BRB No. 96-1460 BLA

JACKIE H. BUTLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	DATE ISSUED:
Employer-Petitioner	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-In-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

William D. Turner (Crandall, Pyles & Haviland), Lewisburg, West Virginia, for claimant.

Curtis D. McKenzie (Arter & Haden), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (95-BLA-1276) of Administrative Law Judge Mollie W. Neal awarding 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 found that the parties stipulated that employer is the responsible operator and that the miner established at least twenty-three years of qualifying coal mine employment and that claimant[1] invoked the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly,

[1]Claimant is Jackie H. Butler, the miner, who filed a claim for benefits on May 4, 1994. Director's Exhibit 1.

benefits were awarded. On appeal, employer contends that the administrative law judge erred in failing to weigh all of the evidence of record pursuant to Section 718.304. Employer responds urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate on 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 Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements compels a denial of benefits. *See Anderson*, *supra*; *Baumgartner*, *supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Section 718.202(a)(3) contains the presumption found in Section 718.304, implementing Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Through this section, claimant can meet the burden of establishing that he has pneumoconiosis by producing medical evidence of complicated pneumoconiosis and thereby gaining an irrebuttable presumption of total disability due to pneumoconiosis. *See generally Trent v. Director, OWCP*, 11 BLR 1-26 (1987). This burden may be met with x-ray or biopsy evidence showing one or more large opacities greater than one centimeter in diameter. *Handy v. Director, OWCP*, 16 BLR 1-73 (1990); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988).

Employer's contention that the administrative law judge erred in failing to consider the pathology reports, CT scan reports and independent medical evaluations indicating that claimant does not have complicated pneumoconiosis has merit. Employer's Brief at 2-19. In considering the x-ray evidence pursuant to Section 718.304, the administrative law judge found that, based on four interpretations of x-rays taken in 1994, which show category 3 pneumoconiosis with either size A or B large opacities, claimant established the existence of complicated pneumoconiosis and successfully invoked the irrebuttable presumption of

[2]We affirm the administrative law judge's findings regarding the miner's coal mine employment and employer's status as the responsible operator as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

total disability due to pneumoconiosis. Decision and Order at 4-5. The record however contains medical opinion, biopsy, and CT scan evidence contrary to the administrative law judge's finding that claimant has complicated pneumoconiosis, that the administrative law judge failed to consider pursuant to Section 718.304 (b) and (c). Employer's Exhibits 5-9.

The Board, based on the express language of the Act as set forth at 30 U.S.C. §923(b) and *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), has held that Section 718.304(a)-(c) does not provide alternative means of establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis, but rather requires the administrative law judge to first evaluate the evidence in each category, and then weigh together the categories at Section 718.304(a), (b) and (c) prior to invocation. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(en banc). Because the administrative law judge did not consider all of the relevant evidence of record, we vacate the administrative law judge's finding that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304 and remand the case for the administrative law judge to consider all of the relevant evidence of record pursuant to Section 718.304. *See Melnick, supra; Brewster v. Director, OWCP*, 7 BLR 1-120 (1984); *Ridings v. C & C Coal Co., Inc.*, 6 BLR 1-227 (1983). Further, if the administrative law judge, on remand, finds that claimant fails to invoke the presumption at Section 718.304, the administrative law judge must then determine whether claimant establishes total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202, 718.203, 718.204. *See Anderson*, *supra*; *Baumgartner*, *supra*.

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated 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