BRB No. 89-3731 BLA

ARTHUR CAMERON)
)
Claimant-Petitioner)
)
v.)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order of Frank J. Marcellino, Administrative Law Judge, United States Department of Labor.

Philip J. Guenzer, Elkton, Maryland, for claimant.

Before: DOLDER and McGRANERY, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (87-BLA-03661) of Administrative Law Judge Frank J. Marcellino 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 determined that claimant established a material change in conditions pursuant to 20

C.F.R. §725.309(d), and thus considered the merits of this duplicate claim under the regulations at 20 C.F.R. Part 718. The administrative law judge credited claimant with ten years of

*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).

qualifying coal mine employment, but found that the evidence was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) - (a)(4). Accordingly, benefits were denied. Claimant appeals, challenging the administrative law judge's findings under Section 718.202(a)(4). The Director, Office of Workers' Compensation Programs, has not participated in this appeal.[1]

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

[1] The administrative law judge's findings under Section 718.202(a)(1) - (a)(3), 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).

(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).

Claimant maintains that the evidence of record establishes the existence of pneumoconiosis under Section 718.202 pursuant to the standard set forth in Nance v. Benefits Review Board, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988). Contrary to claimant's arguments, however, the administrative law judge properly reviewed the x-ray evidence of record and found that all of the x-ray interpretations were insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1). Decision and Order at 7, 8. In evaluating the medical opinions of record, the administrative law judge reasonably determined that Dr. Baxter's diagnosis of "Suspect Coalworkers' Pneumoconiosis with pleural thickening probably related to CWP" was qualified, and thus insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4)[2]. Decision and Order at 9; Director's

[2] The administrative law judge noted that the x-ray interpretation contained in Dr. Baxter's report found densities "most likely representing residual changes from previous infection", and a "less likely consideration would be pneumoconiosis"; and pleural thickening which "could be related to pneumoconiosis", although it could be

Exhibit 20; see generally Handy v. Director, OWCP, BLR , BRB No. 88-4233 BLA (Nov. 14, 1990); Campbell v. Director, OWCP, 11 BLR 1-16 (1987). In reviewing Dr. Rizzo's opinion, the administrative law judge noted that the physician diagnosed exertional dyspnea compatible with restrictive lung disease, but could not rule out cardiac disease. In addition, while Dr. Rizzo checked the "yes" box on the Department of Labor Medical Examination Form CM-988 to indicate that claimant's diagnosed condition was related to dust exposure in coal mine employment, he reasoned that the "restrictive disease could be causing exertional limitations", and also stated that the "exertional chest pain may be anginal in nature". See Decision and Order at 8; Director's Exhibit 25. Although we agree with claimant that a physician need not explicitly diagnose pneumoconiosis, and that an opinion which links the miner's diagnosed condition to dust exposure in coal mine employment could, if fully credited, support a finding of the existence of pneumoconiosis under Section 718.202(a)(4), see Nance, supra, the administrative law judge acted within his discretion in finding that Dr. Rizzo's report failed to state facts sufficient to enable the administrative law judge to conclude that the physician actually opined that claimant had pneumoconiosis. See generally Campbell, supra. The administrative law judge's findings and inferences are rational and based on substantial evidence, and we may not substitute our judgment. See Anderson, supra. Inasmuch as

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due to a previous infection. Decision and Order at 9; Director's Exhibit 20.

claimant has failed to establish a requisite element of entitlement under 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.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge