BRB No. 99-0988 BLA

VERNON DOTSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: _____
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Second Decision and Order on Remand-Denying Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Harold B. Culley, Jr. (Culley & Wissore), Raleigh, Illinois, for claimant.

Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Second Decision and Order on Remand-Denying Benefits (91-BLA-0988) of Administrative Law Judge Clement J. Kichuk 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).[1] The administrative law

[1]Claimant filed the instant claim on February 22, 1977. Director's Exhibit 1. In the initial Decision and Order issued in this case, Administrative Law Judge Frederick Neusner found that claimant established invocation pursuant to20 C.F.R. §727.203(a)(2) and that employer failed to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1)-(4). Accordingly, benefits were denied. On appeal, the Board held that rebuttal under Section 727.203(b)(2) was established as a matter of law and therefore reversed the award of benefits. *Dotson v. Peabody Coal Co.*, BRB No. 83-1663 BLA (Mar. 18, 1987)(unpub.). Subsequently, the Board granted claimant's Motion for Reconsideration, but denied the relief requested and affirmed its previous reversal of benefits. *Dotson v. Peabody Coal Co.*, BRB No. 83-1663 BLA (Oct. 21, 1987)(unpub.). Subsequent to an appeal by claimant , the United States of Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, held that Administrative Law Judge Neusner erred in finding invocation established at Section 727.203(a)(2) and further held that rebuttal of the interim presumption could be established as a matter of law. The case was thus remanded for further consideration of entitlement. *Dotson v. Peabody Coal Co.*, 846 F.2d 1134 (7th Cir. 1988). Subsequently, Administrative Law Judge Neusner issued a Decision and Order denying benefits on the basis of claimant failing to establish invocation of the presumption pursuant to Section 727.203(a). Administrative Law Judge Neusner also concluded that claimant was unable to establish entitlement under 20 C.F.R. §410.490 or 20 C.F.R. Part 718. Subsequent to claimant's Motion to Reopen the Record, the case was remanded for further proceedings to the district director, who made an initial finding of entitlement, Director's Exhibit 59. On January 5, 1993 Administrative Law Judge Robert Lipson issued a Decision and Order in which he determined that claimant established invocation pursuant to Section 727.203(a)(1), and that employer failed to establish rebuttal. Accordingly, benefits were awarded. On appeal, the Board held that Administrative Law Judge Lipson erred in weighing only that evidence submitted after the record was reopened. Accordingly, the Board vacated the denial of benefits and remanded the claim for further consideration of the entirety of evidence. *Dotson v. Peabody Coal Co.*, BRB No. 93-0945 BLA (Sep. 28, 1995)(unpub.). On remand, Administrative Law Judge Kichuk found that claimant was unable to establish invocation of the interim presumption pursuant to Part 727, and that claimant was unable to establish entitlement pursuant to Part 718. Accordingly, benefits were denied. Subsequently, the Board vacated the Judge Kichuk's denial of benefits and remanded the claim for reconsideration of the medical opinions of Drs. Kahn and Tuteur pursuant to Section 727.203(a)(4), and, if reached, further consideration pursuant to Part 718. *Dotson v. Peabody Coal Co.*, BRB No. 97-1722 BLA (Oct. 21, 1998)(unpub.). On June 10 1999, Administrative Law Judge Kichuk issued the Decision and Order denying benefits from

judge, pursuant to the remand instructions of the Board, again reviewed the medical opinions of Drs. Tuteur and Kahn and concluded that the evidence failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(4). Second Decision and Order on Remand at 2-6. Accordingly, the administrative law judge found that claimant was unable to establish entitlement to benefits pursuant to Part 727. The administrative law judge further concluded that claimant was unable to establish entitlement to benefits pursuant to Part 718, inasmuch as the evidence failed to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Second Decision and Order on Remand at 6-8.

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which claimant now appeals.

On appeal, claimant contends that the administrative law judge erred in failing to find that Dr. Tuteur's opinion supported a finding of invocation of the interim presumption of total disability due to pneumoconiosis pursuant to Section 727.203(a)(4). Claimant further contends that the evidence of record fails to support a finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(2)-(4). Finally, claimant contends that the administrative law judge erred in failing to find that claimant established entitlement to benefits pursuant to Part 718. Employer, in response, urges that the administrative law judge's denial of benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.[2]

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 into the

[2]On remand, the administrative law judge again found that the opinion of Dr. Khan failed to support a finding of invocation at Section 727.203(a)(4). The administrative law judge concluded that Dr. Khan's finding that claimant was totally disabled due to coal workers' pneumoconiosis, Claimant's Exhibit 1, was entitled to little weight, as it was not well-supported by underlying documentation. Decision and Order on Remand at 3. Claimant makes no challenge to this determination, other than a general assertion that the physician's opinion supports a finding of invocation. Claimant's Brief at As claimant has failed to challenge the administrative law judge's findings with specific assertions, we have no substantial issue to review with regard to Dr. Khan's opinion. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *see also Anderson v.Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965).

Claimant contends that the medical opinion evidence provided by Dr. Tuteur supports a finding of a totally disabling respiratory impairment and thus invocation of the interim presumption at Section 727.203(a)(4). Claimant asserts that the physician acknowledged that claimant's pneumoconiosis coupled with his "abnormal lung compliance" established a totally disabling respiratory condition. Claimant's Brief at 5. When this case was most recently before the Board, it held that the administrative law judge failed to address certain ambiguities presented in Dr. Tuteur's medical opinions[3] and that statements by Dr. Tuteur, if credited, could constitute a diagnosis of a totally disabling respiratory or pulmonary impairment

[3]Specifically, Dr. Tuteur concluded that claimant's pneumoconiosis was not associated with abnormal physiological testing and that "there is no objective data found in the data set or in the totality of available medical data that would indicate that [claimant] is unable to perform the tasks of an underground miner." Director's Exhibit 56 at 12-13. Later, Dr. Tuteur was asked whether "the totality of those findings preclude [claimant] from being gainfully employed as a coal miner or other comparable work." Dr. Tuteur answered "yes." Director's Exhibit 56 at 16. The Board held that these seemingly irreconcilable statements must be addressed and, if possible, resolved by the administrative law judge on remand. *Dotson*, BRB No. 97-1722 BLA, *slip op.* at 8.

pursuant to Section 727.203(a)(4). *Dotson*, BRB No. 97-1722 BLA, *slip* op. at 7. At the same time, the Board held that the administrative law judge could permissibly accord greater weight to the opinions of Dr. Tuteur based on the physician's superior credentials and the finding that the physician provided the most thorough and well-reasoned opinion of record. *Id*.

It is the role of the administrative law judge to address, and, if possible, resolve any inconsistencies presented in a physician's opinion. *See Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *see also Justice v. Island Creek Coal Co.,* 11 BLR 1-91 (1988). On remand, the administrative law judge acknowledged that Dr. Tuteur's statements regarding the extent of claimant's disability were inconsistent in that they were "mutually exclusive." Second Decision and Order on Remand at 5. The administrative law judge, however, reviewed the entirety of Dr. Tuteur's opinion and found that the physician at no time opined that claimant lacked the functional lung capacity to return to his previous coal mine employment. The administrative law judge found that the physician's response of "yes" to the inquiry of whether the totality of findings precluded claimant from being gainfully employed, Director's Exhibit 56 at 16, was tantamount to a statement that the miner should avoid further exposure to coal mine dust and not a diagnosis of total respiratory disability sufficient due to a loss of residual functional capacity. Second Decision and Order on Remand at 6. A physician's opinion which merely advises against a return to coal

mine employment is not tantamount to a determination that claimant is totally disabled. *See DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988)(Part 718 cases). Accordingly, the administrative law judge permissibly concluded that Dr. Tuteur's opinion was not supportive of a finding of invocation at Section 727.203(a)(4). *See* ***Migliorini v. Director, OWCP***, 898 F.2d 1292, 13 BLR 2-418 (7th Cir. 1990); *McMath v. Director, OWCP,* 12 BLR 1-6 (1988); *Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986); *Turner v. Director, OWCP*, 7 BLR 1-419 (1984); *Horn v. Jewell Ridge Coal Corp.*, 6 BLR 1-933 (1984). We conclude, therefore, that the administrative law judge has complied with the Board's remand instructions, *see Hall v. Director, OWCP*, 12 BLR 1-80 (1988), and we affirm the administrative law judge's finding that claimant is unable to establish invocation of the interim presumption pursuant to Section 727.203(a)(4).[4] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Claimant further contends, alternatively, that in the absence of a finding of entitlement pursuant to Part 727, the evidence of record establishes entitlement to benefits pursuant to Part 718. Claimant argues that his earlier contentions regarding Dr. Tuteur's opinion, "apply

[4]Inasmuch as claimant has failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(1)-(4), we need not address his assertions regarding rebuttal. *See Lattimer v. Peabody Coal Co.*, 8 BLR 1-509 (1986); *see generally Coen v. Director, OWCP*, 7 BLR 1-30 (1984).

with equal force" to the consideration of the evidence at Section 718.204(c)(4). Claimant's Brief at 9. Claimant asserts that such evidence demonstrates the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(4), thus entitling claimant to the presumption found at 20 C.F.R. §718.305 that the totally disabling respiratory impairment pursuant is due to pneumoconiosis.

In order for a living claimant to avail himself of the presumption of pneumconiosis at Section 718.305, his claim must have been filed prior to January 1, 1982, the evidence demonstrate a coal mine employment history of greater than fifteen years, and a claimant must affirmatively establish the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c). *See* 20 C.F.R. §718.305(a)-(c); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986);

In considering the medical evidence pursuant to Section 718.204(c), *see Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987), the administrative law judge concluded that the weight of relevant evidence failed to support a finding of total disability pursuant to Section 718.204(c). Second Decision and Order on Remand at 7-8.

Claimant raises no challenge to the administrative law judge's findings other than his assertion that its previous arguments at Section 727.203(a)(4) are equally applicable as Section 718.204(c). Inasmuch as we have concluded that the administrative law

judge properly concluded that Dr. Tuteur's opinion was not supportive of a finding of total disability, *see* discussion, *supra*, we reject claimant's assertion that the physician's opinion is supportive of a finding of total disability pursuant to Section 718.204(c)(4). Since claimant raises no further challenge to the administrative law judge's consideration of the evidence at Section 718.204(c), we affirm the finding that claimant has failed to establish the presence of a totally disabling respiratory impairment pursuant to that section and further affirm the administrative law judge's determination that claimant is not entitled to the presumption of pneumoconiosis pursuant to Section 718.305. *See Trent, supra; Shedlock, supra*. Inasmuch as claimant is unable to establish the presence of a totally disabling respiratory impairment, a requisite element of entitlement pursuant to Part 718, we must affirm the denial of benefits at that section. *Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc).*

Accordingly, the administrative law judge's Second Decision and Order on Remand-Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge