

BRB Nos. 89-0538 BLA

HERBERT D. MORRIS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
EASTERN ASSOCIATED COAL)	
COMPANY)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

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

James W. McNeely (United Mine Workers of America, District 29), Beckley, West Virginia, for claimant.

Karen S. Rapaport (Arter & Hadden), Washington, D.C., for employer.

Before: STAGE, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order and the Order Denying Reconsideration (86-BLA-2521) of Administrative Law Judge John H. Bedford

denying benefits on a claim filed pursuant to the

*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).

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 this claim pursuant to the provisions of 20 C.F.R. Part 718, and credited claimant with thirty-six years of qualifying coal mine employment. The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), and 718.203(b), but further found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), and consequently denied benefits.

Upon claimant's motion for reconsideration, the administrative law judge reviewed the evidence and acknowledged that a blood gas study submitted with Dr. Buddington's report produced values sufficient to establish total disability pursuant to Section 718.204(c)(2), but found that the contrary probative evidence was entitled to greater weight. Accordingly, benefits were denied. Claimant appeals, challenging the administrative law judge's findings pursuant to Section 718.204(c). Employer responds, urging affirmance. The Director, Office of Workers' Compensation

Programs, has not participated 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 pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of 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).

¹ The administrative law judge's findings pursuant to Sections 718.202 and 718.203(b), and with regard to the length of coal mine employment, are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge mischaracterized the opinion of Dr. Buddington, and thus erred in evaluating the evidence pursuant to Section 718.204(c)(4). See generally Tackett v. Director, OWCP, 7 BLR 1-703 (1985). We agree. The administrative law judge found that the opinion of Dr. Buddington was insufficient to establish total disability pursuant to Section 718.204(c)(4), as the physician did not comment on the extent of claimant's disability. Decision and Order at 4, 6; Order Denying Reconsideration at 1. A review of the record, however, indicates that Dr. Buddington assessed claimant's respiratory impairment as "moderate," and stated that "[t]his degree of impairment indicates the patient does not have dyspnea at rest but may have dyspnea during the usual activities of daily living. The patient may be able to perform some heavy physical labor for brief periods of time with long periods of rest in between." Claimant's Exhibit 1. Claimant notes that an administrative law judge may infer total disability pursuant to Section 718.204(c) by comparing a physician's assessment of impairment with the exertional requirements of a miner's usual coal mine employment. See Nance v. Benefits Review Board, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988); Gee v. W.G. Moore and Sons, 9 BLR 1-4 (1986). Consequently, we must vacate the administrative law judge's findings pursuant to Section 718.204(c)(4), and remand this case for the administrative law judge to determine whether the opinion of Dr. Buddington is sufficient to establish total disability thereunder, see Nance, supra, and if so, to reweigh all probative evidence and determine whether claimant

has established total disability pursuant to Section 718.204.² See Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195 (1986). If, on remand, the administrative law judge determines that claimant has established a totally disabling respiratory impairment, then the administrative law judge must determine whether this impairment is due to pneumoconiosis. See Robinson v. Pickands Mather & Co., 914 F.2d 1144, 14 BLR 2-68 (4th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order and Order Denying Reconsideration are 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 J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

² Employer notes that the administrative law judge did not consider the non-qualifying objective test results obtained by Dr. Endres-Bercher, which constitute additional contrary probative evidence supportive of employer's position. See Employer's Exhibit 2.

LEONARD N. LAWRENCE
Administrative Law Judge