

BRB No. 95-1275 BLA

VERONICA SIMONETTI)	
(Widow of BIAGIO SIMONETTI))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
BCNR MINING CORPORATION)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Second Supplemental Decision and Order on Remand of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Jean Zeiler (United Mine Workers of America), Belle Vernon, Pennsylvania, for claimant.

Gary K. Stearman (J. Davitt McAteer, Acting 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, the United States Department of Labor.

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

PER CURIAM:

Claimant¹ appeals the Second Supplemental Decision and Order on Remand

(87-BLA-3822) of Administrative Law Judge Charles P. Rippey denying benefits on claims 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 the third time. Initially, the administrative law judge credited the miner with forty-three years of coal mine employment and found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b) on the miner's claim. The administrative law judge further found death due to pneumoconiosis established pursuant to 20 C.F.R. §718.205(c) on the survivor's claim, and awarded benefits on both claims.

The Board vacated the awards and remanded the case for the administrative law judge to consider all relevant evidence and make specific findings pursuant to Sections 718.204 and 718.205(c).² *Simonetti v. BCNR Mining Corp.*, BRB No. 89-0641 BLA (Apr. 30, 1991)(unpub.).

On remand, the administrative law judge again found entitlement established on both claims. On appeal, the Board vacated the administrative law judge's findings pursuant to Section 718.204(c) and 718.205(c) because he had applied the invalidated true-doubt rule, mischaracterized a blood gas study, and failed to consider all relevant evidence. *Simonetti v. BCNR Mining Corp.*, BRB No. 92-0234 BLA (Aug. 22, 1994)(unpub.). The Board instructed the administrative law judge on remand to render separate findings under Sections 718.204 and 718.205. [1994] *Simonetti*, slip op. at 6.

On remand, the administrative law judge found that the evidence failed to establish total respiratory disability or death due to pneumoconiosis pursuant to Sections 718.204(c) and 718.205(c) and, accordingly, denied benefits.

On appeal, claimant challenges the administrative law judge's weighing of the evidence pursuant to Sections 718.204(c)(4) and 718.205(c). The Director, Office of Workers' Compensation Programs (the Director), responds,³ urging affirmance of the denial of benefits on the survivor's claim but requesting remand of the miner's claim.⁴

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 into the Act by 30 U.S.C. § 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 718.204(c)(4), claimant and the Director contend that the administrative law judge failed to compare the exertional requirements of the miner's last coal mine job with his physical limitations to determine whether he was totally disabled. Claimant's Brief at 2-5; Director's Brief at 10-11. The miner and employer stipulated⁵ to his job duties in a series of letters dated September 7, October 28, and

November 1, 1988. The September 7, 1988 letter states that the miner, as a railroad car loader, "had to walk up and down 35 steps 10-12 times a day. [The miner] would have to shovel coal spillage every day for at least one hour." Dr. Bajwa listed shortness of breath "going up one flight of stairs," in his assessment of physical limitations on the Department of Labor examination form. Director's Exhibit 7.

In finding that the miner was not totally disabled, the administrative law judge⁶ stated that "Dr. Bajwa's description is insufficient to infer total respiratory disability because the limitation cannot be compared to the exertional requirements of [the miner's] coal mine employment." Second Supplemental Decision and Order on Remand at 2. Accordingly, the administrative law judge credited the opinions of the physicians who concluded that the miner did not have total respiratory disability.

Because the administrative law judge did not consider Dr. Bajwa's assessment of claimant's physical limitations in conjunction with the exertional requirements of claimant's usual coal mine employment, see *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*); *Kowalchick v. Director, OWCP*, 893 F.2d 615, 13 BLR 2-226 (3d Cir. 1990), we vacate the administrative law judge's finding pursuant to Section 718.204(c) and remand this case for him to make findings regarding the nature and exertional requirements of claimant's usual coal mine employment, see *Budash, supra*; *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), and then compare all the relevant medical opinions⁷ with these requirements to determine whether claimant has demonstrated total respiratory disability at Section 718.204(c)(4), see *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83 (1988).

Claimant next contends that the administrative law judge erred in weighing the opinion of Dr. Kristofic pursuant to Section 718.204(c)(4). Claimant's Brief at 6-7. We agree, inasmuch as the administrative law judge failed to consider Dr. Kristofic's opinion pursuant to *Budash*, see discussion, *supra*, and conflated his findings at Sections 718.204(c)(4) and 718.204(b) by attempting to discredit Dr. Kristofic's opinion regarding total respiratory disability on the ground that the miner's shortness of breath was "due primarily or entirely to heart disease." Second Supplemental Decision and Order on Remand at 3. Accordingly, we instruct the administrative law judge on remand to render separate findings pursuant to Sections 718.204(c) and 718.204(b).

Although we vacate the administrative law judge's finding pursuant to Section 718.204(c)(4), we reject claimant's contention that the admission records from Saint Margaret's Memorial Hospital must be accepted as probative of total respiratory disability. Claimant's Brief at 7. These records, which document the miner's 1978

hospitalization for bilirubinemia, do not address the existence or severity of a totally disabling respiratory impairment.⁸ See *Horn v. Jewell Ridge Coal Corp.*, 6 BLR 1-933 (1984).

Claimant also asserts that the administrative law judge improperly discredited Dr. Perper's opinion. Claimant's Brief at 7-9. After reviewing the administrative law judge's analysis pursuant to Section 718.205(c), we hold that the administrative law judge failed to comply with the Board's instructions to separate his analysis of the different legal elements of entitlement. [1994] *Simonetti*, slip op. at 6; Second Supplemental Decision and Order on Remand at 3; see *Hall v. Director, OWCP*, 12 BLR 1-80 (1988). He also failed to consider the death certificate, which lists pneumoconiosis as a contributing cause of death. Director's Exhibit 4. Therefore, we vacate the administrative law judge's finding pursuant to Section 718.205(c).

On remand, the administrative law judge must evaluate all relevant evidence to determine whether total disability is established pursuant Section 718.204(c), see *Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), and if so, he must then determine whether pneumoconiosis was a substantial contributor to the miner's total disability. 20 C.F.R. §718.204(b); *Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

In evaluating the survivor's claim, the administrative law judge must determine whether pneumoconiosis actually hastened the miner's death, accounting for all relevant evidence. See *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); see also *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

Accordingly, the administrative law judge's Supplemental Decision and Order on Remand denying benefits is affirmed in part and vacated in part, 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