

BRB No. 93-2475 BLA

THOMAS F. MULLINS)
)
 Claimant-Respondent)

v.)

ISLAND CREEK COAL COMPANY)
) DATE ISSUED:
 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 of Eric Feirtag, Administrative Law Judge,
United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia,
for claimant.

Sannie L. Overly (Jackson & Kelly), Lexington, Kentucky.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals
Judges.

PER CURIAM:

Employer appeals the Decision and Order (93-BLA-0352) of Administrative Law Judge Eric Feirtag awarding 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). Claimant filed a claim for benefits on February 10, 1992. Upon considering the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established twenty-three years of coal mine employment and that employer stipulated that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). The administrative law judge then found that claimant established the existence of pneumoconiosis

pursuant to 20 C.F.R. §718.202(a)(1), that his pneumoconiosis arose from his coal mine employment pursuant to 20 C.F.R. §718.203(b), and that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in weighing the evidence of record pursuant to Sections 718.202(a)(1) and 718.204(b). Claimant responds urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond to

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 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).

Upon considering the evidence of record pursuant to Sections 718.202(a)(1) and 718.204(b), the administrative law judge found that doubtful questions of fact were raised as to whether claimant established the existence of pneumoconiosis and whether he is totally disabled due to pneumoconiosis. See Decision and Order at 2-4. The administrative law judge then resolved the doubt in claimant's favor and found that he established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and total disability due to pneumoconiosis pursuant to Section 718.204(b). See Decision and Order at 2-4. As employer contends on appeal, the administrative law judge's applications of the true doubt rule¹ are in error as the United States Supreme Court has held that the true doubt rule may no longer be applied in the weighing of the evidence to aid a claimant in meeting his burden of proof. See *Director, OWCP v. Greenwich Collieries, [Ondecko]*, U.S. , 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom., Greenwich v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3rd Cir. 1993). As a result, the administrative law judge's findings that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and total disability due to pneumoconiosis pursuant to Section 718.204(b) are vacated and the case is remanded for further consideration of the evidence of record pursuant to Section 718.202(a) and Section 718.204(b), if necessary.

¹The true doubt rule is an evidentiary rule applicable to the administrative law judge's conclusion concerning the weight of the evidence. "True doubt" is said to arise only when equally probative but contradictory evidence is presented in the record, where selection of one set of facts would resolve the case against the claimant, but selection of the contradictory set of facts would resolve the case for claimant. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); *Provance v. United States Steel Corp.*, 1 BLR 1-483 (1978).

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge