

BRB No. 98-0160 BLA

ROGER PERSINGER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
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 of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane. L.C.), Charleston, West Virginia, for claimant.

Sarah M. Hurley (Marvin Krislov, Deputy Solicitor for National Operations; 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, the United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1357) of Administrative Law Judge Daniel L. Stewart 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, and the parties stipulated to, twenty years of coal mine employment and based on the date of filing, the administrative law judge

adjudicated the claim pursuant to 20 C.F.R. Part 718.<sup>1</sup> Decision and Order at 6. The administrative law judge concluded that although the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine pursuant to 20 C.F.R. §§718.202(a) and 718.203, the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding that total disability was not established pursuant to 20 C.F.R. §718.204(c)(4). The Director, Office of Workers' Compensation Programs, responds, urging remand.<sup>2</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements preclude entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Claimant contends that the administrative law judge erred in his weighing of the medical opinion evidence pursuant to Section 718.204(c)(4). We agree. The administrative law judge, in the instant case, found that Dr. Rasmussen's opinion, that claimant would be unable to perform his last coal mine job because of his lung disease, was not credible as it was based on a finding that claimant's coal mine employment consisted of heavy manual labor and was thus, based on a misunderstanding as to claimant's coal mine work and was inconsistent with Dr. Zaldivar's notation that truck driving was not heavy manual labor.

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<sup>1</sup> Claimant filed his claim for benefits on September 7, 1995, which was denied on February 28, 1996. Director's Exhibits 1, 20.

<sup>2</sup> The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.203, and 718.204(c)(1)-(3) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Decision and Order at 22; Director's Exhibit 13. Claimant testified that his last coal mine employment was as a truck driver, and that he helped at the tipple and garage as a mechanic by replacing and repairing heavy equipment. Hearing Transcript at 30-33, 39-40. Dr. Zaldivar noted that claimant stated that when he was not driving a truck, he was a mechanic's helper, which was heavy manual labor consisting of replacing and repairing heavy equipment and that driving the truck was not heavy work. Employer's Exhibit 2. Dr. Rasmussen, the only physician of record to address claimant's ability to perform coal mine employment, diagnosed significant chronic obstructive pulmonary disease, and total and permanent disability from performing former coal mine employment, which required heavy manual labor when lifting parts as a mechanics helper. Director's Exhibit 13. Dr. Rasmussen also noted that claimant's last job was driving a truck but that he also worked as a mechanic's helper. Director's Exhibit 13. Thus, contrary to the administrative law judge's findings, the descriptions of claimant's coal mine employment by Drs. Rasmussen and Zaldivar are consistent with each other and with claimant's testimony at the hearing. As the administrative law judge mischaracterized the medical opinion evidence at Section 718.204(c)(4), a remand is necessary for the administrative law judge to reconsider Dr. Rasmussen's disability assessment. *Trugillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). We therefore vacate the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to Section 718.204(c)(4) and remand the case for the administrative law judge to reconsider the relevant medical evidence. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Tackett, supra*.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge