

BRB No. 98-1052 BLA

MARTHA J. LEWIS)		
(Widow of RANSOM LEWIS))		
)		
Claimant-Petitioner))	
)		
v.)		
)		
KENTUCKY MOUNTAIN)	DATE	ISSUED:
COAL COMPANY)		
)		
and)		
)		
LIBERTY MUTUAL INSURANCE)		
COMPANY)		
)		
Employer/Carrier-)		
Respondents)		
)		
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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Deron L. Johnson (Boehl, Stopher and Graves), Prestonsburg, Kentucky, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (94-BLA-1715) of Administrative Law Judge Ralph A. Romano (the administrative law judge) 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 involving a 1992 survivor's claim is before the Board for the second time. In the initial decision, the administrative law judge, after crediting the miner with twenty-three years of coal mine employment, found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits. By Decision and Order dated November 25, 1997, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Lewis v. Kentucky Mountain Coal Co.*, BRB No. 97-0344 BLA (Nov. 25, 1997) (unpublished). Inasmuch as claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), the Board held that the administrative law judge properly denied survivor's benefits under 20 C.F.R. Part 718. *Id.* The Board, however, remanded the case to the administrative law judge to determine whether claimant was entitled to have her survivor's claim considered under 20 C.F.R. Part 727. *Id.*

¹Claimant is the surviving spouse of the deceased miner who died on April 23, 1992. Director's Exhibit 7.

On remand, the administrative law judge found that inasmuch as the miner's claim was in payment status at the time the miner died,² claimant was entitled to benefit from the filing date of the miner's claim, March 11, 1976. The administrative law judge, therefore, found that claimant was entitled to have her survivor's claim considered pursuant to 20 C.F.R. Part 727. The administrative law judge, however, found that claimant was not entitled to invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(5). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.³

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a);

²The miner filed a claim for benefits on March 11, 1976. Director's Exhibit 19. In the initial decision, Administrative Law Judge George G. Pierce found that the miner was not entitled to invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2) and (3). *Id.* However, Judge Pierce found that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and (a)(4). *Id.* Judge Pierce further found that employer failed to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1)-(4). *Id.* Accordingly, Judge Pierce awarded benefits. *Id.* By Decision and Order dated February 26, 1992, the Board affirmed Judge Pierce's findings pursuant to 20 C.F.R. §727.203(a)(2), (a)(3) and (b)(1) as unchallenged on appeal. *Lewis v. Kentucky Mountain Coal Co.*, BRB No. 88-0868 BLA (Feb. 26, 1992) (unpublished). The Board, however vacated Judge Pierce's findings pursuant to 20 C.F.R. §727.203(a)(1), (a)(4) and (b)(2)-(4) and remanded the case for further consideration. *Id.*

In a Decision and Order on Remand dated April 16, 1992, Administrative Law Judge David A. Clarke, Jr. found that the evidence was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and (4). Director's Exhibit 19. Judge Clarke further found that the miner was not entitled to benefits under 20 C.F.R. Part 718. *Id.* Accordingly, Judge Clarke denied benefits. *Id.* There is no indication that claimant took any further action in regard to the miner's 1976 claim.

³Inasmuch as no party challenges the administrative law judge's finding pursuant to 20 C.F.R. §727.203(a)(5), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

Claimant argues that the administrative law judge erred in finding the x-ray evidence insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). In his consideration of whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge permissibly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. See *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order on Remand at 4. The administrative law judge noted that Dr. Brandon, a B reader and Board-certified radiologist, interpreted claimant's July 19, 1983 x-ray as positive for pneumoconiosis. Director's Exhibit 19. However, two equally qualified physicians, Drs. Quillin and Cole, interpreted this same x-ray as negative for pneumoconiosis. *Id.* The remaining x-ray interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists, are either negative for pneumoconiosis or are classified as unreadable.⁴ Director's Exhibit 19. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1).

Claimant also contends that the administrative law judge erred in finding the

⁴The record contains only two other positive x-ray interpretations. Dr. Becknell, whose radiological qualifications are not found in the record, interpreted the miner's June 14, 1976 x-ray as positive for pneumoconiosis. Director's Exhibit 19. Drs. Quillin and Pendergrass, each of whom is dually qualified as a B reader and Board-certified radiologist, interpreted this x-ray as negative for pneumoconiosis. *Id.* Dr. Proto, a similarly qualified physician, classified this x-ray as unreadable. *Id.* Three other physicians, Drs. Kelly, Wiot and Felson, also interpreted the miner's June 14, 1976 x-ray as negative for pneumoconiosis. *Id.*

Dr. Clarke, whose radiological qualifications are not found in the record, interpreted the miner's June 5, 1979 x-ray as positive for pneumoconiosis. Director's Exhibit 19. However, Drs. Quillin, Proto and Cole, each of whom is dually qualified as a B reader and Board-certified radiologist, classified this x-ray as unreadable. *Id.* Drs. Broudy, Wiot, and Felson also classified this x-ray as unreadable. *Id.*

The miner's March 29, 1980 x-ray was uniformly interpreted as negative for pneumoconiosis. Director's Exhibit 19. Drs. O'Neill, Quillin, Broudy, Hayes, Pendergrass and Cole each interpreted this x-ray as negative for pneumoconiosis. *Id.*

pulmonary function study evidence insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2). In his consideration of whether the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2), the administrative law judge stated:

In the Board's Decision and Order issued on February 26, 1992, Administrative Law Judge George G. Pierce's determination that the miner failed to invoke the interim presumption pursuant to §727.203(a)(2) and (3) was affirmed. There is no additional evidence in the widow's claim to be reviewed under these parts. Upon review of Judge Pierce's summary of the evidence and findings under §727.203(a)(2) and (3), I find his conclusions supported by the evidence of record and hereby adopt his findings as they pertain to §727.203(a)(2) and (3). Therefore, Claimant has failed to invoke the interim presumption pursuant to §727.203(a)(2) and (3).

Decision and Order on Remand at 4-5.

Claimant argues that the administrative law judge failed to adequately discuss the miner's four qualifying pulmonary function studies conducted on June 14, 1976, June 5, 1979, May 15, 1980 and May 29, 1980. Claimant further argues that the administrative law judge erred "by not fully detailing his rationale for finding that the claimant had failed to invoke the interim presumption at Section 727.203(a)(2)." Claimant's Brief at 5. Contrary to claimant's contention, the administrative law judge clearly explained that he adopted Judge Pierce's finding that the pulmonary function study evidence was insufficient to establish invocation pursuant to 20 C.F.R. §727.203(a)(2). Judge Pierce's reasoning is found in his February 2, 1988 Decision and Order, a copy of which is contained in the record.⁵ See Director's Exhibit 19.

⁵In his consideration of the pulmonary function study evidence of record, Judge Pierce considered five pulmonary function studies dated June 14, 1976, June 5, 1979, May 15, 1980, May 29, 1980 and July 19, 1983. Director's Exhibit 19. Judge Pierce found that the miner's May 29, 1980 and July 19, 1983 pulmonary function studies were non-conforming. *Id.* Judge Pierce further stated that:

Dr. Kraman found the June 1979 study unacceptable due to variable effort; Dr. O'Neill considered the May 29, 1980 study probably invalid due to inadequate effort and stated that only 2 MVV attempts were made, and found the June 1979 study invalid due to failure to correct for temperature, variable effort on the FEV1, and inadequate duration of the MVV and the June 1976 study invalid due to inadequate effort; Dr. Anderson found the May 15, 1980 study unreportable due to

Claimant does not argue that Judge Pierce erred in finding that the pulmonary function study evidence was insufficient to establish total disability pursuant to 20 C.F.R. §727.203(a)(2).⁶ Consequently, we affirm the administrative law judge's

lack of cooperation, and Dr. Becknell noted poor effort on the June 1976 study. Dr. Kraman validated the July 1983 study, but it is non-conforming for lack of MVV values.

In light of the criticisms made of the only qualifying and conforming studies, it is unclear whether they validly measure the amount of the Claimant's pulmonary disability. I find, therefore, that the Claimant has not invoked the interim presumption by this method.

Judge Pierce's February 2, 1988 Decision and Order at 8 (Exhibit numbers omitted).

⁶The validity of each of claimant's four qualifying pulmonary function studies was questioned by either the administering physician or by reviewing physicians. The miner's June 14, 1976 qualifying pulmonary function study was conducted in association with Dr. Becknell's examination. Director's Exhibit 19. Claimant's effort was noted to be poor. *Id.* In addition, Dr. O'Neill invalidated the miner's June 14, 1976 study due to inadequate effort. *Id.*

The miner's June 5, 1979 qualifying pulmonary function study was conducted in association with Dr. Clarke's examination. Director's Exhibit 19. Dr. Kraman invalidated the miner's June 5, 1979 pulmonary function study because of less than optimal effort, cooperation and comprehension. *Id.* Dr. O'Neill also invalidated the miner's June 5, 1979 pulmonary function study, noting that the FVC/FEV1 curves showed an irregular and inconsistent expiratory flow and variability between the curves in excess of five percent. *Id.*

The miner's May 15, 1980 qualifying pulmonary function study was conducted in association with Dr. Anderson's examination. Director's Exhibit 19. Claimant was noted to be uncooperative during the administration of the study. *Id.* During a July 7, 1980 deposition, Dr. Anderson explained that the miner did not provide sufficient cooperation to produce reportable results. *Id.*

The miner's May 29, 1980 qualifying pulmonary function study was conducted in association with Dr. O'Neill's examination. Director's Exhibit 19. During a July 9, 1980 deposition, Dr. O'Neill indicated that although his technician stated that the miner's cooperation during the May 29, 1980 pulmonary function study was good, his own interpretation of the curves, particularly the MVV curves, indicated that there was not a maximal effort. *Id.* Dr. O'Neill noted that the three individual MVV curves

finding that claimant failed to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2).

were all distinctly different, suggesting a lack of effort. *Id.* In a report dated August 15, 1983, Dr. O'Neill noted that the miner's May 29, 1980 pulmonary function study was probably invalid due to inadequate effort. *Id.*

Claimant further contends that the administrative law judge erred in finding the arterial blood gas study evidence insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(3). In his consideration of whether the evidence was sufficient to establish invocation presumption pursuant to 20 C.F.R. §727.203(a)(3), the administrative law judge adopted Judge Pierce's earlier finding that the arterial blood gas study evidence of record was insufficient to establish invocation pursuant to 20 C.F.R. §727.203(a)(3). Decision and Order on Remand at 5. Inasmuch as Judge Pierce found that all of the arterial blood gas studies of record were non-qualifying, he found that this evidence was insufficient to establish invocation pursuant to 20 C.F.R. §727.203(a)(3). Judge Pierce's February 2, 1988 Decision and Order at 9. Claimant does not argue that Judge Pierce erred in finding that the arterial blood gas study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §727.203(a)(3). Consequently, we affirm the administrative law judge's finding that claimant failed to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(3).⁷

⁷Judge Pierce, at the time of his February 2, 1988 Decision and Order, correctly noted that all of the arterial blood gas studies of record were non-qualifying. Director's Exhibit 19. Specifically, the miner's arterial blood gas studies conducted on April 30, 1979, May 15, 1980, May 29, 1980 and July 19, 1983 are all non-qualifying. *Id.*

We note that the record contains the results of arterial blood gas studies conducted on August 15, 1991, August 16, 1991, August 22, 1991 and April 15, 1992. Director's Exhibit 9. These studies were conducted subsequent to the issuance of Judge Pierce's February 2, 1988 Decision and Order. However, inasmuch as each of these studies is non-qualifying, the administrative law judge's failure to address these studies is harmless. See *Larioni v. Director, OWCP*, 6 BLR

Claimant also argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(4). Claimant specifically argues that the administrative law judge erred in finding the opinions of Drs. Pellegrini and Clarke insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(4). The administrative law judge noted that he adopted Judge Clarke's reasons for finding the opinions of Drs. Pellegrini and Clarke insufficient to establish invocation pursuant to 20 C.F.R. §727.203(a)(4). Decision and Order on Remand at 5. Judge Clarke's reasoning is found in his April 16, 1993 Decision and Order on Remand, a copy of which is contained in the record. See Director's Exhibit 19.

Judge Clarke noted that Dr. Pellegrini indicated that he considered the miner “totally and permanently disabled from mining or further exposure to coal, sand, or rock dust which might continue to impair his pulmonary function.” Director’s Exhibit 19. Judge Clarke found that this statement was vague because it was unclear whether Dr. Pellegrini believed that claimant was totally disabled from all work in the mines or whether he merely believed that claimant retained the capacity to work, but should not subject himself to further exposure. *Id.* Judge Clarke permissibly accorded little weight to Dr. Pellegrini’s opinion. A medical opinion that merely advises against returning to work in a dusty environment is insufficient to establish a totally disabling respiratory or pulmonary impairment. See *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83 (1988).

However, Judge Clarke committed several errors in his consideration of the other medical opinion evidence pursuant to 20 C.F.R. §727.203(a)(4). Specifically, Judge Clarke accorded little weight to Dr. Clarke’s opinion because he found that the issue was whether the miner had the physical capacity to perform his coal mine work, not whether the miner should work in a dusty environment. Director’s Exhibit 19. Dr. Clarke, however, clearly opined that claimant was permanently and totally disabled for all work in a dusty environment and all manual labor due to his pneumoconiosis. Director’s Exhibit 19. Contrary to Judge Clarke’s assessment, Dr. Clarke’s opinion supports a finding that the miner suffered from a totally disabling respiratory or pulmonary impairment.

1-1276 (1984).

Moreover, the administrative law judge adopted several of Judge Clarke's mischaracterizations of the evidence. For example, like Judge Clarke, the administrative law judge stated that the "majority of physicians, Drs. Becknell, Anderson, O'Neill, Broudy, and Lane, are of the opinion that the miner had little or no respiratory impairment." Decision and Order on Remand at 5. While the opinions of Drs. Becknell and O'Neill indicate that claimant did not suffer from a totally disabling respiratory impairment, the opinions of Drs. Anderson and Broudy do not. A respiratory or pulmonary impairment adequate to establish invocation under subsection (a)(4) is not limited to impairments caused by pneumoconiosis. See *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). While Dr. Anderson opined that claimant did not suffer from any impairment due to his pneumoconiosis, he indicated that the miner's heart disease was responsible for the miner's shortness of breath and was disabling. Director's Exhibit 19. Dr. Broudy clearly opined that the miner did not have the respiratory functional capacity to perform the work of a coal miner or to do similarly arduous manual labor.⁸ *Id.* In light of these errors, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §727.203(a)(4) and remand the case for further consideration.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

⁸We further note that Dr. Lane opined that the miner did not have "any significant pulmonary disability *arising out of his occupation as a coal miner.*" Director's Exhibit 19 (emphasis added). Although Dr. Lane's opinion does not support a finding that the miner suffered from a totally disabling pulmonary impairment, it also does not explicitly rule out the possibility that the miner may have suffered from a pulmonary impairment attributable to a cause other than his coal dust exposure.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge