BRB No. 93-1077 BLA

JAMES M. TANNER)
)
Claimant-Petitioner)
)
v.)
)
SOUTHERN OHIO COAL COMPANY)
)
Employer-Respondent) DATE ISSUED:
)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-In-Interest) DECISION and ORDER

Appeal of the Decision and Order of Edith Barnett, Administrative Law Judge, United States Department of Labor.

James M. Tanner, Newton, West Virginia, *pro se*.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (91-BLA-2532) of Administrative Law Judge Edith Barnett 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). This case involves a duplicate claim. Claimant filed his first claim for benefits on August 4, 1980. This claim was denied on December 3, 1980 as claimant failed to establish the existence of pneumoconiosis, pneumoconiosis due to coal mine employment, total disability and total disability due to pneumoconiosis. *See* Director's Exhibit 36. Claimant filed a second claim for benefits on September 23, 1985. The administrative law judge determined that claimant has over thirty years of

coal mine employment and considered the claim as a duplicate claim pursuant to 20 C.F.R. §725.309. Upon considering the newly submitted evidence of record,

*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)(1988).

the administrative law judge found that claimant failed to establish that he is totally disabled and, thus, that he failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge then considered all of the evidence of record and determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Accordingly, benefits were denied. Claimant appeals this denial. Neither employer nor the Director, Office of Workers' Compensation Programs (the Director), have chosen to respond to this appeal.

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).

Initially, it is noted that, as the record contains newly submitted evidence that is positive for the existence of pneumoconiosis, the administrative law judge erred in finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *See* Director's Exhibits 27, 34, 35; *Rice v. Sahara Coal Co., Inc.*, 15 BLR 1-19 (1990). However, any error is harmless as the administrative law judge properly considered all of the evidence of record in making his finding regarding the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Regarding the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge first considered the x-ray evidence of record pursuant to 20 C.F.R. §718.202(a)(1). The record contains fourteen interpretations of five x-rays, thirteen of which are negative for the existence of pneumoconiosis. *See* Director's Exhibits 30-33; Employer's Exhibits 1, 3-7. Thirteen of the negative interpretations, including the most recent interpretation of record, were read by B-readers. *See* Director's Exhibits 30-32; Employer's Exhibits 1, 3-7. The one positive interpretation was by Dr. Bassali, whose qualifications are not in the record. *See* Director's Exhibits 34, 35. The administrative law judge permissibly found that the weight of the x-ray evidence was negative for the existence of pneumoconiosis. *See* Decision and Order at 7; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). 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 it is supported by substantial evidence.

There is no autopsy or biopsy evidence in the record in this case, thus pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(2). Also, 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.[1]

The administrative law judge next considered the medical opinion evidence of record, which consists of five medical reports, pursuant to 20 C.F.R. §718.202(a)(4). Of the five opinions, only two diagnosed pneumoconiosis. Dr. Fritzhand, in a 1980 report, diagnosed chronic obstructive pulmonary disease and related it to claimant's coal mine employment and Dr. Rasmussen, in a 1986 report, diagnosed coal workers' pneumoconiosis. *See* Director's Exhibits 26, 27. The remaining physicians, Dr. Crisalli, in two reports dated 1992 and 1987, and Dr. Lockey, in a report dated 1987, opined that claimant did not have pneumoconiosis. *See* Employer's Exhibit 1, 2, 7. Upon considering these opinions, the administrative law judge permissibly found that Dr. Crisalli's 1992 opinion is entitled to the most weight as he had the most familiarity with claimant's condition than the other physicians of record, and it is better reasoned and more recent than the other opinions. *See* Decision and Order at 8; Employer's Exhibits 2, 7; *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), *see generally Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). 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)(4) is affirmed as it is supported by substantial evidence.[2] Further, as claimant has not established the existence of pneumoconiosis, a requisite element of

[1]The presumption at 20 C.F.R. §718.304 is not applicable as there is no evidence that the deceased miner suffered from complicated pneumoconiosis. The fifteen 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).

[2]We note that the administrative law judge erred in finding that Dr. Fritzhand's diagnosis of chronic obstructive pulmonary disease due to claimant's coal mine employment was not a diagnosis of pneumoconiosis. *See* Decision and Order at 7; Director's Exhibit 26; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). However, any error is harmless as the administrative law judge permissibly found Dr. Crissali's reports to be entitled to the most weight. *See Larioni*, *supra*.

entitlement under 20 C.F.R. Part 718, the administrative law judge's denial of benefits is affirmed. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge