

BRB No. 88-3127 BLA

ELGIE JARRELL)
)
 Claimant-Petitioner)
)
 v.)
)
UNITED STATES STEEL)
CORPORATION)
)
 Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Leonard N. Lawrence, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman, Kanner & Crane), Charleston, West Virginia, for claimant.

Howard G. Salisbury, Jr. (Love, Wise & Woodroe), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (86-BLA-2523) of Administrative Law Judge Leonard N. Lawrence 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

*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).

claim pursuant to the provisions of 20 C.F.R. Part 718, and credited claimant with more than ten years of qualifying coal mine employment. The administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(1) and 718.203(b), and the existence of a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(c). The administrative law judge further found, however, that the evidence was insufficient to establish that claimant's disability was due to pneumoconiosis under 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

Claimant appeals, contending that the evidence establishes total disability due to pneumoconiosis. Employer responds, urging affirmance of the finding that claimant failed to establish that his disability was due to pneumoconiosis and contending that the evidence is insufficient to establish the existence of pneumoconiosis under

Section 718.202(a)(1).¹ The Director, Office of Workers' Compensation Programs, has 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).

To establish entitlement to benefits under 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).

¹ The administrative law judge's findings under Sections 718.203(b) and 718.204(c), and with regard to length of coal mine employment are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

Employer contends that the administrative law judge erred in weighing the x-ray evidence under Section 718.202(a)(1), arguing that the preponderance of the x-ray evidence by qualified readers is negative for pneumoconiosis and that the only uncontroverted x-ray evidence was a negative interpretation. Employer's Brief at 4. Employer's arguments are without merit. The administrative law judge was not required to rely on the numerical preponderance of negative x-ray interpretations, nor was he required to accord preferential weight to the only uncontradicted interpretation of record. See generally York v. Jewell Ridge Coal Corp., 7 BLR 1-766 (1985). The administrative law judge considered the qualifications of the readers and acted within his discretion in according little weight to the interpretation of an undated film and rather according greatest weight to the most recent films. See generally Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989). In considering the most recent x-ray interpretations of record, the administrative law judge found this evidence to be equally probative but contradictory. Decision and Order at 3. The record indicates that a film dated June 11, 1986 was interpreted as negative by a B-reader, while a film dated October 19, 1987 was interpreted as positive by two Board-certified radiologists and B-readers, and as negative by one equally qualified reader. Claimant's Exhibits 1, 3; Employer's Exhibits 3, 5. The administrative law judge permissibly determined that these interpretations constituted equally probative but contradictory evidence requiring application of the "true doubt" rule and

resolution of the doubt in claimant's favor. Decision and Order at 3; see Clark, supra; Conley v. Roberts and Schaefer Co., 7 BLR 1-309 (1984). We therefore affirm the administrative law judge's findings under Section 718.202(a)(1), as they are based on substantial evidence.

Next, claimant challenges the administrative law judge's application of the standard enunciated in Wilburn v. Director, OWCP, 11 BLR 1-135 (1988), in finding that the evidence was insufficient to establish total disability due to pneumoconiosis under Section 718.204(b). In evaluating the evidence on this issue, the administrative law judge credited the opinions of both physicians who submitted reports. Dr. Zaldivar excluded pneumoconiosis as a source of claimant's total disability, whereas Dr. Rasmussen opined that a significant portion of claimant's disabling impairment was related to bronchospastic disease which could be related to smoking, bronchial asthma or coal dust exposure, and that while it was not possible to determine the extent to which pneumoconiosis was responsible, it was impossible to exclude pneumoconiosis as a major contributing cause of claimant's disability. Decision and Order at 5, 6; Director's Exhibits 9, 10; Claimant's Exhibit 2; Employer's Exhibit 3. The administrative law judge determined that Dr. Rasmussen's opinion was insufficient to establish that claimant's pneumoconiosis was in and of itself totally disabling, and therefore found that claimant failed to meet his burden of proof under Section 718.204(b). See Wilburn, supra. However,

following the issuance of the administrative law judge's Decision and Order, the Board overruled the standard enunciated in Wilburn and held that in order to prove total disability due to pneumoconiosis under Section 718.204(b), claimant must only establish that pneumoconiosis was a contributing cause of his total disability. See Scott v. Mason Coal Co., BLR , BRB No. 88-1838 BLA (June 22, 1990)(en banc). Consequently, we vacate the administrative law judge's findings under Section 718.204(b) and remand the case in order for the administrative law judge to reconsider the evidence in light of Scott, supra.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

ROBERT S. AMERY
Administrative Law Judge