BRB No. 94-0669 BLA

RONALD BLANKENSHIP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
U.S. STEEL MINING COMPANY	)	
	)	
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 George A. Fath, Administrative Law Judge, United States Department of Labor.

Ronald Blankenship, Iaeger, West Virginia, *pro se*.

Sarah M. Hurley (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, the United States Department of Labor.

Before: BROWN, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (93-BLA-0168) of Administrative Law Judge George A. Fath 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). The administrative law judge credited claimant with five years of coal mine employment,

concluded that employer is the responsible operator, and considered the claim pursuant to 20 C.F.R. Part 718. The administrative law judge accepted employer's stipulation that claimant has pneumoconiosis, noting the seven positive x-ray readings of record, and found the presumption that claimant's pneumoconiosis arose out of coal mine employment unrebutted. However, the administrative law judge found the evidence insufficient to establish total respiratory disability due to

pneumoconiosis pursuant to 20 C.F.R. §718.204 and, accordingly, denied benefits.

On appeal, claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director) responds, asserting that the administrative law judge erred in his evaluation of the medical opinions and requesting a remand for reconsideration of the evidence relevant to total disability. Employer has not responded to this appeal.[1]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

[1] We affirm as unchallenged on appeal and not adverse to claimant the administrative law judge's findings regarding responsible operator status and those made pursuant to Sections 718.202(a)(1), 718.203(c), and 718.204(c)(3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

The administrative law judge found five years of coal mine employment, consisting of three and one half years underground for employer, and the remainder as a coal truck driver. Decision and Order at 1. Claimant initially alleged ten years, but a review of the record indicates that the Social Security earnings record and claimant's testimony concerning one period of employment working underground and three periods of hauling coal support approximately five years.[2] Hearing Transcript at 12-17; Director's Exhibit 4. Further, the administrative law judge found the record to be unclear as to how additional hauling jobs listed by claimant would relate to coal mine employment, Decision and Order at 1, and it is claimant's burden to establish the nature of his qualifying coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Trusty v. Director, OWCP*, 4 BLR 1-263 (1981), *aff'd*, 709 F.2d 1059 (6th Cir. 1983)(table). Thus, we affirm the administrative law judge's finding of five years of coal mine employment.[3]

[2] Specifically, claimant testified that he was a general helper underground for employer for three and a half years, carrying cable and roof bolts, and helping on the continuous miner. Hearing Transcript at 13. Claimant also testified that after leaving employer, he hauled raw coal from the mine to the tipple for three different firms, for periods totalling approximately eighteen months. Hearing Transcript at 13, 14. Thus, the
administrative law judge's finding of five years of qualifying coal mine employment is supported by substantial evidence. *See Whisman v. Director, OWCP*, 8 BLR 1-96 (1985).

[3] The Director notes that the administrative law judge made no finding regarding the nature of claimant's usual coal mine employment. Director's Brief at 3. We instruct the administrative law judge on remand to determine the miner's usual coal mine employment.

In finding that claimant's pneumoconiosis arose from coal mine employment, the administrative law judge cited Sections 725.492 and 725.493(a)(6), instead of Section 718.203. Decision and Order at 3. We deem this error harmless, *see Larioni v. Director,* OWCP, 6 BLR 1-1276 (1984), because, of the four medical opinions of record, three diagnose pneumoconiosis and all three opine that the pneumoconiosis arises from claimant's coal mine employment. Director's Exhibit 13, Employer's Exhibit 1, Claimant's Exhibit 1. Further, there is no contrary evidence. *See Coval v. Pike Coal Co*., 7 BLR 1-272 (1984); *see also Begley v. Consolidation Coal Co*., 826 F.2d 1512, 10 BLR 2-265 (6th Cir. 1987). Therefore, we affirm the administrative law judge's finding that claimant's pneumoconiosis arose from coal mine employment.

Pursuant to Section 718.204(c)(1) and (2), the administrative law judge made no specific findings, but instead generally discussed the pulmonary function and blood gas studies in his analysis of the medical opinion evidence at Section 718.204(c)(4). Decision and Order at 7-9. All three pulmonary function studies yielded qualifying pre-bronchodilator values, and one of the three blood gas studies was qualifying.[4] Director's Exhibits 10, 11; Employer's Exhibit 1; Claimant's Exhibit 1. Although the administrative law judge noted the administering doctors' interpretations of these studies, he did not weigh the objective test evidence as required by the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986). Therefore, we instruct him on remand to make specific findings at Section 718.204(c)(1) and (2).

At Section 718.204(c)(4), the administrative law judge found the medical opinion evidence insufficient to establish that claimant is totally disabled. Decision and Order at 4-9. Doctor Rasmussen diagnosed totally disabling pneumoconiosis. Claimant's Exhibit 1. Doctor Daniel diagnosed pneumoconiosis and chronic obstructive lung disease, but opined that claimant could perform his usual coal mine employment.[5] Employer's Exhibit 1. The administrative law judge rejected Dr. Rasmussen's opinion because Dr. Rasmussen failed to explain how the exercise blood gas studies that he conducted reflected claimant's inability to perform his usual

[4] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

[5] Neither Dr. Ranavaya nor Dr. Vasudevan addressed total disability. Director's Exhibits 4, 13.

coal mine employment.[6] Decision and Order at 8.

The Director contends that the administrative law judge erred by selectively analyzing Dr. Rasmussen's opinion and ignoring a key portion of the doctor's explanation of the exercise studies. Director's Brief at 10. The Director also asserts that the administrative law judge erred in faulting Dr. Rasmussen's conclusion based on the administrative law judge's view that the blood gas studies were "normal," while ignoring the non-qualifying pulmonary function studies which, as interpreted by Dr. Rasmussen, support his opinion of total disability. Director's Brief at 11.

We agree with the Director's arguments and thus vacate the administrative law judge's rejection of Dr. Rasmussen's opinion. *See Justice v. Island Creek Coal Co*., 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co*., 7 BLR 1-295 (1984). In his report, Dr. Rasmussen recited the results of the exercise test, then concluded:

> [T]hese studies indicate moderate loss of respiratory functional capacity . . . . The degree of impairment encountered would render this patient totally disabled for performing heavy manual labor. The patient was required to do some heavy manual labor as a coal truck driver, but had done considerable heavy manual labor at his last underground job which required considerable heavy and some very heavy manual labor. Thus, this patient's pulmonary impairment would render him totally disabled . . . .

Claimant's Exhibit 1. Because the administrative law judge's analysis ignores this section of the report, we remand this case for reconsideration of the medical opinion

[6] The administrative law judge noted: "Bearing in mind that claimant had normal oxygen transfer . . . it is reasonable to ask for the basis of Doctor Rasmussen's judgment . . . . Assuming that claimant's breathing capacity during exercise is 67% of his post bronchodilator maximum, how does that affect his ability to work at coal mining . . ? Assuming that . . . claimant reached his anaerobic threshold at 65% of his predicted maximum oxygen consumption, how does that affect his ability to do the work required of a coal miner?" Decision and Order at 8.

evidence at Section 718.204(c)(4). Moreover, the administrative law judge is instructed not to rely solely on the non-qualifying nature of the objective tests in assessing Dr. Rasmussen's opinion of total disability. *See Fuller v. Gibraltar Coal Co.*, 6 BLR 1-1291 (1983).

The administrative law judge credited Dr. Daniel's opinion of no total disability as more consistent with the blood gas studies. Decision and Order at 8. The Director contends that the administrative law judge's crediting of Dr. Daniel's opinion was also a selective analysis of the evidence. Director's Brief at 11. Specifically, the Director notes that the pulmonary function study that Dr. Daniel administered was qualifying, yet Dr. Daniel found that "there is no evidence of disabling factors . . . present," without explaining how he reconciled claimant's qualifying pulmonary function study with this conclusion. Director's Brief at 11; Employer's Exhibit 1. We find the administrative law judge's analysis of Dr. Daniel's opinion to be selective and inconsistent with his treatment of Dr. Rasmussen's opinion on the total disability issue. Therefore, we vacate the administrative law judge's crediting of Dr. Daniel's opinion. *See Justice, supra*; *Hess, supra*.

Pursuant to Section 718.204(b), the administrative law judge accorded less weight to Dr. Rasmussen's opinion that claimant's total disability was due to pneumoconiosis for two reasons: First, Dr. Rasmussen relied on an inaccurate coal mine employment history, and second, he was equivocal on the etiology of claimant's respiratory impairment.[7] Decision and Order at 9. The Director correctly points out that while Dr. Rasmussen did record that claimant had twelve to thirteen years of coal mine employment and the administrative law judge found five established, the doctor also stated that claimant had a history of three to four years of underground coal mining--the same amount of underground mining that the administrative law judge found, Decision and Order at 1--and opined that this period of underground mining was sufficient to produce pneumoconiosis, the cause of claimant's impairment. Director's Brief at 12; Claimant's Exhibit 1. Thus, we vacate the
administrative law judge's first reason for according less weight to Dr. Rasmussen's opinion at Section 718.204(b).

We also vacate the administrative law judge's second reason for according less weight to Dr. Rasmussen's opinion because the doctor stated that "coal mine dust exposure with its resultant pneumoconiosis [is] a significant contributing factor to [claimant's] disabling respiratory insufficiency," Claimant's Exhibit 1, and such a

[7] Although Dr. Daniel did not address the cause of claimant's disability, the administrative law judge stated that he accorded less weight to Dr. Daniel's opinion on the same grounds at Section 718.204(b). Decision and Order at 8-9.

statement is not equivocal on the issue of causation. *See Carpeta v. Mathies Coal Co*., 7 BLR 1-145 (1984); *see also Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Scott v. Mason Coal Co*., 14 BLR 1-37 (1990)(*en banc*).

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge