BRB No. 91-0520 BLA

BLAINE P. WILSON )
)
Claimant-Petitioner )
)
v. )
)
SPRING HOLLOW COAL COMPANY )
)
and ) DATE ISSUED:
)
OLD REPUBLIC INSURANCE COMPANY)
)
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Vernon P. Williams (Wolfe & Farmer), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (81-BLA-5764) of Administrative Law Judge Daniel L. Leland denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine and Safety Act of 1969, as amended, 30 U.S.C.

§901 et seq. This case is on appeal before the Board for the third time. In his first Decision and Order, the administrative law judge credited claimant with seven years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 410, Subpart D. The administrative law judge found that the x-ray evidence of record did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §410.414(a). The administrative law judge then found the evidence of record sufficient to establish a totally disabling

respiratory or pulmonary impairment arising out of coal mine employment pursuant to 20 C.F.R. §410.414(c). Accordingly, benefits were awarded. The Board on appeal vacated the administrative law judge's Decision and Order awarding benefits and remanded the case for the administrative law judge to reconsider the evidence pursuant to 20 C.F.R. §§410.414(c) and 410.426, to explain his findings pursuant to 20 C.F.R. §410.416, and to consider the claim pursuant to 20 C.F.R. §410.490. Wilson v. Spring Hollow Coal Co., BRB No. 84-488 BLA (Oct. 30, 1987)(unpub.) On remand, the administrative law judge determined the evidence insufficient to establish that claimant's totally disabling respiratory or pulmonary impairment arose out of coal mine employment pursuant to 20 C.F.R. §410.414(c), thus precluding entitlement to benefits pursuant to 20 C.F.R. Part 410, Subpart D. The administrative law judge then found that the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §410.490(b)(1)(i), that the evidence was sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §410.490(b)(2) and that rebuttal of the interim presumption was not established pursuant to 20 C.F.R. §410.490(c). Accordingly, benefits were awarded. In the second appeal, the Board vacated the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §410.490(b)(1)(i), affirmed the administrative law judge's finding that claimant established that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §410.490(b)(2), and remanded the case for the administrative law judge to reconsider the x-ray evidence of record pursuant to 20 C.F.R. §410.490(b)(1)(i) and the rebuttal issue pursuant to 20 C.F.R. §410.490(c). Wilson v. Spring Hollow Coal Co., BRB No. 88-615 BLA (Feb. 28, 1990)(unpub.) In his third Decision and Order, the administrative law judge reconsidered the x-ray evidence of record and determined that claimant did not establish invocation of the presumption at 20 C.F.R. §410.490 as the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §410.490(b)(1)(i). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to consider the claim pursuant to 20 C.F.R. Part 727 and in weighing the x-ray evidence of record. Employer responds in support of the administrative law judge's Decision and Order on Remand denying benefits. The Director, Office of Workers' Compensation Programs (the Director), 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).

Pursuant to 20 C.F.R. §410.490(b)(1)(i), the administrative law judge considered the x-ray evidence of record, which consists of seventeen interpretations of eight x-rays. Of the seventeen interpretations, six were read as positive for the existence of pneumoconiosis. See Director's Exhibits 14, 16, 17, 19, 26, 30; Claimant's Exhibits 1, 3, 4; Employer's Exhibits 7, 8. Ten of the interpretations were made by B-readers, and of those ten, only one was read as positive for the existence of pneumoconiosis. See Director's Exhibits 16, 26; Employer's Exhibits 7, 8. The administrative law judge permissibly assigned greater weight to the interpretations of the B-readers. See Decision and Order on Remand-Denying Benefits at 2; Trent v. Director, OWCP, 11 BLR 1-26 (1987); Vance v. Eastern Associated Coal Corp., 8 BLR 1-68 (1985). The administrative law judge further permissibly found that the weight of the B-readers' interpretations was negative for the existence of pneumoconiosis. See Decision and Order on Remand- Denying Benefits at 2; Lafferty v. Cannelton Industries, Inc., 12 BLR 1-190 (1989). As a result, the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §410.490(b)(1)(i) and entitlement to benefits pursuant to 20 C.F.R. §410.490 are affirmed as they are supported by substantial evidence. 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).[1]

Further, claimant contends that the administrative law judge erred in failing to invoke the interim presumption pursuant to 20 C.F.R. §727.203(a). However, this contention is rejected as claimant failed to establish more than ten years of coal mine employment. See Phipps, supra.

[1]Claimant contends that the evidence of record is sufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment. As this issue was previously decided and affirmed, it is now affirmed as law of the case. See Wilson v. Spring Hollow Coal Co., BRB No. 88-615 BLA (Feb. 28, 1990)(unpub.); Brinkley v. Peabody Coal Co., 14 BLR 1-147 (1990).

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