes 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).
Based

*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).

on the date of filing, May 31, 1991, the administrative law judge considered the claim pursuant to 20 C.F.R. Part 718. In his Decision and Order, the administrative law judge found that claimant has a maximum of eight and three-quarter years of coal mine employment which is divided into approximately equal periods of time as: (1) a miner and (2) work as a mechanic which would not qualify as a coal mine employment. The administrative law judge next found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and that claimant is "entitled to the presumption that he is totally disabled by a pulmonary impairment since his pulmonary function test results meet the criteria under Appendix B" of 20 C.F.R. Part 718. See Decision and Order at 4. The administrative law judge then found that claimant failed to establish that his pneumoconiosis is causally related to his coal mine employment or that his pulmonary impairment is due to pneumoconiosis. See Decision and Order at 5. Accordingly, benefits were denied. Claimant appeals this denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a motion to remand¹ urging that the case be remanded to the administrative law judge for reconsideration of the evidence pursuant to 20 C.F.R. §§718.203(c) and 718.204(b).²

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman &*

¹We accept the Director's Motion to Remand as his response brief and decide the case on its merits.

²The administrative law judge's findings that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and that claimant established total disability pursuant to 20 C.F.R. §718.204(c)(1) are affirmed as they are supported by substantial evidence, are unchallenged on appeal, and are favorable to claimant. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Grylls Associates, Inc., 380 U.S. 359 (1965).

Pursuant to 20 C.F.R. §718.203(c), the administrative law judge considered the evidence of record and found that claimant failed to establish that his pneumoconiosis arose out of his coal mine employment. The record contains five medical opinions, two of which diagnose pneumoconiosis and one of which diagnoses possible pneumoconiosis. See Director's Exhibits 10, 17, 19, 28; Claimant's Exhibit 1. Dr. Vasudevan diagnoses "cwp" and states that the etiology of the "cwp" is occupational. See Director's Exhibit 10. Dr. Rasmussen states that it is medically reasonable to conclude that claimant has coal workers' pneumoconiosis which arose from his previous occupational exposures. He further states that claimant's coal mine dust exposure was sufficient to produce pneumoconiosis. See Claimant's Exhibit 1. Dr. Piekarek, in Black Lung Clinic Program progress notes dated February 13, 1990, assessed possible "cwp". The progress notes also contain the notation: "A/ cwp/copd" on October 19, 1990. See Director's Exhibit 17. In making his finding pursuant to 20 C.F.R. §718.203(c), the administrative law judge states that "claimant's exposure to coal dust in a very limited amount as a coal miner, may not have contributed significantly to his pneumoconiosis." See Decision and Order at 5. As the Director argues, the administrative law judge erred in stating that claimant must show that his coal mine employment contributed significantly to his pneumoconiosis. See Decision and Order at 5; Director's Motion to Remand at 5; *Robinson v. Pickands Mather and Company*, 914 F.2d 35 (4th Cir. 1990). As a result, the case is remanded for the administrative law judge to utilize the standard, as stated by the United States Court of Appeals for the Fourth Circuit in *Robinson*, that claimant must establish that his coal mine employment was a contributing cause of his pneumoconiosis pursuant to 20 C.F.R. §718.203(c). Additionally, the administrative law judge erroneously mischaracterized Dr. Vasudevan's report when he states that Dr. Vasudevan makes a very tentative finding of pneumoconiosis and does not specifically relate it to coal mine work. See Decision and Order at 5; *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Dr. Vasudevan diagnosed "cwp", which stands for coal worker's pneumoconiosis, and he stated that the etiology of the "cwp" was occupational. See Director's Exhibit 10. The administrative law judge also erred in failing to discuss Dr. Rasmussen's opinion and the additional comments in the progress report of October 19, 1990 pursuant to 20 C.F.R. §718.203(c). See Director's Exhibit 17; Claimant's Exhibit 1; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Tackett, supra*. As a result, the administrative law judge's finding that claimant failed to establish that his pneumoconiosis arose from his coal mine employment pursuant to 20 C.F.R. §718.203(b) is vacated and the case is remanded for the administrative law judge to make further findings on this issue.

Pursuant to 20 C.F.R. §718.204(b), the administrative law judge found that, even if claimant did suffer from pneumoconiosis causally related to his coal dust exposure, he would find that it did not significantly contribute to his totally disabling pulmonary impairment. See Decision and Order at 6. Again, the administrative law judge erred in requiring claimant to establish that his pneumoconiosis is a significant contribution to his pulmonary impairment, instead of merely a contributing cause of his impairment. See *Robinson, supra*. As a result, the administrative law judge's finding that claimant failed to establish that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) is vacated and the case is remanded for the administrative law judge to reconsider the medical opinion evidence of record to determine whether claimant established that his pneumoconiosis is a contributing cause of his impairment pursuant to 20 C.F.R. §718.204(b).

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge