

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT KNOXVILLE

**FILED**

January 7, 1998

Cecil Crowson, Jr.  
Appellate Court Clerk

OTIS RUTHERFORD,	)	ANDERSON CIRCUIT
	)	
Plaintiff/Appellant	)	NO. 03S01-9611-CV-00114
	)	
v.	)	HON. JAMES B. SCOTT, JR.,
	)	JUDGE
CROSS MOUNTAIN COAL INC. and	)	
LARRY BRINTON, JR., DIRECTOR,	)	
DIVISION OF WORKERS'	)	
COMPENSATION, TENNESSEE	)	
DEPARTMENT OF LABOR, SECOND	)	
INJURY FUND,	)	
	)	
Defendants/Appellees	)	

**For the Appellant:**

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**For the Appellee:**

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**MEMORANDUM OPINION**

**Members of Panel:**

Justice Adolpho A. Birch, Jr.  
Senior Judge John K. Byers  
Special Judge Irvin H. Kilcrease, Jr.

AFFIRMED

BYERS, Senior Judge

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The plaintiff filed this workers' compensation claim on July 29, 1993, alleging that on April 15, 1991 he discovered that he was permanently and totally disabled from work due to coal workers' pneumoconiosis ["black lung disease"].

The defendants answered that the plaintiff had retired from their employ on February 6, 1991 under their regular old age retirement program and they had no information about any alleged work related disability.

After a hearing on the merits, the trial court found the plaintiff "had not sustained his burden of proof of establishing his claim for occupational disease benefits arising out of his black lung condition" and dismissed the complaint.

We affirm the judgment of the trial court.

The plaintiff is now 69 years old. He has been receiving old age retirement benefits from the Social Security Administration and from the defendants since February 6, 1991. He has applied for black lung benefits from the U. S. Department of Labor on three occasions. Two of those applications were denied. The defendants sought, by Motion to Consider Post-Judgment Facts in this case, to have the results of the third Department of Labor adjudication admitted as evidence; however, the Motion was denied as inappropriate under RULE 14(a), TENN. R. APP. P.

The plaintiff contends that the medical evidence proves that he was totally and permanently disabled from work at the time of his retirement under old age programs, notwithstanding the fact that he was working full-time up to the day he retired. To support this claim, he introduced at trial the medical evidence previously submitted to the Department of Labor in his black lung claims; his testimony and that of his wife; an independent medical evaluation by Dr. Glen Baker performed on October 6, 1993; and the testimony of Dr. Norman Hankins and Ms. Kelly Lenz, vocational experts who performed a vocational evaluation in October 1994.

The thrust of plaintiff's argument for award of workers' compensation benefits is that the trial court and this Panel are required to apply federal standards in making our determinations and that under 20 C. F. R. § 718.304, he is irrebuttably presumed

to be entitled to benefits based on the chest x-ray readings which were submitted in his three Department of Labor black lung claims and in this claim.

Tenn. Code Ann. § 50-6-302 provides:

“(b) In considering whether an employee has the occupational disease of coal worker’s pneumoconiosis and is totally disabled or dies therefrom, all the presumptions, criteria and standards contained in or promulgated by reason of the federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173 (30 U. S. C. 901 et seq.), specified as the basis for determining eligibility of applicants for benefits because of the disease or its effects shall be used and be applicable under this chapter, and where in a proceeding under this chapter for benefits it is determined the employee or the employee’s dependents would be entitled to benefits under the federal Coal Mine Health and Safety Act of 1969, and the Black Lung Benefits Act of 1972 (Publ. L. No. 92-303 as amended (930 U. S. C. 901 et seq.)), the employee or the employee’s dependents by reason of the determination shall be considered totally disabled from coal worker’s pneumoconiosis and its effects, under this chapter the same as if the employee, or the employee’s dependents, establishes the right to recover benefits based upon a total disability from coal worker’s pneumoconiosis, or death by reason thereof under the laws of this state.”

Our Supreme Court has held that in a state proceeding all of the presumptions and standards created by the federal Coal Mine Health and Safety Act of 1969 (30 U. S. C. 901 et seq., Black Lung Benefits Act) and used to determine eligibility for black lung disability payments are incorporated by reference into state law. *Blankenship v. Old Republic Ins. Co.*, 539 S.W.2d 23 (Tenn. 1976); *Gibson v. Consolidation Coal Co.*, 588 S.W.2d 290 (Tenn. 1979).

However, an award from the Social Security Administration under the federal Coal Mine Health and Safety Act of 1969 is not binding or conclusive upon the state courts in determining entitlement to workers’ compensation under this section, although the trial judge is not prohibited from considering and evaluating the proof which was before the federal agency. *Old Republic Ins. Co. v. Blankenship*, 567 S.W.2d 156 (Tenn. 1978).

The specific presumption which the plaintiff invokes for our consideration as determinative in this case is contained in 20 C. F. R. § 718.304:

**“§ 718.304 Irrebuttable presumption of total disability or death due to pneumoconiosis.**

There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, that a miner’s death was due to pneumoconiosis or that a miner was totally disabled due to pneumoconiosis at the time of death, if such miner is suffering or suffered from a chronic dust disease of the lung which:

(a) When diagnosed by chest x-ray (see § 718.202 concerning the standards for x-rays and the effect of interpretation of x-rays by

physicians) yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C in:

(1) The ILO-U/C International Classification of Radiographs of the Pneumoconioses, 1971, or subsequent revisions thereto . . . “

It is undisputed that the plaintiff in this case has black lung. The diagnosis was first made on May 3, 1971 in a letter addressed “To Whom It May Concern” from William K. Swann, M. D., Knoxville, Tennessee [Exhibit 14], which states:

“Chest x-ray done on re above listed individual on April 28, 1971, is interpreted as showing small rounded opacities in the two lowermost lung zones on both side of the thorax which fit category P-1/1 according to the U/C classification. IMPRESSION: Coal Workers Pneumoconiosis.”

The trial court, while acknowledging that plaintiff has black lung, found that the plaintiff failed to carry the burden of proof that he was totally disabled. Our review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2). *Stone v. City of McMinnville*, 896 S.W.2d 584 (Tenn. 1991).

The evidence on the issue of whether the plaintiff has met his burden of proof includes several medical depositions, including that of Dr. Glen Baker, Jr., a board-certified internist, pulmonologist, and “B” reader who evaluated plaintiff at the request of his attorney on October 6, 1993. Dr. Baker diagnosed job-related 2/2 coal workers’ pneumoconiosis which he opined was 100 percent occupationally disabling. He also testified that plaintiff’s pulmonary function testing and blood gas reports did not qualify plaintiff for black lung benefits according to federal criteria.

Dr. Richard E. Parrish, a board-certified internist and pulmonologist, also testified by deposition. He first saw the plaintiff in April 1991, after Mr. Rutherford’s retirement, on referral for evaluation by the Department of Labor. Dr. Parrish also opined plaintiff’s chest x-ray revealed a 2/2 classification for pneumoconiosis. However, his pulmonary function tests revealed normal lung function at that time.

Dr. Norman Hankins, vocational expert, testified by deposition that he conducted a vocational assessment of plaintiff on November 16, 1994. He opined that plaintiff would be limited to sedentary work and that there were no jobs in the local market that he could perform, therefore he would be considered 100 percent vocationally disabled.

The plaintiff's wife testified that he left his job with Cross Mountain because he was not able to do the work. His strength was gone because of his hard breathing. He had shortness of breath. He could not sleep because of his shortness of breath and was deteriorating overall.

The Plaintiff testified that he had to quit his job because he could not breathe and he could not sleep. He would have preferred to go on working. After he left Cross Mountain his lungs became worse instead of better. He worked every day, but he did have a lot of problems. He never complained or talked with management of Cross Mountain about health problems that he was having.

Mr. Robert Brandonburg, plaintiff's supervisor, testified at trial that plaintiff never missed work, never complained to him about any breathing problem, and never appeared to have any breathing problems at work. He stated that plaintiff told him the reason he was retiring was that ". . . he worked all of his life and he wanted to enjoy what he could."

A letter from the U. S. Department of Labor, Office of Workers' Compensation, Division of Coal Mine Workers' Compensation, dated July 19, 1991, advised plaintiff that the evidence in his claim under the Black Lung Benefits Act did not show that he qualifies for black lung benefits because the evidence :

"does not show that you are totally disabled by the disease. Totally disabled means you are unable to perform the type of work required by your coal mine work because of a breathing impairment caused by pneumoconiosis (black lung disease). The results of your medical evidence are shown on the enclosed explanation."

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"The ventilatory study (breathing test) performed on 5/24/91 to measure your breathing capacity indicated that you have

a measured one second forced expiratory volume (FEV-1) of 3.18 Liters per second and

a maximum breathing capacity (MVV or MBC) of 75 Liters per minute, and/or

a maximum forced vital capacity (FVC) of 3.96 Liters and a FEV-1/FVC ratio of 80%

In order to establish total disability under the law a miner of your height, 71 inches and age, 63, must demonstrate by a ventilatory study that his or her breathing capacity has been reduced to a level where:

the FEV-1 does not exceed 2.10 Liters per second and;

the MVV or MBC does not exceed 84 Liters per minute, or

the FVC does not exceed 2.69 Liters, or

The FEV-1/FVC ratio must be equal to or less than 55%  
or

that the pneumoconiosis condition has caused a breathing impairment which is the medical equivalent of the above standards.

The Arterial Blood-Gas Study performed on 5/24/91 to detect any impairment in alveolar gas exchange indicated the following:

	<u>At Rest</u>	<u>During Exercise</u>
<u>PCO-2</u>	40.6	34.9
<u>PO-2</u>	82.4	91.6

In order to establish total disability under the Law, test results with a PCO-2 value of 40.6 must have a PO-2 value of 60 or lower. Test results with a PCO-2 value of 34.9 must have a PO-2 value of 65.”

A letter from the U. S. Department of Labor, Office of Workers’

Compensation, Division of Coal Mine Workers’ Compensation, dated December 27, 1993, advised plaintiff that his claim for black lung benefits was denied because the evidence, again, did not show total disability by the disease, and because:

“Section 20 CFR 725.309(c) and/or(d) of the regulations governing the Black Lung Program requires that this claim be denied because there has been no material change in condition since the denial of your previous claim.”

Considering all of the foregoing evidence and the record as a whole, we find that the preponderance of the evidence supports the trial court’s denial of workers’ compensation benefits for black lung disease. The judgment of the trial court is affirmed at the cost of the appellant.

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John K. Byers, Senior Judge

CONCUR:

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Adolpho A. Birch, Jr., Justice

\_\_\_\_\_  
Irvin H. Kilcrease, Jr., Special Judge



IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

OTIS RUTHERFORD,	)	Anderson Circuit
	)	No. 93LA0311
Plaintiff-Appellant,	)	
	)	Hon. James B. Scott, Jr.
v.	)	
	)	Supreme Court
CROSS MOUNTAIN COAL, INC.,	)	No. 03S01-9611-CV-00114
	)	
Defendant-Appellee.	)	Affirmed

**JUDGMENT ORDER**

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well-taken and should be denied; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs are taxed to the plaintiff-appellant and his surety, for which execution may issue if necessary.

It is so ordered this 7 day of Jan, 1998.

PER CURIAM

Birch, J., not participating