BRB No. 91-0454 BLA

JOHN CODY)
)
Claimant-Petitioner)
)
v.)
)
NATIONAL MINES CORPORATION)
)
and)
)
OLD REPUBLIC INSURANCE)
) DATE ISSUED:
Employer/Carrier-)
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Karen S. Rapaport (Arter & Hadden), Washington, D.C., for petitioner.

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

PER CURIAM:

Employer appeals the Decision and Order (89-BLA-1072) of Administrative Law Judge Gerald M. Tierney awarding 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 on the date of filing, February 16,

1988, the administrative law judge adjudicated the claim pursuant to the permanent regulations at 20 C.F.R. Part 718. The administrative

*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).

law judge made no determination as to the length of claimant's coal mine employment; however, the 30 years of coal mine employment, alleged by claimant, is not contested on appeal. The administrative law judge determined that claimant established he was totally disabled due to pneumoconiosis which arose out of his coal mine employment pursuant to 20 C.F.R. §§718.202, 718.203, and 718.204. Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in determining that claimant suffered from pneumoconiosis and was totally disabled pursuant to 20 C.F.R. §§718.202 and 718.204. The Director, Office of Workers' Compensation Programs has not filed a brief 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).

Employer contends that the administrative law judge erred in finding that the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). We disagree. The administrative law judge considered the medical opinions of fourteen physicians and found that of the twelve physicians that examined claimant, eight diagnosed pneumoconiosis. The administrative law judge permissibly gave greater weight to the opinions of the examining physicians because their diagnoses are the result of an accumulation of information that provides a fuller picture of the claimant's condition. See Decision and Order at 11. As it is within the administrative law judge's discretion, as trier-of-fact, to afford greater weight to examining physicians and the preponderance of the evidence, we affirm his finding that claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a)(4).[1] See Hall v. Director, OWCP, 8 BLR 1-193 (1985); See Price v. Peabody Coal Company, 7 BLR 1-671 (1985).

[1]Inasmuch as the administrative law judge's finding at Section 718.202(a)(4) is supported by substantial evidence, we need not address the employer's contentions regarding his finding at Section 718.202(a)(1).

Employer also contends that the administrative judge erred in finding the evidence established total disability pursuant to Section 718.204(c)(4).[2] Employer specifically contends that the administrative law judge misstated the testimony of Dr. Anderson, who actually testified that claimant has no pulmonary dysfunction associated with his coal mine employment. We agree. The administrative law judge considered all the medical opinions of record, and found that the opinion of Dr. Anderson, stating that "claimant is 100 percent disabled by his pulmonary problem which he attributes to the claimant's coal mine employment and long history of cigarette smoking", was the most persuasive because he is a Board-certified specialist in pulmonary medicine and his diagnosis of pneumoconiosis is consistent with the weight of evidence on that issue. Decision and Order at 13. The record, however, is void of any report or testimony by Dr. Anderson, consisting of a diagnosis establishing claimant's total disability.[3] Additionally, the fact that a miner would not be rehired, see Claimant's Exhibit 1 at 20; Ramey v. Kentland Elkhorn Coal Co., 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985); or should not have further coal dust exposure, does not support a finding of total disability. See Claimant's Exhibit 1 at 19; Zimmerman v. Director, OWCP, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). As the administrative law judge's finding regarding the opinion of Dr. Anderson,

[2]The administrative law judge's findings pursuant to 20 C.F.R. §§718.203, 718.204(c)(1) and (c)(2), are affirmed as they are unchallenged on appeal. Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

[3]The report of Dr. Anderson, dated May 5, 1987, diagnosed category 2 pneumoconiosis, hypertensive cardiovascular disease, emphysema with moderate obstructive defect, and noted that claimant stopped working because of an orthopedic injury. Claimant's Exhibit 1, Director's Exhibit 43. In his deposition, taken April 14, 1988, Dr. Anderson responded "No," when asked, "Is any of the pulmonary dysfunction you noted related to claimant's occupation as a coal miner?" Claimant's Exhibit 1 at 23; Director's Exhibit 43 at 23.

which he found the most persuasive, is unsupported by the evidence of record, we must vacate his finding pursuant to Section 718.204(c)(4) and remand this case for reconsideration of the medical evidence.

Employer further alleges that the administrative law judge erred in rejecting the medical reports of Drs. Dahhan, Vuskovich, Broudy, and Branscomb because they failed to diagnose pneumoconiosis. See Employer's Brief at 22, 23. We agree. A diagnosis of pneumoconiosis is not necessary for determining the existence of a totally disabling respiratory impairment. See 20 C.F.R. §718.204(c)(4). The administrative law judge improperly afforded lesser weight to the reports of Drs. Dahhan, Vuskovich, Broudy, and Branscomb, who stated that claimant was not totally disabled, based on their failure to diagnose pneumoconiosis. Decision and Order at 14. See McMath v. Director, OWCP, 12 BLR 1-6 (1988); Hall v. Consolidation Coal Co., 6 BLR 1-1306 (1984); see also Marcum v. Director, OWCP, 11 BLR 1-23 (1987). Consequently, we vacate the administrative law judge's award of benefits and remand this case for the administrative law judge to consider all the relevant evidence of record and determine whether claimant has established total disability pursuant to Section 718.204(c). See Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195 (1986). If on remand the administrative law judge finds total disability established pursuant to Section 718.204(c), he must then determine whether this total disability is due to pneumoconiosis pursuant to Section 718.204(b). See Adams v. Director, OWCP, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1989).

Lastly, on remand the administrative law judge is further instructed to determine whether the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). See Adams, supra.

Accordingly, the Decision and Order awarding benefits is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge