

BRB No. 88-3024 BLA

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

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

Edward O. Falkowski (Marshall J. Breger, Solicitor of Labor; 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 the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director) appeals the Decision and Order (84-BLA-8803) of Administrative Law Judge Michael H. Schoenfeld awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine and Safety Act of 1969, as amended, 30 U.S.C. §901 et seq. (the Act). Based on the date of filing, July 14,

*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).

1983, the administrative law judge adjudicated the claim pursuant to the permanent regulations found at 20 C.F.R. Part 718. After crediting claimant with seven and three quarters years of coal mine employment, the administrative law judge considered the evidence of record and determined that claimant established the existence of pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§ 718.202(a)(4), 718.203(c). The administrative law judge then determined that claimant is totally disabled due to pneumoconiosis which arose out of his coal mine employment and is thus entitled to benefits under the Act. On appeal, the Director contends that the administrative law judge failed to properly consider the medical opinion evidence of record pursuant to 20 C.F.R. § 718.204(c)(4).¹

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with law. 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).

¹The administrative law judge's finding that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203 is unchallenged on appeal and is therefore affirmed. Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983). Moreover, as the administrative law judge's finding that claimant failed to establish total disability under Sections 718.204(c)(1)-(c)(3) is also unchallenged on appeal, it is affirmed. See Skrack, supra.

In making his finding under Section 718.204(c)(4), the administrative law judge considered the medical opinions of Drs. Weber, Mariglio, and Krol, and determined that claimant established total disability. The administrative law judge found that while neither the report of Dr. Weber nor Dr. Mariglio constituted evidence of total disability, they did not "contradict Dr. Krol's specifically stated conclusion that claimant is unable to perform all of his prior coal mine duties." See Decision and Order at 8.²

On appeal, the Director contends that the administrative law judge did not determine whether Dr. Krol's medical report is documented and reasoned; did not consider whether Dr. Krol's opinion is unequivocal on the issue of claimant's ability to perform his usual coal mine employment, and did not consider the medical report of Dr. Ahluwalia. In support of its contention that the administrative law judge did not consider whether Dr. Krol's report is documented and reasoned, the Director asserts that Dr. Krol relied on an x-ray initially read as positive, but which was later re-read as negative by a more qualified physician. Further, the Director correctly notes that the doctor relied on a pulmonary function study on which he noted: "Severe restriction in MVV probably effort related", see Director's Exhibit 33B, and relied on an arterial blood gas study which he found to be normal. The results of these objective tests do not fully support Dr. Krol's conclusion that claimant can not perform his usual coal mine work. Consequently, as the administrative law judge did not make a finding as to whether Dr. Krol's opinion is reasoned and documented, his finding that claimant established total disability pursuant to Section 718.203(c)(4) is vacated and the case is remanded for the administrative law judge to make such a determination. See Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987).

The Director next contends that Dr. Krol's statement that claimant's "[i]mpairment is mild. He probably could not perform all of his previous duties but could do some of them.", see Director's Exhibit 33, is equivocal. We agree. The Board has held that an administrative law judge must take the qualified nature of a opinion into account when weighing medical evidence. See Salisbury v. Island Creek Coal Co., 7 BLR 1-501 (1984). Thus, as the administrative law judge in the instant case did not discuss the possible equivocal nature of Dr. Krol's opinion, on remand

²Claimant bears the burden pursuant to Section 718.204 to establish total disability due to pneumoconiosis as defined in Section 718.201 by a preponderance of the evidence. See Gee v. W.G. Moore and Sons, 9 BLR 1-4 (1986).

the administrative law judge should determine whether this opinion is sufficiently certain to support a finding of total disability. See Snorton v. Zeigler Coal Co., 9 BLR 1-106 (1986).

Finally, the Director contends that the administrative law judge did not consider the medical report of Dr. Ahluwalia. In his report, Dr. Ahluwalia concluded that claimant had a " normal cardiopulmonary examination (except for borderline cardiomegaly on CXR); normal arterial blood gas studies." See Director's Exhibit 36. As the administrative law judge must discuss and weigh all contrary probative evidence, see Fields, supra; Shedlock v. Bethlehem Mines Corporation, 9 BLR 1-195 (1986), the case is remanded for the administrative law judge to discuss and weigh Dr. Ahluwalia's report, as well as all other contrary probative evidence of record.

Accordingly, the Decision and Order awarding benefits is vacated and the case remanded for further consideration consistent with this opinion.³

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

³If, on remand, the administrative law judge finds that claimant has established that he is totally disabled pursuant to Section 718.204(c)(4), he should the make a separate determination as to whether claimant's total disability was caused by pneumoconiosis as required by 20 C.F.R. §718.204(b).

SHELDON R. LIPSON
Administrative Law Judge