

BRB No. 91-1778 BLA

MILLARD ROOT )

)  
Claimant-Petitioner )

)  
v. )

)  
) DATE ISSUED:  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )

)  
Respondent ) DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel L. Stewart,  
Administrative Law Judge, United States Department of Labor.

John C. Dixon, Barbourville, Kentucky, for claimant.

Deborah E. Mayer (Thomas S. Williamson, Jr., 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: DOLDER, Acting Chief Administrative Appeals Judge, BROWN,  
Administrative Appeals Judge, and SHEA, Administrative Law Judge.\*

PER CURIAM:

Claimant appeals the Decision and Order on Remand (87-BLA-2896) 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). This case is before the  
Board for

\*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)(1988).

the second time. In his first Decision and Order, the administrative law judge considered the claim pursuant to 20 C.F.R. Part 718 and found that claimant established eleven and a half years of coal mine employment. The administrative law judge then found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4), that the pneumoconiosis arose from coal mine employment pursuant to 20 C.F.R. §718.203(b), and total disability pursuant to 20 C.F.R. §718.204(c)(1) and (4). Accordingly, benefits were awarded. On appeal, the Board affirmed the administrative law judge's findings Sections 718.203(a)(1) and (4), 718.203(b) and 718.204(c). The Board then remanded the case for the administrative law judge to determine the etiology of claimant's disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). See *Root v. Director, OWCP*, BRB No. 89-0163 BLA (Jan. 30, 1991)(unpub.). On remand, the administrative law judge considered the medical opinion evidence of record and determined that claimant failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(b). Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in weighing the medical opinion evidence of record. He recites only the evidence of record which is favorable to him and makes no specific allegations of error. The Director, Office of Workers' Compensation Programs (the Director), responds arguing that the case must be remanded as the administrative law judge's conclusion that claimant's totally disabling respiratory impairment was not due to pneumoconiosis is not compatible with his earlier conclusion that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In her response brief, the Director assumes that the administrative law judge accorded greatest weight to Dr. Jackson's opinion, that claimant was not disabled due to pneumoconiosis, and that the administrative law judge found Dr. Broudy's opinion, that claimant's disability is related to cigarette smoking and not to pneumoconiosis, to be highly probative on the issue of the etiology of claimant's disability. The Director contends that this weighing of the evidence is inconsistent with his earlier conclusions regarding the existence of pneumoconiosis because the administrative law judge implicitly rejected Drs. Jackson's and Broudy's conclusions regarding the existence of pneumoconiosis in finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Therefore, the

Director contends that the administrative law judge cannot credit these opinions pursuant to Section 718.204(b) because the diagnoses are based on the faulty assumption that claimant does not have pneumoconiosis. See Director's Brief at 9. However, in determining that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) in his first Decision and Order, the administrative law judge stated that he found the opinion of Dr. Baker, who concluded that claimant has pneumoconiosis, and Dr. Jackson's opinion that claimant does not have pneumoconiosis to be equally probative and resolved this issue in claimant's favor pursuant to the true doubt rule. See Decision and Order at 11. Thus, as the administrative law judge found the opinions to be equally probative, he did not reject Dr. Jackson's opinion and he could consider this opinion pursuant to Section 718.204(b). As a result, the Director's contention of error regarding the administrative law judge's consideration of Dr. Jackson's opinion is rejected.

However, as the Director also contends, the administrative law judge failed to provide explanations for his weighing of the evidence pursuant to Section 718.204(b). The administrative law judge merely listed the medical opinion evidence of record and then concluded, without explanation, that claimant failed to prove that he is disabled due to pneumoconiosis and that the etiology of claimant's total disability is cigarette smoking and not pneumoconiosis. See Decision and Order on Remand at 2. As a result, the administrative law judge's findings pursuant to Section 718.204(b) are vacated and the case is remanded for the administrative law judge to provide specific explanations for his weighing of the evidence pursuant to Section 718.204(b). See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Further, as the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (4) by applying the true doubt rule, the administrative law judge's findings pursuant to Section 718.202(a)(1) and (4) are vacated and the case is remanded for further findings pursuant to those subsections as, subsequent to the issuance of the administrative law judge's Decision and Order, the United States Supreme Court held that the application of the true doubt rule violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a). See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251 (1994), *aff'g sub nom., Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Accordingly, the administrative law judge's Decision and Order on Remand is vacated and the case is remanded for further findings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

ROBERT J. SHEA  
Administrative Law Judge