

BRB No. 93-0272 BLA

EMERSON BENNETT)
)
 Claimant-Petitioner)
)
 v.)
) DATE ISSUED:
 MACK ENERGY COMPANY, INCORPORATED)
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 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 of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Emerson Bennett, Gallipolis, Ohio, pro se.

C. Terry Owen (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (91-BLA-1342) of Administrative Law Judge Donald W. Mosser 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). The administrative law judge credited claimant with eleven years of coal mine employment, and based on the filing date, June 14, 1990, considered the claim pursuant to the provisions of 20 C.F.R. Part 718. The administrative law judge found the evidence of record sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). However, the administrative law judge further found the evidence insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) or that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R.

§718.204(b). Accordingly, benefits were denied. Claimant now appeals these findings. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has not responded to this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

In finding that claimant failed to establish his entitlement to benefits, the administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis.¹ We agree. Out of twelve x-ray interpretations, one was positive; a 1/0 reading which the administrative law judge permissibly gave less weight as barely qualifying. See *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985). The administrative law judge also relied on the weight of the interpretations of the most qualified physicians of record to find that the x-ray evidence did not establish pneumoconiosis. See *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). There was no biopsy evidence in the record to be considered at 20 C.F.R. §718.202(a)(2), and the administrative law judge correctly determined that the presumptions listed at 20 C.F.R. §718.202(a)(3) were inapplicable. We therefore

¹ The administrative law judge's findings of eleven years of coal mine employment and total disability at 20 C.F.R. §718.204(c) are affirmed as unchallenged on appeal as they are not adverse to claimant. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(3).

In his analysis at 20 C.F.R. §718.202(a)(4), the administrative law judge properly evaluated all of the medical opinions of record and found them insufficient to establish the existence of pneumoconiosis. As the administrative law judge noted, Drs. Zaldivar, Walker and Pushkin found no pneumoconiosis. Director's Exhibit 11; Employer's Exhibits 1, 2. While Dr. Linder, claimant's treating physician, diagnosed pneumoconiosis in one report, the administrative law judge noted that Dr. Linder failed to explain the basis for his diagnosis. Decision and Order at 9; Claimant's Exhibit 1. Thus, the administrative law judge permissibly accorded less weight to this opinion. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). In a second report, Dr. Linder diagnosed chronic obstructive pulmonary disease, pleural thickening, and pulmonary scarring, opining that claimant's "pulmonary impairment...is likely work related." Director's Exhibit 12. The administrative law judge permissibly found this report insufficient to establish the existence of pneumoconiosis because Dr. Linder did not relate the conditions diagnosed to dust exposure in claimant's coal mine employment as required by the regulatory definition of pneumoconiosis at 20 C.F.R. §718.201. Further, the administrative law judge properly discredited Dr. Linder's opinion as equivocal. See *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Claimant argues that the administrative law judge erred in considering, at Section 718.202(a), documentary evidence from claimant's then pending West Virginia Workers' Compensation claim because the initial denial of benefits was later reversed. Claimant's Letter at 1. We disagree. Claimant, represented by counsel at the hearing, had the opportunity to object to the admission of this evidence but failed to do so. See, 20 C.F.R. §725.456; Hearing Transcript at 50. Thus, the evidence was properly admitted into the record and the administrative law judge was bound to consider it and draw his own conclusions and inferences from it. See 30 U.S.C. §932(b); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Therefore, the administrative law judge properly considered the documentary evidence related to claimant's state workers' compensation claim.

Thus, as claimant has failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, the denial of benefits is affirmed. See *Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

_____ JAMES F.
BROWN
Administrative Appeals Judge