

BRB No. 89-2300 BLA

RAYMOND J. WILLIAMS)
)
 Claimant-Petitioner)
)
 v.)
)
ALABAMA BY-PRODUCTS)
CORPORATION)
)
 Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DATE ISSUED:

Appeal of the Decision and Order and Supplemental Decision and Order on Remand of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

Charles Tyler Clark, Birmingham, Alabama, for claimant.

Before: BROWN and DOLDER, Administrative Appeals Judges, and NEUSNER, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order and the Supplemental Decision and Order on Remand (84-BLA-2466) of Administrative Law Judge Ben H. Walley 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 reviewed this claim pursuant to the

*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).

provisions of 20 C.F.R. Part 718, and credited claimant with at least thirty-five years of qualifying coal mine employment as stipulated by the parties. 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)(1) and 718.203(b), and that claimant established total disability pursuant to 20 C.F.R. §718.204(c). The administrative law judge further found, however, that claimant failed to establish that his disability was due to pneumoconiosis pursuant to Section 718.204(b), and consequently denied benefits. On appeal, the Board vacated the administrative law judge's findings pursuant to Section 718.204(b), and remanded this case for the administrative law judge to provide his rationale for finding that the opinions of Drs. Hasson and Branscomb were more persuasive than the other medical opinions of record, and to determine whether claimant's pneumoconiosis, as defined in 20 C.F.R. §718.201, was, in and of itself, totally disabling pursuant to Wilburn v. Director, OWCP, 11 BLR 1-135 (1988). On remand, the administrative law judge found that claimant failed to establish that his disability was due to pneumoconiosis

pursuant to Section 718.204(b), under the standard articulated in Wilburn, supra. Accordingly, benefits were denied. Claimant appeals, challenging the administrative law judge's findings on remand pursuant to Section 718.204(b). Claimant additionally contends that he is entitled to invocation of the presumption of total disability due to pneumoconiosis found at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. Employer and the Director, Office of Workers' Compensation Programs, have not participated in 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).

In order to establish entitlement to benefits pursuant to 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).

Initially, we note that subsequent to the issuance of the Board's Decision and

Order remanding this case for the administrative law judge to determine whether claimant's total disability was due to pneumoconiosis pursuant to the standard enunciated in Wilburn, supra, the United States Court of Appeals for the Eleventh Circuit, wherein appellate jurisdiction of this claim lies, held that in order to qualify for benefits pursuant to Section 718.204, a miner must establish that his pneumoconiosis was a substantial contributing factor in the causation of his total pulmonary disability. See Lollar v. Alabama By-Products Corp., 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990); Scott v. Mason Coal Co., 14 BLR 1-37 (1990)(en banc). As the administrative law judge evaluated the medical opinions of record in light of the Wilburn standard, we hereby vacate the administrative law judge's findings pursuant to Section 718.204(b).

Claimant additionally contends that he is entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, as this claim was filed prior to January 1, 1982, claimant worked more than fifteen years in underground coal mine employment, and the administrative law judge found that the evidence of record established the existence of a totally disabling pulmonary or respiratory impairment pursuant to Section 718.204(c). 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. See Tanner v. Freeman United Coal Co., 10 BLR 1-85 (1987). As the administrative law judge did not consider the application of Section 718.305 in this case, we must vacate the administrative law judge's denial of benefits, and remand this case for the administrative law judge to determine whether claimant has

established invocation of the presumption at Section 718.305, and, if so, to determine whether employer has established rebuttal thereof by establishing that claimant's totally disabling respiratory impairment did not arise out of or in connection with coal mine employment. See Alabama By-Products Corp. v. Killingsworth, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984); DeFore v. Alabama By-Products Corp., 12 BLR 1-27 (1988); Tanner, *supra*; see generally Black Diamond Coal Mining Co. v. Benefits Review Board, [Raines], 758 F.2d 1532, 7 BLR 2-209 (11th Cir.), reh'g denied, 768 F.2d 1353 (11th Cir. 1985). If, on remand, the administrative law judge finds rebuttal established pursuant to Section 718.305(d), claimant will be precluded from entitlement to benefits under the Act. See Trent, *supra*.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

FREDERICK D. NEUSNER
Administrative Law Judge