BRB No. 91-1431 BLA

SAM J. NOLAND )
)
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 of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Charles S. Murry (Sunbelt Advocacy Services, Inc.), Bessemer, Alabama, for claimant.

J. Matthew McCracken (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, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (86-BLA-0333) of Administrative Law Judge Richard E. Huddleston 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). Claimant first filed for benefits on November 27, 1972 and the claim was denied on July 31, 1980. Claimant filed a second claim on November 26, 1984. The administrative law judge considered this claim under the duplicate claim provisions of 20 C.F.R. §725.309, and found the

evidence sufficient to establish a material change in conditions. The administrative law judge then determined that claimant established eleven and one-quarter years of coal mine employment and considered the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied. On appeal,

claimant contends that the administrative law judge erred in his consideration of the evidence pursuant to 20 C.F.R. §718.202(a), and argues that the miner is totally disabled due to pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's Decision and Order.

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).

In order to establish entitlement under Part 718, a claimant must establish that the miner had pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204, 718.205; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The existence of pneumoconiosis may be established by x-ray, by biopsy or autopsy, or by operation of a presumption and by medical opinion evidence. *See* 20 C.F.R. §718.202(a).

Claimant first contends that the administrative law judge erred in weighing the evidence and in failing to find that there is true doubt which must be weighed in favor of claimant. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered the x-ray evidence of record, which consists of eleven interpretations of six x-rays. Of these eleven interpretations, only two were positive for the existence of pneumoconiosis. *See* Director's Exhibits 10, 11, 12, 19, 24; Claimant's Exhibits 2, 3. The administrative law judge permissibly gave the positive interpretations less weight as neither were performed by a B-reader and in light of the fact that all of the interpretations by B-readers were negative. *See* Decision and Order at 8; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). The administrative law judge then permissibly found that the weight of the x-ray evidence was negative for the existence of pneumoconiosis. *See* Decision and Order at 9; *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). As a result, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed as supported by substantial evidence.[1]

[1]As the administrative law judge did not find the x-ray evidence of record to be equally probative, claimant's contention that the true doubt rule should apply in this case is rejected. *See Conley v. Roberts and Schaefer Co.*, 7 BLR 1-309 (1984).

There is no autopsy or biopsy evidence in the record in this case, thus the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(2). The administrative law judge then found that the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(3) as there are no presumptions that apply in this case.[2] Claimant contends however that the administrative law judge erred in finding that the evidence was insufficient to invoke the presumption at 20 C.F.R. §718.304, as Dr. Goodman interpreted a 1973 x-ray as indicating the presence of large opacities in claimant's lungs measuring in excess of 3 cm and 1.5 cm respectively. The record indicates that Dr. Goodman's x-ray report does not state that claimant has large opacities, but instead states that there are "[t]wo areas in the right hilar area which are suspicious of large nodes. The larger being about 3 x 1.5 cm. The smaller being about 1.5 x 1 cm." Director's Exhibit 24. Dr. Goodman also noted "a fine nodular fibrosis measuring 1-2 mm", and reported his interpretation as 1.) Moderately severe pulmonary emphysema, 2.) Hilar mass, etiology undetermined, appearing to be a large hilar node and 3.) mild nodular fibrosis consistent with simple pneumoconiosis, Class 1. *See* Director's Exhibit 24. As there is no indication that Dr. Goodman considered the large nodes to be opacities, and as he interpreted the x-ray as showing simple pneumoconiosis based on the diagnosed mild nodular fibrosis, the administrative law judge's finding that there is no evidence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 is affirmed as it is supported by substantial evidence. *See generally Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991).

Claimant further contends that all of the medical reports show that claimant has pneumoconiosis as defined in 20 C.F.R. §718.201. Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinion evidence of record, which consists of four medical reports and two progress reports. In his report of January 4, 1985, Dr. Hasson stated that there were no changes on chest x-ray consistent with pneumoconiosis. *See* Director's Exhibit 8. Dr. Snow produced progress reports dated May 24, 1985 and June 21, 1985 and he remarked in the latter report that claimant has some interstitial markings on his chest x-ray and could have some degree of pneumoconiosis. *See* Director's Exhibit 19. The administrative law judge permissibly discredited Dr. Snow's opinion as it was equivocal and does not establish the existence of pneumoconiosis. *See* Decision

[2]The 15 year presumption contained in 20 C.F.R. §718.305 is inapplicable here as claimant's application for benefits was filed after January 1, 1982. 20 C.F.R. §718.305(e). The presumption at 20 C.F.R. §718.306 applies only to survivor's claims filed prior to June 30, 1982 wherein the miner died on or before March 1, 1978. 20 C.F.R. §718.306(a).

and Order at 10; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Dr. Watkins examined claimant on May 30, 1973 and diagnosed probable pulmonary emphysema which he does not link to coal mine employment. *See* Director's Exhibit 24. The administrative law judge permissibly determined that Dr. Boyd's diagnosis of chronic obstructive lung disease of a mild degree only minimally associated to claimant's coal mine employment, does not constitute a diagnosis of pneumoconiosis pursuant to 20 C.F.R. §718.201 as the regulation requires that claimant's condition be "significantly related to, or substantially aggravated by, dust exposure in coal mining". Decision and Order at 10; Director's Exhibit 24; *see generally Shoup v. Director, OWCP*, 11 BLR 1-110 (1987). In his reports dated January 3, 1990 and September 19, 1990, Dr. Vincent diagnosed shortness of breath secondary to pneumoconiosis. *See* Claimant's Exhibits 2, 3. The administrative law judge permissibly accorded little weight to this opinion as it was based on a positive x-ray when he had previously determined that the x-ray evidence is negative for pneumoconiosis. *See* Decision and Order at 10; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). The administrative law judge states that he is not able to determine the weight that Dr. Vincent accorded to his reading of the x-ray and that he can not determine what Dr. Vincent's diagnosis might have been had he read the film as negative. *See* Decision and Order at 11. The administrative law judge further permissibly accorded Dr. Vincent's opinion less weight as it appears that Dr. Vincent relied on a coal mine employment history of over 40 years when he credited claimant with eleven years of coal mine employment. *See* Decision and Order at 11; Claimant's Exhibit 3; *Lafferty*, *supra*; *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). As a result, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is affirmed as it is supported by substantial evidence. Since claimant has failed to establish a requisite element of entitlement, we affirm the administrative law judge's denial of benefits under Part 718. *See Trent*, *supra*.

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER

Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge