

BRB No. 89-0111 BLA

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| EVA R. BARBER (Widow of )       | ) |                    |
| LAWRENCE A. BARBER, JR.)        | ) |                    |
|                                 | ) |                    |
| Claimant-Respondent             | ) |                    |
|                                 | ) |                    |
| v.                              | ) |                    |
|                                 | ) |                    |
| U.S. STEEL CORPORATION          | ) |                    |
|                                 | ) |                    |
| Employer-Petitioner )           | ) |                    |
|                                 | ) |                    |
| DIRECTOR, OFFICE OF WORKERS'    | ) |                    |
| COMPENSATION PROGRAMS, UNITED ) | ) |                    |
| STATES DEPARTMENT OF LABOR )    | ) |                    |
|                                 | ) |                    |
| Respondent                      | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of John H. Bedford, Administrative Law Judge, United States Department of Labor.

Howard G. Salisbury, Jr. (Kay, Casto, Chaney, Love & Wise), Charleston, West Virginia, for employer.

Nicholas J. Levintow (Robert P. Davis, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Jeffrey J. Bernstein, 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 and McGRANERY, Administrative Appeals Judges, and AMERY, Administrative Law Judge.\*

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (87

\*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).

-BLA-3230 of Administrative Law Judge John H. Bedford, awarding benefits on a miner's claim and denying benefits on a survivor's 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 both the miner's and survivor's claims

pursuant to the provisions of 20 C.F.R. Part 718, and credited the miner with twenty-four years and two months of qualifying coal mine employment. The administrative law judge found that the transfer provisions of 20 C.F.R. §725.496 were inapplicable to these claims, and thus concluded that employer was the responsible operator. The administrative law judge further found that the evidence established the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(1) and 718.203(b), and established total disability under 20 C.F.R. §718.204(c)(1) and (c)(2). Accordingly, benefits were awarded on the miner's claim. The administrative law judge additionally found, however, that the evidence was insufficient to establish death due to pneumoconiosis with respect to the survivor's claim pursuant to 20 C.F.R. §718.205(c). Consequently, benefits were denied on the survivor's claim. Employer appeals, contending that liability in this case was properly transferable to the Black Lung Disability Trust Fund (Trust Fund) under Section 725.496, and that the evidence, when taken as a whole, is insufficient to establish the existence of pneumoconiosis on the miner's claim. The Director, Office of Workers' Compensation Programs (the Director), responds solely on the issue of employer's liability, urging affirmance. Claimant has not participated in this appeal.<sup>1</sup>

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

Initially we note that no one has challenged the administrative law judge's finding that claimant failed to establish death due to pneumoconiosis and thus failed to establish entitlement to benefits on the claim filed by the surviving spouse. We therefore affirm the findings under 20 C.F.R. §718.205(c). See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

In order to establish entitlement to benefits on the miner's claim under 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that the miner was totally disabled due to pneumoconiosis arising out of

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<sup>1</sup> The administrative law judge's findings under 20 C.F.R. §§718.203(b), 718.205(c), and with regard to length of coal mine employment are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

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).

Employer first contends that the administrative law judge erred in failing to transfer liability for payment of benefits on the miner's claim to the Trust Fund under Section 725.496. We disagree. In order for a claim filed with and denied by the Social Security Administration (SSA) prior to March 1, 1978 to qualify for transfer, a request must have been made for Section 435 review of the miner's original claim, and such claim must be approved under the provisions of Section 435 of the Act. 30 U.S.C. §945; 20 C.F.R. §725.496(d). Claimant must, therefore, have filed a valid election card requesting Section 435 review within six months of notification, unless good cause for failure to timely respond is established. 20 C.F.R. §410.704(d). Employer concedes that an election card was mailed to the miner, but argues that the miner did not receive it and therefore never had an opportunity to elect review of his denied Part B claim. However, the administrative law judge reasonably found that the miner received an election card but failed to complete it, thus precluding transfer, relying on the notation "Election Review card never completed and sent to SSA, therefore, requesting to file new claim" contained in the miner's second claim filed on September 30, 1980. Decision and Order at 7; Director's Exhibit 1. See 20 C.F.R. §§410.704(d), 725.496(d); Chadwick v. Island Creek Coal Co., 8 BLR 1-447 (1986); Bolling v. Old Ben Coal Co., 8 BLR 1-133, 1-135 (1985). The administrative law judge's findings and inferences are rational and supported by substantial evidence, and we may not substitute our judgment for his.<sup>2</sup> See Anderson, supra. We therefore affirm the administrative law judge's findings under Section 725.496.

Next, employer maintains that the evidence taken as a whole is insufficient to establish the existence of pneumoconiosis by a preponderance of the evidence under 20 C.F.R. §718.202(a). Employer concedes that the x-ray evidence would establish the existence of pneumoconiosis under Section 718.202(a)(1), but contends that the negative autopsy evidence is more probative and notes that the administrative law judge found that the evidence under 20 C.F.R. §718.202(a)(2) - (a)(4) did not establish the existence of pneumoconiosis. Decision and Order at 7, 8. However, Section

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<sup>2</sup> A review of the record indicates that the miner consulted an attorney prior to filing his 1980 claim for benefits. See Director's Exhibit 53 at 4-5. In signing the claim form, the miner certified that the information contained therein was true and correct. See Director's Exhibit 1.

718.202(a) provides four alternative methods whereby a claimant may establish the existence of pneumoconiosis, and the establishment of pneumoconiosis under any one of the four methods obviates the need to do so under any of the other methods. See Dixon v. North Camp Coal Co., 8 BLR 1-344 (1985). As the administrative law judge's findings under Section 718.202(a)(1) are based on substantial evidence and are unchallenged on appeal, we hereby affirm them. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

Finally, employer challenges the administrative law judge's findings under 20 C.F.R. §718.204, arguing that the evidence of record, reviewed as a whole, fails to establish total disability due to pneumoconiosis. The administrative law judge found that claimant established total disability on the miner's claim based on the pulmonary function study results under 20 C.F.R. §718.204(c)(1) and the blood gas study results under 20 C.F.R. §718.204(c)(2). However, the administrative law judge failed to address and weigh the contrary probative evidence of record. Consequently, we vacate the administrative law judge's findings under Section 718.204, and remand the case for the administrative law judge to weigh all probative evidence together, like and unlike, in determining whether claimant has established a totally disabling respiratory or pulmonary impairment under Section 718.204(c). See Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); Rafferty v. Jones & Laughlin Steel Corp., 9 BLR 1-231 (1987); Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195 (1986). If on remand the administrative law judge finds total disability established under Section 718.204(c), he must then separately determine whether the miner's disability was due to pneumoconiosis under 20 C.F.R. §718.204(b), pursuant to the standard enunciated in Scott v. Mason Coal Co., 14 BLR 1-37 (1990)(en banc).

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

SO ORDERED.

JAMES F. BROWN  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

ROBERT S. AMERY  
Administrative Law Judge