BRB No. 89-1475 BLA

ALLARD WRIGHT)
)
Claimant-Petitioner)
)
v.)
)
CLASSIC COAL CORPORATION)
)
and)
)
OLD REPUBLIC COMPANIES) DATE ISSUED:
)
Employer/Carrier-)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand of W. Ralph Musgrove, Administrative Law Judge, United States Department of Labor.

Howard Keith Hall (Johnson, Vanover & Hall), Pikeville, Kentucky, for claimant.

James P. Anasiewicz (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (83-BLA-1775) 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

*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).

U.S.C. §901 et seq. (the Act). This case is on appeal before the Board for the second time. On February 18, 1986, Administrative Law Judge James P. Abell, Jr. found the evidence of record sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(4) and that rebuttal was not established pursuant to 20 C.F.R. §727.203(b). Accordingly, benefits were awarded. Employer appealed, and, in its first Decision and Order, the Board remanded the case to the administrative law judge for reconsideration of the evidence pursuant to 20 C.F.R. §§727.203(b)(3) and (b)(4). See Wright v. Classic Coal Corporation, BRB No. 86-733 BLA (May 20, 1988) (unpubl.). On remand, Administrative Law Judge W. Ralph Musgrove reconsidered the evidence and determined that employer established rebuttal of the presumption pursuant to 20 C.F.R. §727.203(b)(3) and (b)(4). The administrative law judge further determined that claimant failed to establish entitlement under either 20 C.F.R. Part 410, 20 C.F.R. Part 718, or the interim presumption at 20 C.F.R. §410.490. Accordingly, the Decision and Order of Administrative Law Judge Abell was reversed and benefits were denied. On appeal, claimant contends that the administrative law judge's Decision and Order on Remand went beyond the scope of the Board's remand order, and that the administrative law judge's finding of rebuttal is not supported by substantial evidence of record. 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 this case.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with 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(b)(4), the administrative law judge determined that the record contains nine interpretations of three x-rays, all of which were read as negative for the existence of pneumoconiosis. See Director's Exhibits 14, 15, 16, 17, 22, 23, 24; Employer's Exhibit 1, 2. Thus, the administrative law judge properly found that the preponderance of the x-ray evidence is negative for pneumoconiosis. See Decision and Order on Remand at 12; Lafferty v. Cannelton Industries, Inc., 12 BLR 1-190 (1989). The administrative law judge then considered the medical opinions of record[1] and permissibly found the opinions

[1]Dr. O'Neill examined claimant on October, 28, 1976 and diagnosed 1) chronic obstructive airway disease-moderately severe with a restrictive component. 2) chronic bronchitis 3) probable emphysema 4) coal worker's pneumoconiosis simple, stage 1/1(p and q). See Director's Exhibit 10. By letter dated June 7, 1983, Dr. O'Neill added that claimant's "obstructive airway disease, chronic

of Drs. Wright and Broudy to be supported by the weight of the objective evidence of record and thus, more persuasive than the opinions of Drs. O'Neill and Anderson on the issue of the existence of pneumoconiosis. See Decision and Order at 12; Mabe v. Bishop Coal Co., 9 BLR 1-67 (1986). As both Dr. Wright and Dr. Broudy found that claimant does not have pneumoconiosis, the administrative law judge properly

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bronchitis, pulmonary emphysema and respiratory disability were caused by chronic cigarette abuse." See Employer's Exhibit 3. Dr. Anderson examined claimant on December 14, 1976 and diagnosed category 1 pneumoconiosis and pulmonary emphysema. See Director's Exhibit 11. By letter of July 15, 1983, Dr. Anderson stated that claimant's "physiological or functional disability is on the basis of pulmonary emphysema as a result of his cigarette smoking and not related to his category 1 pneumoconiosis or coal mine dust." See Employer's Exhibit 4. Dr. Wright, who examined claimant on February 24, 1977, diagnosed chronic obstructive airway disease and checked "no" on the examination form to indicate that there was no relation between claimant's impairment and his coal mine employment. See Director's Exhibit 12. Dr. Broudy examined claimant on March 21, 1983 and diagnosed pulmonary emphysema and chronic bronchitis with very severe airways obstruction. He stated further that he did not believe that claimant has pneumoconiosis and that he believes that claimant's impairment is a result of chronic bronchitis and pulmonary emphysema which has predominantly resulted from claimant's long history of cigarette smoking. See Employer's Exhibit 6.

found that the preponderance of the evidence establishes that claimant does not have pneumoconiosis. See Decision and Order at 12-13; Lafferty, supra. Consequently, the administrative law judge's finding that employer established rebuttal pursuant to 20 C.F.R. §727.203(b)(4) is affirmed as it is supported by substantial evidence.

In regard to claimant's contention that the administrative law judge's Decision and Order went beyond the scope of the remand order, the administrative law judge properly reconsidered the evidence pursuant to 20 C.F.R. §§727.203(b)(3) and (b)(4) as was instructed by the Board. See Wright, supra. Claimant's contention of error on this issue is therefore rejected. Moreover, as the administrative law judge's finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(4) is affirmed, there is no need to address claimant's contention of error at 20 C.F.R. §727.203(b)(3).[2]

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[2]The finding of no pneumoconiosis, which has been affirmed, precludes entitlement under the Act. Stanford v. Valley Camp Coal Co., 7 BLR 1-906 (1985).

RENO E. BONFANTI
Administrative Law Judge