

BRB No. 90-1043 BLA

LONZA McKAMEY)
)
 Claimant-Petitioner)
)
 v.)
)
 RIVER BASIN COALS,) DATE ISSUED:
 INCORPORATED)
)
 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 and Order on Claimant's Motion for Reconsideration of E. Earl Thomas, Administrative Law Judge, United States Department of Labor.

Dorothy B. Stulberg (Mostoller and Stulberg), Oak Ridge, Tennessee, for claimant.

Eric R. Collis (Lynch, Cox, Gilman & Mahan, P.S.C.), Louisville, Kentucky, for employer.

Before: STAGE, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and FEIRTAG, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order and the Order on Claimant's Motion for Reconsideration (88-BLA-1188) of Administrative Law Judge E. Earl Thomas 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 reviewed this claim

*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) (Supp. V 1987).

pursuant to the provisions of 20 C.F.R. Part 718, and credited the miner with forty-two and three-quarter years of qualifying coal mine employment. The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), but failed to establish total disability pursuant to 20 C.F.R. §718.204(c), and consequently denied benefits. In his Order on Claimant's Motion for Reconsideration, the administrative law judge found that claimant had established changed circumstances of employment pursuant to Section 718.204(e), but further found that the evidence was insufficient to establish total disability pursuant to Section 718.204(c), and that the provisions of 20 C.F.R. §718.305(b) were inapplicable, as claimant was not deceased. Accordingly, benefits were denied. Claimant appeals, contending that the evidence of record establishes entitlement pursuant to Section 718.204(e). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.¹

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

In order to establish entitlement to benefits pursuant to 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).

Claimant contends that he has established entitlement to benefits pursuant to Section 718.204(e), inasmuch as the administrative law judge found that claimant had demonstrated changed circumstances of employment. We disagree. Although employer has not challenged the administrative law judge's findings pursuant to Section 718.204(e) on appeal, and these findings are hereby affirmed as they are based on substantial evidence, claimant must first establish total disability pursuant to the methods set forth at Section 718.204(c), and must also establish that this disability is due to pneumoconiosis pursuant to Section 718.204(b), before the provisions of Section 718.204(e) are applicable. See Mazgaj v. Valley Camp Coal Co., 9 BLR 1-201, 1-204 (1986). We cannot affirm, however, the administrative law judge's findings pursuant to Section 718.204(c)(4). The administrative law judge determined that total disability could be inferred by comparing Dr. Seargeant's assessment of physical limitations with the exertional requirements of claimant's usual coal mine employment. Order on Claimant's Motion for Reconsideration at 4, 5; Director's Exhibit 6; see Gee v. W.G. Moore and Sons, 9 BLR 1-4 (1986). Nevertheless, while noting that Drs. Hall, Bruton and Hudson offered no opinion as to the degree of the miner's disability and thus concluding that their opinions were not probative evidence of total disability pursuant to Section 718.204(c), the administrative law judge concluded that claimant had failed to establish total disability by a preponderance of the evidence. This finding by the administrative law judge cannot be affirmed, as the administrative law judge appears to have credited the opinions of Drs. Hall, Bruton and Hudson as contrary probative evidence. As the opinions of Drs. Hall, Bruton and Hudson were not relevant to a determination of whether claimant suffers a totally disabling respiratory or pulmonary impairment, the administrative law judge could not rationally weigh those opinions against the opinion of Dr. Seargeant in concluding that claimant failed to establish total disability. Moreover, as employer additionally notes, the administrative law judge did not weigh all of the probative evidence on this issue, specifically the consultative opinion of Dr. Anderson, who concluded that claimant had no pulmonary disability and could perform underground or surface mining activities. See Employer's Exhibit 2. Consequently, we vacate the administrative law judge's findings pursuant to Section 718.204(c)(4), and remand this case

¹ The administrative law judge's findings pursuant to Sections 718.202(a)(1), and 718.305(b), his finding that the evidence was insufficient to establish total disability pursuant to Section 718.204(c)(1) - (c)(3), and his findings with regard to the length of coal mine employment, are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

for the administrative law judge to reconsider the evidence thereunder, and determine whether claimant has established total disability due to pneumoconiosis pursuant to Section 718.204(b) and (c). See Adams v. Director, OWCP, 806 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195 (1986).

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ERIC FEIRTAG
Administrative Law Judge