

BRB No. 89-3849 BLA

WALTER KELLICHNER)
)
 Claimant-Respondent)
)
 v.)
)
 BARNES AND TUCKER COMPANY)
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order and Decision and Order Denying Motion for Reconsideration of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Theresa C. Homady (Pawlowski, Creany & Tulowitzki), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and CLARKE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order and Decision and Order Denying

Motion for Reconsideration (88-BLA-958) of Administrative Law Judge Gerald M. Tierney awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine *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).

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 twenty-seven 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)(4), 718.203(b) and 718.302, and total disability pursuant to 20 C.F.R. §718.204(c)(4). Accordingly, benefits were awarded. Employer appeals, challenging the administrative law judge's findings under Section 718.204(c), and with regard to the onset date of total disability pursuant to 20 C.F.R. §725.503. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.¹

¹ The administrative law judge's findings under Sections 718.202, 718.203(b), 718.302, 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).

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 under 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).

Employer maintains that the administrative law judge erroneously evaluated the evidence on the issue of total disability pursuant to Section 718.204(c). The administrative law judge determined that all of the pulmonary function studies and blood gas studies of record were non-qualifying², and that there was no evidence of

² A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values.

cor pulmonale with right-sided congestive heart failure. Thus claimant has failed to establish total disability pursuant to Section 718.204(c)(1) - (c)(3). The administrative law judge found total disability established pursuant to Section 718.204(c)(4), however, based on the opinion of Dr. Mastrine, who concluded that claimant's respiratory symptoms were of such severity that they rendered him totally disabled from performing his usual coal mine employment, and the supporting opinion of Dr. Malhotra, who also found that claimant was totally disabled. Decision and Order at 6, 7; Claimant's Exhibits 1, 2. The administrative law judge further found that the severe respiratory complaints noted in Dr. Mastrine's report were consistent with claimant's credible testimony, twenty-seven year coal mine employment history, and the fact that Dr. Sabo, claimant's treating physician, has prescribed breathing medications since approximately 1985.³ Decision and Order at 7; Director's Exhibit 18. Employer contends that the administrative law judge erred in assessing the physicians' conclusions without first determining whether the underlying documentation was reliable and supported those conclusions; and that the administrative law judge failed to consider all contrary probative evidence contained in the record. Specifically, employer contends that the administrative law judge ignored the pulmonary function study and blood gas study results which were

³ Employer notes that the administrative law judge failed to additionally discuss the fact that Dr. Sabo's objective studies were non-qualifying and his pulmonary function study was interpreted as showing no obstructive or restrictive disease. See Director's Exhibits 15, 23.

interpreted as normal; failed to address the invalidations of Dr. Malhotra's pulmonary function study by Drs. Pickerill and Fino, both Board-certified pulmonary specialists, see Employer's Exhibits 18, 19; and failed to address either Dr. Fino's review of Dr. Mastrine's pulmonary function study tracings, in which Dr. Fino opined that the spirometric values reflected an underestimation of claimant's true pulmonary function, see Employer's Exhibit 8, or the deposition testimony of Dr. Begley, a Board-certified pulmonary specialist, finding that Dr. Mastrine misinterpreted his pulmonary function study results, see Employer's Exhibit 22 at 16, 17. As an administrative law judge may not reject relevant evidence without explanation, and must address the opinions of physicians who have reviewed pulmonary function study tracings, see generally Revnack v. Director, OWCP, 7 BLR 1-771 (1985), we hereby vacate the administrative law judge's findings under Section 718.204(c) and we remand this case for the administrative law judge to reconsider all of the relevant probative evidence of record thereunder, like and unlike, pursuant to Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987), and Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195 (1986). Employer further maintains that the administrative law judge failed to provide a proper reason for according less weight to the opinions of Drs. Katter, Gress, Lantos and Fino, who found that claimant suffered no pulmonary impairment. See Employer's Exhibits 7, 10, 11, 16, 17, 21, 23. The administrative law judge gave less weight to the opinions of said physicians, as they offered no objective explanation for claimant's respiratory complaints. Decision and Order at 7.

Subjective symptoms, however, are not the equivalent of a respiratory impairment, see generally Clay v. Director, OWCP, 7 BLR 1-82 (1984), and a physician's failure to explain the source of subjective complaints does not constitute a basis for rejecting the opinion, see Coleman v. Kentland Elkhorn Coal Co., 5 BLR 1-260 (1982). On remand, therefore, the administrative law judge must reassess the opinions of Drs. Katter, Gress, Lantos and Fino under Section 718.204(c)(4).

Finally, employer contends that the administrative law judge erred in finding that claimant was entitled to benefits from March 1, 1987, the month in which claimant filed his claim for benefits, without providing any analysis concerning the onset date of total disability. See 20 C.F.R. §725.503; Williams v. Director, OWCP, 13 BLR 1-28 (1989); Lykins v. Director, OWCP, 12 BLR 1-181 (1989). We agree. Consequently, if on remand the administrative law judge finds total disability established pursuant to Section 718.204, he must then determine the onset date of total disability pursuant to Williams, supra; Lykins, supra.

Accordingly, the administrative law judge's Decision and Order awarding benefits and Decision and Order Denying Motion for Reconsideration are affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

DAVID A. CLARKE, JR.
Administrative Law Judge