

BRB No. 97-1177 BLA

WEDO SCICCHITANO)
)
 Claimant-Respondent)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Petitioner) DECISION and ORDER

Appeal of the Decision and Order of Ainsworth H. Brown,
Administrative Law Judge, United States Department of Labor.

Sarah M. Hurley (Marvin Krislov, Deputy Solicitor of Labor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (96-BLA-01606) of Administrative Law Judge Ainsworth H. Brown 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 credited claimant with five years and three months of coal mine employment, and based on the filing date, adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1) and 718.203(c). He concluded at the hearing that the Director had conceded the issue of the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c) and

that the evidence of record was sufficient to demonstrate that claimant's totally disabling respiratory impairment was due to pneumoconiosis at 20 C.F.R. §718.204(b). Accordingly, benefits were awarded. On appeal, the Director challenges the finding of the administrative law judge that the Director conceded the issue of total disability and the findings of the administrative law judge at 20 C.F.R. §§718.203(c) and 718.204(b). Claimant does not participate 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Initially, the Director challenges the finding of the administrative law judge that the issue of total disability at Section 718.204(c) was conceded by the district director when this claim was administratively denied. The record reveals that the district director denied this claim by letter dated April 3, 1996, on the grounds that the evidence does not show: that claimant has pneumoconiosis; that the disease was caused in part by his coal mine employment; and that claimant was totally disabled by the disease. See Director's Exhibit 18. To this letter, the district director attached form CM-998, in which she advised claimant that the pulmonary function study performed on February 6, 1996 met the regulatory total disability standards and that the blood gas study performed on December 5, 1995 did not meet these disability standards. *Id.* At the bottom of the page of form CM-998 the district director states that "[a]lthough the results of the breathing test and/or blood gas test

¹ We affirm the findings of the administrative law judge on the length of coal mine employment and the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

meet the disability standards described above, the evidence does not establish that your impairment was caused by black lung disease.” *Id.* In addition to this form, the district director attached to the denial letter a form captioned “Guidance for Submitting Evidence”, and on page 2, marked the proof of total disability box which outlines four categories for establishing total disability and notes at the bottom of the page that a reasoned medical opinion addressing all issues was needed. *Id.* When this case was referred to the Office of Administrative Law Judges for a hearing, the Director listed total disability as one of the challenged issues on the list of contested issues. See Director’s Exhibit 45. Based on the attachments to the denial letter, the administrative law judge concluded that:

“Although there wasn’t a specific agreement or concession by the district director, from a *de facto* standpoint, … the issue of total disability was resolved.” Hearing Transcript at 23.

We hold that substantial evidence does not support the administrative law judge’s finding that the Director conceded the issue of total disability. The Director is not bound by the findings of the district director once the case has been transferred to the Office of Administrative Law Judges, if, as the record indicates, the Director lists total disability as a contested issue. Director Exhibit 45; see 20 C.F.R. §§725.421, 725.450, 725.451; see generally 20 C.F.R. §725.463; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Since the Director identified total disability as a contested issue when this case was referred for hearing, the administrative law judge must fully consider the challenged issue. See 20 C.F.R. §§725.421(b)(7), 725.463(a); *Mullins v. Director, OWCP*, 11 BLR 1-132 (1988)(*en banc*, Ramsey, C.J., dissenting); *Oggero, supra*; see also *Kott v. Director, OWCP*, 17 BLR 1-9 (1992); Director’s Exhibit 45. We, therefore, vacate the findings of the administrative law judge at Section 718.204(c) and remand this case for the administrative law judge to consider the issue of the presence of a totally disabling respiratory impairment. In addition, the administrative law judge must reconsider his decision to deny the Director’s Motion to Compel Physical Examination and to exclude the report of Dr. Michos addressing the validity of the November 21, 1996 pulmonary function study, since these decisions were premised on the belief that total disability was not at issue. The Director also contends that the administrative law judge’s rulings on these requests prevented him from presenting evidence relevant to the issues of the cause of pneumoconiosis at Section 718.203(c) and the cause of total disability at Section 718.204(b). We agree.

The Director argues further that the administrative law judge failed to provide a reasoned rationale for his finding at Section 718.203(c). The Director specifically asserts that the administrative law judge’s analysis fails to comply with the

requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). We agree. The administrative law judge stated that Dr. Kraynak was the only physician whose medical opinion addressed whether claimant's pneumoconiosis arose out of coal mine employment and that "since his conclusion is not inherently defective it is controlling in this record." Decision and Order at 6. Since the APA requires the administrative law judge to make specific findings of fact and conclusions of law regarding the validity of medical opinion evidence, this brief statement of the administrative law does not comply with the APA. *Id.*; see *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, vacate the findings of the administrative law judge at 20 C.F.R. §§718.203(c) and 718.204(b) and remand this case for the administrative law judge to consider all relevant evidence and to determine whether Dr. Kraynak's medical opinion is reasoned, and, therefore, sufficient to establish that claimant has met his burden of proving that his pneumoconiosis arose out of his coal mine employment and that he is totally disabled due to pneumoconiosis. *Wojtowicz, supra*.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is 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 JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGANERY
Administrative Appeals Judge