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BRB Nos. 97-1614 BLA
and 97-1614 BLA-A

ARTHUR D. WHITEMAN)
)
Claimant-Petitioner)
Cross-Respondent)
)
v.)
)
ERWIN SUPPLY/PITTSTON COMPANY) DATE ISSUED:08/11/1998
)
Employer-Respondent)
Cross-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

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

Arthur D. Whiteman, Shinnston, West Virginia, *pro se.*

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Richard A. Seid (Marvin Krislov, Deputy Solicitor for National Operations; 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: HALL, Chief, Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals and employer cross-appeals the Decision and Order (95-BLA-0742) of Administrative Law Judge

Daniel L. Leland (the administrative law judge) 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). The administrative law judge credited claimant with twenty-eight years and four months of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b).[1] Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. On cross-appeal, employer contends that the administrative law judge erred in finding that employer is the properly designated responsible operator. The Director, Office of Workers' Compensation Programs, urges affirmance of the administrative law judge's finding that employer is the properly designated responsible operator.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we note that claimant appeared before the administrative law judge without the assistance of counsel. Based on the facts of the instant case, we hold that there was a valid waiver of claimant's right to be represented, *see* 20 C.F.R. §725.362(b), and that the administrative law judge provided claimant with a full and fair hearing. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); Transcript at 5-9, 11-52, 54-56.

We next address the administrative law judge's consideration of the claim on the merits pursuant to 20 C.F.R. Part 718. After considering the x-ray evidence of record, the administrative law judge found the evidence

insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Of the seven interpretations of record, four readings are positive for pneumoconiosis, Director's Exhibits 20, 21, 29, and three readings are negative,[2] Employer's Exhibits 1-3. The administrative law judge stated that "[a]lthough Dr. Harron, a [B]oard certified radiologist/B reader, and Drs. Bellotte and Renn, who are B readers, classified the [March 22, 1994 and November 4, 1994] chest x-rays they reviewed as positive for pneumoconiosis, three [B]oard certified radiologists/B readers: Drs. Wiot, Shipley, and Spitz, found no evidence of pneumoconiosis in the [March 22, 1994] x-ray they interpreted." Decision and Order at 7. The administrative law judge properly accorded greater weight to the negative x-ray readings provided by physicians who are both Board-certified radiologists and B-readers. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Thus, substantial evidence supports the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994).

We also affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) because the administrative law judge correctly found that the record does not contain any biopsy or autopsy results. Decision and Order at 7. Further, we affirm the administrative law judge's finding that claimant could not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 7. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Finally, in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the relevant medical opinions of Drs. Bellotte and Renn. The administrative law judge correctly stated that "there are no medical opinions relating claimant's pulmonary impairment to his coal mine employment."[3] Decision and Order at 7. Drs. Bellotte and Renn opined that claimant suffers from chronic obstructive

pulmonary disease related, inter alia, to tobacco smoking.[4] Director's Exhibits 16, 29; Employer's Exhibits 5, 6. Therefore, substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Shoup v. Director, OWCP*, 11 BLR 1-110 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Since claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, the administrative law judge properly denied benefits under 20 C.F.R. Part 718.[5] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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Footnotes.

1)Employer stipulated that claimant is totally disabled from a respiratory standpoint. Hearing Transcript at 8; Decision and Order at 6.

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2)The record also consists of seventeen negative x-ray readings which were not considered by the administrative law judge. Director's Exhibits 14, 15, 29. However, inasmuch as these negative x-ray readings support the administrative law judge's finding at 20 C.F.R. §718.202(a)(1), any error by the administrative law judge in failing to consider these negative x-ray readings is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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3)The administrative law judge accurately stated that "[t]he CT scan also failed to disclose the presence of a coal mine dust-related pulmonary impairment." Decision and Order at 7.

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4)In a report dated March 22, 1994, Dr. Bellotte diagnosed "COPD - asthma, emphysema, chronic bronchitis," and "Pneumoconiosis - « t/q *Asbestosis*." Director's Exhibit 16. Dr. Bellotte opined that claimant's asthma is a disease of the general population and that claimant's emphysema and chronic bronchitis are related to cigarette smoking. *Id*. Moreover, Dr. Bellotte opined that claimant does not suffer from a coal dust induced disease. *Id*. In a subsequent deposition, Dr. Bellotte opined that claimant suffers from a chronic obstructive pulmonary disease with chronic bronchitis and emphysema related to a long heavy smoking history, and that claimant does not suffer from any impairment related to coal dust exposure. Employer's Exhibit 5. Dr. Renn, in a report dated November 22, 1994, opined that claimant's "chronic bronchitis and bullous emphysema were caused by his years of tobacco smoking." Director's Exhibit 29. Further, Dr. Renn opined that claimant's "chronic bronchitis, bullous emphysema, rheumatic aortic valvular disease and chronic atrial fibrillation were neither caused, nor contributed to, by his exposure to coal mine dust." *Id*. In a subsequent deposition, Dr. Renn opined that claimant suffers from chronic obstructive pulmonary disease caused by tobacco smoking, and that claimant does not suffer from any disease which resulted from an occupational exposure to coal mine dust. Employer's Exhibit 6.

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5)In view of our disposition of this case at 20 C.F.R. §718.202(a), we decline to address employer's contention on cross-appeal that the administrative law judge erred in finding it to be the properly designated responsible operator. Moreover, we similarly decline to address the administrative law judge's finding at 20 C.F.R. §718.204(b).

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