

BRB No. 90-1492 BLA

KENNETH C. FISHER)
)
Claimant-Petitioner)
)

v.)

) DATE ISSUED: _____)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

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

Kenneth C. Fisher, Cedar Grove, West Virginia, pro se.
Matthew P. Levin (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order on Remand (85-BLA-3715) of Administrative Law Judge Ralph A. Romano 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. This case is on appeal before the Board for the second time. Claimant filed for benefits on February 18, 1977 and the administrative law judge, who credited claimant with nine and one-half years of coal mine employment, considered the claim pursuant to 20

C.F.R. Part 410, Subpart D. In his first Decision and Order, the administrative law judge found that while the Director, Office of Workers' Compensation Programs (the Director), had conceded the existence of pneumoconiosis, claimant had not established total disability pursuant to 20 C.F.R. §§410.424 and 410.426. The administrative law judge further found that claimant was not entitled to the presumption at 20 C.F.R. §410.490 because his claim was filed after July 1, 1973. Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's findings of nine and one-half years of coal mine employment, the existence of pneumoconiosis and claimant's failure to establish total disability pursuant to 20 C.F.R. §§410.424 and 410.426. However, the Board remanded the case for the administrative law judge to consider whether claimant established that his impairment arose out of coal mine employment pursuant to 20 C.F.R. §410.490(b)(2), and if so, whether the Director has established rebuttal pursuant to 20 C.F.R. §410.490(c)(1) and (c)(2). Fisher v. Director, OWCP, BRB No. 87-3418 BLA (Sept. 28, 1989)(unpub.) On remand, the administrative law judge found that claimant failed to establish that his respiratory impairment arose out of coal mine employment pursuant to 20 C.F.R. §410.490(b)(2) and that the Director established rebuttal pursuant to 20 C.F.R. §410.490(c)(2). Accordingly, benefits were again denied. Claimant now appeals this denial of benefits. The Director responds in support of the administrative law judge's Decision and Order on remand.

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).

As claimant has established less than ten years of coal mine employment, he must establish that he has pneumoconiosis and that his impairment arose out of coal mine employment in order to invoke the presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §410.490. See Phipps v. Director, OWCP, BLR , BRB No. 89-3919 BLA (Nov. 13, 1992)(en banc with Smith, J., concurring and McGranery, J., concurring and dissenting). As the administrative law judge's finding that claimant established the existence of pneumoconiosis was previously affirmed by the Board, claimant needs only to establish that his respiratory impairment arose out of his coal mine employment pursuant to 20 C.F.R. §410.490(b)(2). See Fisher, supra. Pursuant to 20 C.F.R. §410.490(b)(2), the administrative law judge considered the medical opinions of record, which consist of the opinions of Drs. Aguilar, Mir, Pauig, Zaldivar, and Fritzhand. Dr. Aguilar

diagnosed, in a discharge summary and a medical report, that claimant suffered from low back syndrome, pulmonary fibrosis, emphysema, and anxiety neurosis. He gave no opinion as to the cause of claimant's pulmonary fibrosis, emphysema. See Director's Exhibits 25, 26. Dr. Mir, in a discharge summary, diagnosed acute low back sprain and spondylolisthesis. See Director's Exhibit 25. Dr. Pauig stated that claimant suffered from pulmonary emphysema and arthritis of the spine. He stated further that claimant's disease may have been due to the years he has worked in the mines. See Director's Exhibits 27, 28. Dr. Zaldivar diagnosed anxiety and hypertension and stated that this condition is not related to claimant's coal mine employment. See Director's Exhibit 29. Dr. Fritzhand stated that claimant has a slight degree of coal workers' pneumoconiosis and chronic obstructive pulmonary disease. He further stated that claimant's impairment is caused by a long history of cigarette inhalation. See Director's Exhibit 49. Upon considering this evidence, the administrative law judge permissibly accorded less weight to Dr. Pauig's opinion as it is equivocal. See Decision and Order on Remand at 2; Justice v. Island Creek Coal Co., 11 BLR 1-91 (1988). The administrative law judge further permissibly accorded the greatest weight to Dr. Fritzhand's opinion attributing claimant's impairment to cigarette smoking, as it is well reasoned and well documented and due to Dr. Fritzhand's superior qualifications. See Decision and Order at 2; Scott v. Mason Coal Co., 14 BLR 1-37 (1990); Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989); Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987). As a result, the administrative law judge's finding that claimant failed to establish that his impairment arose out of his coal mine employment pursuant to 20 C.F.R. §410.490(b)(2) is affirmed as it is supported by substantial evidence.

As the administrative law judge's finding that claimant did not establish that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §410.490(b)(2) is affirmed, benefits are precluded pursuant to Section 410.490.

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH,
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge