

BRB No. 00-0366 BLA

MARTHA J. LEWIS)
(Widow of RANSOM LEWIS))
)
 Claimant-Petitioner)
)
 v.)
)
 KENTUCKY MOUNTAIN COAL) DATE ISSUED:
 COMPANY)
)
 and)
)
 LIBERTY MUTUAL INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Gretchen Nunn Gullett (Boehl, Stopher and Graves), Prestonsburg, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Remand (94-BLA-1715) of Administrative Law Judge Ralph A. Romano 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). This case has a lengthy procedural history. In his initial Decision and Order issued on November 5, 1996, the administrative law judge credited the miner with at least twenty-three years of qualifying coal mine employment, and adjudicated the survivor's claim pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and consequently denied benefits. On appeal, the Board affirmed the denial of benefits pursuant to 20 C.F.R. Part 718, but remanded the case to the administrative law judge to determine whether claimant was entitled to consideration of her survivor's claim under the regulations contained in 20 C.F.R. Part 727. *Lewis v. Kentucky Mountain Coal Co.*, BRB No. 97-0344 BLA (Nov. 25, 1997) (unpub.). On remand, in a Decision and Order issued on April 15, 1998, the administrative law judge found that under Section 422(I) of the Act, 30 U.S.C. §932(I), claimant was entitled to consideration of her claim pursuant to the provisions at 20 C.F.R. Part 727. The administrative law judge further found, however, that the evidence was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(5). Accordingly, benefits were denied.

On appeal, the Board affirmed the administrative law judge's findings pursuant to Section 727.203(a)(1)-(3), (5), but vacated his findings pursuant to Section 727.203(a)(4) because they contained mischaracterizations of the evidence, and remanded the case for reconsideration of the medical opinions thereunder. *Lewis v. Kentucky Mountain Coal Co.*, BRB No. 98-1052 BLA (Apr. 27, 1999)(unpub.). On remand, the administrative law judge again found the evidence insufficient to establish invocation pursuant to Section 727.203(a)(4), and consequently denied benefits. In the present appeal, claimant challenges the administrative law judge's findings pursuant to Section 727.203(a)(4). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to participate 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,

¹Claimant is the widow of the deceased miner, Ransom Lewis, who filed a claim for benefits on March 11, 1976. Director's Exhibit 19. The miner died on April 23, 1992, and claimant filed her survivor's claim on May 4, 1992, which was adjudicated separately from the miner's claim. Director's Exhibits 1, 7. In a Decision and Order on Remand issued on April 16, 1993, Administrative Law Judge David A. Clarke, Jr., denied benefits in the miner's claim, from which no further action was taken. Director's Exhibit 19.

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).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish invocation at Section 727.203(a)(4). Specifically, claimant maintains that the administrative law judge did not provide valid reasons for discounting the opinions of Drs. Pellegrini and Clarke, and improperly relied on the opinions of Drs. Broudy and Anderson to defeat invocation when in fact they support invocation. Claimant’s arguments have some merit. While the administrative law judge permissibly gave little weight to the opinion of Dr. Pellegrini on the ground that the physician did not offer an opinion as to whether the miner had the respiratory capacity to perform his usual coal mine employment duties or similar work in the absence of further dust exposure, Decision and Order at 3-5; Claimant’s Exhibit 2; *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), the administrative law judge’s weighing of the remaining medical opinions relevant to subsection (a)(4) invocation cannot be affirmed. In evaluating this evidence, the administrative law judge accorded little weight to the opinion of Dr. Clarke because he found that the physician did not adequately describe whether the miner’s total and permanent disability from all work in a dusty environment was caused by pneumoconiosis or by the miner’s forty-year smoking history, Decision and Order at 4. Contrary to the administrative law judge’s findings, however, Dr. Clarke explicitly stated that the miner was “permanently and totally disabled for all work in a dusty environment and all manual labor due to U.I.C.C. ½ - p-q, pneumoconiosis.” Director’s Exhibit 19. Moreover, the cause of the miner’s disability is not a relevant inquiry at subsection (a)(4) invocation; rather, the sole issue is whether the weight of the evidence establishes the existence of a totally disabling respiratory or pulmonary impairment. In the last appeal, the Board noted that a respiratory or pulmonary impairment adequate to establish invocation under subsection (a)(4) was not limited to impairments caused by pneumoconiosis, *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988), and that the opinions of Drs. Anderson and Broudy could support invocation thereunder. *Lewis*, slip op. at 8 (Apr. 27, 1999)(unpub.). On remand, however, the administrative law judge found the evidence insufficient to establish invocation at Section 727.203(a)(4) after determining that “the reports of Drs. Broudy, Lane and Anderson were consistent with Dr. O’Neill’s opinion that the miner did not have a totally disabling respiratory or pulmonary impairment as a result of his coal mine employment.” Decision and Order at 5. Although the administrative law judge

²Dr. Anderson diagnosed pneumoconiosis and opined that the miner’s heart disease was responsible for the miner’s shortness of breath and was disabling, but concluded that the miner did not suffer from any impairment due to his pneumoconiosis. Director’s Exhibit 19. Dr. Broudy 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, but attributed the miner’s impairment to smoking, and found no pneumoconiosis. Director’s Exhibit 19.

did not mischaracterize these medical opinions, he again included the issue of disability causation within the scope of his inquiry into whether the miner suffered a totally disabling respiratory or pulmonary impairment. Decision and Order at 4-5. We therefore vacate the administrative law judge's findings pursuant to Section 727.203(a)(4), and remand this case for a reevaluation of the evidence thereunder.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge