

BRB No. 96-0386 BLA

WILLIE MARSHALL)
)
 Claimant-Petitioner)
)
 v.)
)
YOGI MINING COMPANY,)
INCORPORATED)
)
 and)
)
UNITED AFFILIATES CORPORATION)
)
 Employer/Carrier-)
 Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DATE ISSUED: DECISION and ORDER

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

Willie Marshall, Grundy, Virginia, *pro se*.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen),
Washington, D.C., for employer.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and Order

(95-BLA-0663) of Administrative Law Judge

Ainsworth H. Brown denying 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). The administrative law judge found that the record supports claimant's "allegation" of thirty-two years of qualifying coal mine employment and the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge then found that claimant failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate.³

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 718.204(c)(1) and (3), the administrative law judge properly found that the two pulmonary function studies of record did not yield qualifying results, Director's Exhibit 7; Employer's Exhibit 1, and that there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 4. Thus, we affirm the administrative law judge's findings that claimant did not establish total respiratory disability pursuant to Section 718.204(c)(1) and (3).

Pursuant to Section 718.204(c)(2), the administrative law judge stated that "[n]one of the . . . arterial blood gas evidence demonstrate[s] the existence of qualifying values." Decision and Order at 4. However, the record contains an arterial blood gas study administered by Dr. Forehand on April 15, 1994 which yielded qualifying results both at rest and after exercise. Director's Exhibit 9.

Inasmuch as the administrative law judge misconstrued the arterial blood gas study evidence, see *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985), we vacate the administrative law judge's findings pursuant to Section 718.204(c)(2) and remand the case for further findings pursuant to this subsection.

Pursuant to Section 718.304, the administrative law judge considered thirteen interpretations of five x-rays and the reports of two CT scans. The administrative law judge stated that Dr. Sargent "diagnosed simple [coal workers' pneumoconiosis] and recognized that there was coalescence in the right upper lobe." Decision and Order at 4. The administrative law judge then stated:

The Operator has not only adduced evidence to outweigh the initial finding of complicated [coal workers' pneumoconiosis], but has produced evidence from an examining pulmonary expert, Dr. Sargent, and two reviewing pulmonologists that there is not pulmonary disability shown. Collectively, their opinions (Drs. Sargent, Branscomb, and Fino) [are] that there is only simple [coal workers' pneumoconiosis] without any pulmonary dysfunction as manifested on pulmonary function or arterial blood gas study.

Decision and Order at 4-5.

However, in his report of February 22, 1995, Dr. Sargent stated:

It is my impression that Mr. Marshall is suffering from complicated pneumoconiosis based on his chest x-ray and chest CT scan findings. At the current time he is suffering from no ventilatory abnormality related to this complicated pneumoconiosis as evidenced by completely normal blood gases and pulmonary functions. Therefore, he has the respiratory capacity to do any job required in the mining of coal...Because of the presence of complicated pneumoconiosis, however, he should not return to work in the mines because of the possibility of progression of his complicated pneumoconiosis should he be exposed to additional dust.

Employer's Exhibit 1. The administrative law judge's findings are contrary to the statements in Dr. Sargent's report.

Inasmuch as the administrative law judge misconstrued Dr. Sargent's opinion, we vacate the administrative law judge's findings pursuant to Section 718.304. See *Beatty v. Danri Corp.*, 16 BLR 1-11 (1991), *aff'd* 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995); *Tackett, supra*. Because the administrative law judge relied on Dr. Sargent's opinion in rendering his disability findings, we also vacate his conclusion at Section 718.204(c)(4). See *Handy v. Director, OWCP*, 16 BLR 1-73 (1990).

We instruct the administrative law judge on remand to consider the credibility of Dr. Sargent's opinion in light of its internal inconsistency, *see Revnack v. Director, OWCP*, 7 BLR 1-771 (1985), *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991), and to reconsider the medical opinion evidence pursuant to Sections 718.304 and 718.204(c)(4), *see Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986), *aff'd in part and remanded*, 16 BLR 1-27 (1991)(*en banc*).

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge