BRB No. 89-1996 BLA

CLIFFORD KELLY)
)
Claimant-Petitioner)
)
v.)
)
ISLAND CREEK COAL COMPANY)
)
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 of David A. Clarke, Jr., Administrative Law Judge, United States Department of Labor.

Lawrance S. Miller, Jr. (Dailey & Miller), Kingwood, West Virginia, for claimant.

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

Before: SMITH and DOLDER, Administrative Appeals Judges, and FEIRTAG, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (87-BLA-3673) of Administrative Law Judge David A. Clarke, Jr., 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

*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).

et seq. (the Act). The administrative law judge credited claimant with thirty-five years of qualifying coal mine employment, but found that although claimant established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(1) and (c)(4), claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202.[1] Accordingly, benefits were denied. Claimant appeals, contending that the administrative law judge erred in finding that the x-ray evidence of record failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1). Claimant further contends that he is entitled to invocation of the presumption of pneumoconiosis contained in 20 C.F.R. §718.305, and that the administrative law judge erred in relying on the medical opinion of Dr. Renn over the opinion of Dr. Rasmussen in finding that claimant failed

[1] The administrative law judge did not specifically cite the regulations at 20 C.F.R. §§718.202(a)(1)-(a)(4) and 718.204(c)(1)-(c)(4), but the appropriate sections may be inferred from the administrative law judge's findings. See generally Wetzel v. Director, OWCP, 8 BLR 1-139, 1-140 (1985).

to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.[2]

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. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. 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).

[2] The administrative law judge's findings under 20 C.F.R. §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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence, and contains no reversible error. The administrative law judge properly considered the qualifications of the readers and acted within his discretion in finding that the weight of the x-ray evidence of record failed to establish the existence of pneumoconiosis under §718.202(a)(1), based on a numerical preponderance of negative interpretations. See Prater v. Clinchfield Coal Co., 12 BLR 1-121 (1989); Roberts v. Bethlehem Mines Corp., 8 BLR 1-211 (1985).[3] We reject claimant's contention that the administrative law judge erred in failing to consider and apply the provisions of Section 718.305, inasmuch as the presumption contained therein is not available to claimant, who filed his claim after January 1, 1982. See 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(e); Kubachka v. Windsor Power House Coal Co., 11 BLR 1-171 (1988); Director's Exhibit 1. Finally, in evaluating the medical opinions of

[3] Claimant contends that, in weighing the evidence under Section 718.202(a)(1), the administrative law judge erred in failing to apply the provisions of 20 C.F.R. §§718.202(a)(1)(i) and 718.202(b). We disagree. Section 718.202(a)(1)(i) is inapplicable to claims, such as this one, filed after January 1, 1982. Section 718.202(a)(1)(i); Director's Exhibit 1. Further, the provisions of Section 718.202(b) are not relevant to a determination of whether the x-ray evidence establishes the existence of pneumoconiosis by a preponderance of the evidence. Contrary to claimant's arguments, the administrative law judge did not deny this claim solely on the basis of a negative chest x-ray, but rather after consideration of all relevant evidence of record, including medical opinions and objective evidence.

record pursuant to Section 718.202(a)(4), the administrative law judge, as the trier-of-fact, permissibly found the opinion of Dr. Renn to be the most persuasive. See Brown v. Director, OWCP, 7 BLR 1-730 (1985). The administrative law judge acted within his discretion in according Dr. Renn's opinion determinative weight, based on his finding that Dr. Renn possessed superior qualifications as a Board-certified pulmonary specialist, see Warman v. Pittsburg & Midway Coal Mining Co., 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988); Cunningham v. Pittsburg and Midway Coal Co., 7 BLR 1-93, 1-96 (1984); his conclusions were corroborated by the opinions of Drs. Lapp, Kung and Morgan[4]; and his opinion was better supported by the x-ray and objective medical evidence of record. See Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); Wetzel v. Director, OWCP, 8 BLR 1-139, 1-141 (1985); Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985). Claimant's assignment of error goes only to the weight of the evidence, which is the province of the administrative law judge.[5] See Price v. Peabody Coal Co., 7 BLR 1-671 (1985). The administrative law judge's findings and inferences are rational and based on substantial evidence,

[4] Claimant's contentions with respect to the reliability and probative value of the opinions of Drs. Lapp, Kung and Morgan are not relevant to the issue of the existence of pneumoconiosis. Further, the administrative law judge did not rely on these opinions, but merely found that they corroborated Dr. Renn's opinion that claimant does not have pneumoconiosis or any occupationally related respiratory impairment. See Decision and Order at 11.

[5] Contrary to claimant's contentions, the administrative law judge applied the proper burden of proof, and did not arbitrarily reject Dr. Rasmussen's conclusions but provided rational reasons for according greater weight to the opinion of Dr. Renn.

and we may not substitute our judgment. See Anderson, supra. Inasmuch as claimant has failed to establish a requisite element of entitlement under 20 C.F.R. Part 718, i.e. the existence of pneumoconiosis, we affirm the administrative law judge's finding that claimant is not entitled to benefits. See Trent, supra.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

ERIC FEIRTAG
Administrative Law Judge

See Decision and Order at 11.