BRB No. 88-0356 BLA

OTIS PRATER)
)
Claimant-Petitioner)
)
v.)
)
SOVEREIGN COAL COMPANY)
) DATE ISSUED:
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 W. Ralph Musgrove, Administrative Law Judge, United States Department of Labor.

Otis Prater, Stopover, Kentucky, pro se.

John T. Chafin (Francis, Kazee & Francis), Prestonsburg, Kentucky, for respondent.

Before: SMITH and BROWN, Administrative Appeals Judges, and LIPSON, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (85-BLA-5202) of Administrative Law Judge W. Ralph Musgrove 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

*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).

on the date of filing, July 22, 1976, the administrative law judge considered the claim pursuant to 20 C.F.R. Part 727. After crediting claimant with 12 years of coal mine employment, the administrative law judge considered the evidence and determined that claimant did not establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a) and that claimant did not establish entitlement pursuant to 20 C.F.R. Part 410, Subpart D or 20 C.F.R. §410.490. Accordingly, benefits were denied. Employer responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has chosen not to respond.

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).

Upon considering the evidence pursuant to 20 C.F.R. §727.203(a)(1), the administrative law judge considered the x-ray evidence of record, which consists of eight interpretations of four x-rays relevant to the existence of pneumoconiosis.[1] See Director's Exhibits 16-18, 37; Employer's Exhibit 1. Of the eight interpretations, only two were read as positive for the existence of pneumoconiosis. See Director's Exhibits 17, 18. The administrative law judge permissibly found the x-ray evidence insufficient to establish the existence of pneumoconiosis, as he found the weight of the evidence to be negative for pneumoconiosis and that the most recent evidence is negative for pneumoconiosis. See Decision and Order at 4-5; Mabe v. Bishop Coal

[1]The record contains hospital records from claimant's hospitalization for injuries unrelated to his claim for benefits under the Act. These records include several x-ray interpretations, most of which indicate a normal chest and one which states "no active pulmonary disease...radiologist did not diagnose pneumoconiosis". See Director's Exhibit 36. The administrative law judge considered these interpretations along with the other interpretations of record. See Decision and Order at 3.

Co., 9 BLR 1-67 (1986); Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989). There is no autopsy or biopsy evidence in the record. As a result, the administrative law judge's finding that claimant did not establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) is affirmed as it is supported by substantial evidence.

Pursuant to 20 C.F.R. §727.203(a)(2), the administrative law judge considered the pulmonary function studies of record and properly found that the two tests of record produced non-qualifying results. See Decision and Order at 5; Director's Exhibits 12, 37. Pursuant to 20 C.F.R. §727.203(a)(3), the administrative law judge considered the arterial blood gas studies of record and properly found that the three tests of record produced non-qualifying results. See Decision and Order at 5; Director's Exhibits 14, 15, 37. As a result, the administrative law judge's findings that claimant did not establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2) and (a)(3) are affirmed as they are supported by substantial evidence.

The administrative law judge next considered the medical opinion evidence of record, which consists of five medical reports and two depositions, pursuant to 20 C.F.R. §727.203(a)(4). Dr. Wright examined claimant on September 29, 1976 and diagnosed category 1 pneumoconiosis, mild chronic obstructive lung disease, and upper thoracic paraplegia. He further states that his pulmonary impairment appears to be most severe due to his thoracic injury rather than dust exposure. See Director's Exhibit 13. Dr. Broudy examined claimant on April 8, 1985 and stated that he does not believe that claimant has coal workers' pneumoconiosis and that he probably does have the respiratory functional capacity to perform the work of a miner. See Director's Exhibit 37. Dr. Broudy performed a record review on June 4, 1987 and he arrived at the same conclusion. See Employer's Exhibit 2. He reiterated his opinion in his deposition of July 10, 1987. See Employer's Exhibit 5. Drs. Lane and Branscomb performed record reviews on June 4, 1987 and July 1, 1987 respectively, and stated that the evidence does not indicate the existence of pneumoconiosis and that claimant has the ability to perform the work of a miner from a respiratory standpoint. See Employer's Exhibits 3, 4. Dr. Lane reiterated his opinion in his deposition of July 13, 1987. See Employer's Exhibit 6. The administrative law judge permissibly found that the weight of the medical opinion evidence does not establish the existence of a totally disabling respiratory or pulmonary impairment. See Decision and Order at 8; Mabe, supra. In making this finding the administrative law judge permissibly relied on the reports Drs. Lane, Broudy, and Branscomb to find that claimant is not totally disabled from a respiratory standpoint. See Decision and Order at 8; Lafferty v. Cannelton Industries, Inc., 12 BLR 1-190 (1989). As a result, the administrative law judge's finding that claimant

did not establish invocation pursuant to 20 C.F.R. §727.203(a)(4) is affirmed as it is supported by substantial evidence.

Additionally, the administrative law judge's finding that the miner did not meet the qualifications for entitlement under Part 410, Subpart D, is supported by substantial evidence. See Decision and Order at 9; Lafferty, supra. Further, as this case arose within the jurisdiction of the Court of Appeals for the Sixth Circuit, and was filed before March 31, 1980, entitlement should have been considered under 20 C.F.R. Part 718 once the administrative law judge determined that claimant failed to establish entitlement to benefits pursuant to 20 C.F.R. Part 727. See Knuckles v. Director, OWCP, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989). However, as claimant did not establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary condition, the administrative law judge's failure to consider the claim pursuant to 20 C.F.R. Part 718 is harmless error. See Larioni v. Director, OWCP, 6 BLR 1-1276 (1984). Also, the regulations set forth at 20 C.F.R. §410.490 do not apply to this claim as it has been properly adjudicated pursuant to 20 C.F.R. Part 727. See Pauley v. Bethenergy Mines, Inc., 111 S.Ct. 2524, 15 BLR 2-155 (1991). As a result, the administrative law judge's findings pursuant to 20 C.F.R. §410.490 are vacated. See also Whiteman v. Boyle Land and Fuel Co., 15 BLR 1-11 (1991).

Accordingly, the administrative law judge's findings regarding 20 C.F.R. §410.490 are vacated and the remainder of the Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH,
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

SHELDON R. LIPSON
Administrative Law Judge