BRB No. 91-1671 BLA

EUGENE SHUPE)
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Claimant-Petitioner)
)
v.)
)
MARCO COAL, INCORPORATED)
)
Employer-Respondent) DATE ISSUED:
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)
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)
)
Party-In-Interest) DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Eugene Shupe, Duffield, Virginia, pro se.

Mark E. Solomons (Arter & Hadden), Washington, D.C., for employer.

Before: STAGE, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and BONFANTI, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (90-BLA-1101) of Administrative Law Judge John C. Holmes 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). Based on the date of filing, June 22, 1989, the administrative law judge

*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).

adjudicated the claim pursuant to 20 C.F.R. Part 718. After crediting claimant with twelve years of coal mine employment, the administrative law judge considered the medical evidence of record and determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Employer responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond in this case.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. Stark v. Director, OWCP, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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 under Part 718, a claimant must establish that the miner had pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204, 718.205; Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989). The existence of pneumoconiosis may be established by x-ray, by biopsy or autopsy, or by operation of a presumption and by medical opinion evidence. See 20 C.F.R. §718.202(a).

In this case, the record contains nineteen interpretations of three x-rays. Of these nineteen x-ray interpretations, all of which were read by "B" readers, only one interpretation was read as positive for the existence of pneumoconiosis. Upon considering this evidence, the administrative law judge permissibly held that, "[b]y an overwhelming preponderance of the evidence, claimant has failed to demonstrate x-ray evidence of pneumoconiosis." See D&O at 4; Kuchwara v. Director, OWCP, 7 BLR 1-167 (1984). Accordingly, the administrative law judge's finding that claimant failed to established the existence of pneumoconiosis pursuant to 20 C.F.R.

§718.202(a)(1) is affirmed as supported by substantial evidence.[1]

There is no autopsy or biopsy evidence in the record in this case, thus the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(2). Also, the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(3) as there are no presumptions that apply in this case.[2]

[1]The administrative law judge failed to consider the x-ray interpretation of Dr. Templeton. See Employer's Exhibit 1. However, this error is harmless as the interpretation is negative as to the existence pneumoconiosis and supports the administrative law judge's finding. See Larioni v. Director, OWCP, 6 BLR 1-1276 (1984).

[2]The presumption at 20 C.F.R. §718.304 is not applicable as there is no evidence that the miner suffered from complicated pneumoconiosis. The 15 year presumption contained in 20 C.F.R. §718.305 is inapplicable here as claimant's application for benefits was filed after January 1, 1982. 20 C.F.R. §718.305(e). The presumption at 20 C.F.R. §718.306 applies only to survivor's claims filed prior to June 30, 1982 wherein the miner died on or before March 1, 1978. 20 C.F.R. §718.306(a).

The medical opinion evidence of record includes the reports of Drs. Kapadia, Dahhan and Fino, as well as office notes from Powell Valley Family Physicians.[3]

Upon considering this medical opinion evidence, the administrative law judge properly determined that claimant has not established the existence of pneumoconiosis pursuant to subsection (a)(4). The administrative law judge properly noted that Dr. Kapadia's x-ray reading of 0/1 is negative for pneumoconiosis, see 20 C.F.R. §718.102(b), and permissibly accorded Dr. Kapadia's report less weight than the reports of Drs. Fino and Dahhan. See Decision and Order at 5; Perry v. Director, OWCP, 9 BLR 1-1 (1986). Consequently, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.204(a)(4), as rational and supported by substantial evidence. Since claimant has failed to establish a requisite element of entitlement, we further affirm the administrative law judge's denial of benefits under Part 718.
See Trent v. Director, OWCP, 11 BLR 1-26 (1987).[4]

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

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[3]In regard to the existence of pneumoconiosis, Dr. Kapadia's July 19, 1989 report diagnosed "coal worker's pneumoconiosis - chest x-ray 0/1-p/s". See Director's Exhibit 16. Drs. Dahhan and Fino conducted reviews of claimant's medical record, dated March 14, 1991 and March 18, 1991 respectively, and concluded that there is insufficient objective evidence for a diagnosis of pneumoconiosis. See Employer's Exhibits 10, 11. The Powell Valley Family Physicians' office notes of August 28, 1989 and November 15, 1989, do not mention pneumoconiosis. See Employer's Exhibit 3.

As to the existence of total disability, Dr. Kapadia states that claimant has "only mild impairment - not enough to impair his last coal mine job." See Director's Exhibit 10. Drs. Dahhan and Fino state that claimant has no impairment and is not disabled from returning to his previous coal mine employment. See Employer's Exhibits 10, 11. The Powell Valley Family Physicians' office notes do not mention a respiratory or pulmonary impairment. See Employer's Exhibit 3.

[4]The administrative law judge also permissibly concluded that the objective evidence of record, which includes two non-qualifying pulmonary function studies and two non-qualifying arterial blood gas studies, and the medical opinion evidence are negative as to the existence of total disability. See Decision and Order at 5; Director's Exhibits 13, 14, 16, 29; Employer's Exhibits 10, 11. Thus, the administrative law judge's finding of no total disability pursuant to 20 C.F.R. §718.204(c) is supported by substantial evidence.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH,
Administrative Appeals Judge

RENO E. BONFANTI
Administrative Law Judge