

BRB Nos. 89-3124 BLA
and 89-3124 BLA-A

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

Appeal of the Decision and Order on Remand of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

David O. Kelley, Boonville, Indiana, for claimant.

W. C. Blanton and James F. Bleeke (Ice Miller Donadio & Ryan), Indianapolis, Indiana, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (83-BLA-0210) of Administrative Law Judge Robert L. Hillyard 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 credited claimant with twenty-nine years

of qualifying coal mine employment, and found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), and total disability pursuant to 20 C.F.R. §718.204(c).¹ Accordingly, benefits were awarded.

On appeal, the Board affirmed the administrative law judge's exclusion of post-hearing evidence from the record pursuant to 20 C.F.R. §725.456(b), his findings pursuant to Sections 718.202(a)(4) and 718.203(b), and his findings regarding the length of coal mine employment, but vacated his finding of total disability and remanded this case for the administrative law judge to weigh all relevant probative evidence together, like and unlike, pursuant to Section 718.204(c). The Board further instructed the administrative law judge to consider the applicability of the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, which would be determinative of the necessity of considering whether claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). *Bailey v. Peabody Coal Co.*, BRB No. 86-212 BLA (April 27, 1988) (unpublished).

On remand, the administrative law judge found that claimant was not entitled to the presumption at Section 718.305, and further found that the evidence was insufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204.² Consequently, the administrative law judge denied benefits.

¹ The administrative law judge also issued an Order Denying Motion for Reconsideration on January 8, 1986, rejecting employer's arguments that the administrative law judge abused his discretion in refusing to admit post-hearing evidence into the record.

² The administrative law judge did not explicitly determine whether the evidence established the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c); rather, the administrative law judge found that claimant was totally disabled, but that his disability was not caused by pneumoconiosis pursuant to Section 718.204(b). Decision and Order on Remand at 5.

In the instant appeal, claimant challenges the administrative law judge's findings pursuant to Sections 718.204(b), (c)(1) and (c)(4), and his finding that claimant is not entitled to the presumption at Section 718.305. Employer responds, urging affirmance, and in a cross-appeal challenges the administrative law judge's findings pursuant to Section 718.202(a)(1) and his refusal to admit post-hearing evidence into the record. 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Turning first to the issues raised in employer's cross-appeal, we decline to address employer's specific arguments regarding the administrative law judge's weighing of the x-ray evidence pursuant to Section 718.202(a)(1) and his exclusion of post-hearing evidence pursuant to Section 725.456(b), inasmuch as the Board previously affirmed the administrative law judge's findings thereunder and no exception to the law of the case doctrine has been demonstrated. See *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

Turning next to the issue of total disability pursuant to Section 718.204(c), claimant asserts that the administrative law judge's weighing of the evidence at subsections (c)(1) and (c)(4) on remand was inconsistent with his original findings which were approved by the Board, and that the administrative law judge provided an inadequate rationale for the change in weight assigned to the evidence on remand. We agree. In his initial Decision and Order, the administrative law judge found that Dr. Calhoun's pulmonary function study of November 5, 1984 was conforming and sufficient to establish total disability at Section 718.204(c)(1), while on remand the administrative law judge questioned the validity of the study because its values were lower than Dr. Howard's earlier nonqualifying study.³ See Decision and Order at 9, 10; Decision and Order on Remand at 4; Director's Exhibits 10, 12, 23; Claimant's Exhibit 2. The administrative law judge, however, did not explain why he accorded greater weight to Dr. Howard's study. The administrative law judge also originally accorded determinative weight to the opinion of Dr. Calhoun that claimant

³ A "qualifying" pulmonary function study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix B. A "nonqualifying" study yields values that exceed those values.

was totally disabled due to pneumoconiosis, as he found that the opinion was reasoned, documented and based on the most recent examination and testing of claimant, whereas on remand the administrative law judge discounted Dr. Calhoun's opinion "because of his lack of reasoning" and because it was based in part upon unreliable studies. The administrative law judge instead relied on the opinions of Drs. Wilhelmus and Howard that claimant did not have pneumoconiosis but was disabled by other causes, as he found these opinions reasoned and supported by the objective medical evidence. See Decision and Order at 10; Decision and Order on Remand at 6; Director's Exhibits 12, 23; Claimant's Exhibit 1. The administrative law judge, however, failed to address and weigh the opinion of Dr. Long that the pulmonary function study results obtained by Drs. Wilhelmus and Howard were invalid. See Director's Exhibits 9, 11, 24, 28. Inasmuch as the administrative law judge did not address all relevant evidence and provide valid reasons for the disparities between the original Decision and Order and the Decision and Order on Remand, we must vacate his findings pursuant to Section 718.204(c), and again remand this case for the administrative law judge to reconsider the evidence thereunder and determine whether it is sufficient to establish a totally disabling respiratory impairment. See *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Claimant also challenges the administrative law judge's finding that because claimant produced no evidence as to the working conditions in an underground mine, no comparison could be made with the conditions prevailing in claimant's strip mine employment, and thus claimant was not entitled to the presumption at Section 718.305. We note that subsequent to our issuance of *Bailey, supra*, the United States Court of Appeals for the Seventh Circuit, wherein appellate jurisdiction of this claim lies, held that in order to qualify for the presumption at Section 718.305, a surface miner must establish that he was exposed to sufficient coal dust in his surface mine employment, but he does not bear the additional burden of proving what conditions prevail in an underground mine. *Director, OWCP v. Midland Coal Co.*, 855 F.2d 509 (7th Cir. 1988) *remanding Leachman v. Midland Coal Co.*, 10 BLR 1-79 (9187). Since the record reflects evidence of the surface mining conditions under which claimant worked, we vacate the administrative law judge's findings pursuant to Section 718.305. On remand, if the administrative law judge finds total disability established pursuant to Section 718.204(c), he must weigh the evidence and make a factual finding regarding substantial similarity of conditions based on his expertise and appropriate objective factors, by comparing the surface mining conditions established by the evidence to conditions known to prevail in underground mines. *Id.* If the administrative law judge finds the evidence sufficient to establish substantial similarity of conditions, claimant is entitled to the presumption at Section 718.305, and the administrative law judge must then determine whether employer has established rebuttal of that presumption. See

Alexander v. Island Creek Coal Co., 12 BLR 1-44 (1988); *Defore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987). If claimant is not entitled to the presumption at Section 718.305, the administrative law judge must determine whether claimant's pneumoconiosis is a contributing cause of his disability. See *Collins v. Director, OWCP*, 932 F.2d 1191, 15 BLR 2-108 (7th Cir. 1991); *Hawkins v. Director, OWCP*, 906 F.2d 697, 14 BLR 2-17 (7th Cir. 1990); *Shelton v. Director, OWCP*, 899 F.2d 630, 13 BLR 2-444 (7th Cir. 1990).

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge