BRB No. 96-0184 BLA

WYLIE N. BROWN )
)
Claimant-Petitioner )
)
v. )
)
EASTERN ASSOCIATED COAL )
CORPORATION )
) DATE ISSUED:
Employer-Respondent )
)
DIRECTOR, OFFICE OF WORKERS' )
COMPENSATION PROGRAMS, UNITED )
STATES DEPARTMENT OF LABOR )
)
Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order of George A. Fath, Administrative Law Judge, United States Department of Labor.

Wylie N. Brown, Beckley, West Virginia, *pro se*.

Before: SMITH, BROWN, and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order (95-BLA-0452) of Administrative Law Judge George A. Fath denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and

[1]Claimant is Wylie N. Brown, the miner, who filed a claim for benefits on February 24, 1993. Director's Exhibit 1.

Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge accepted employer's stipulation to thirty-eight years of qualifying coal mine employment, Decision and Order at 2, and found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

Claimant generally challenges the denial of benefits. No response was received from Employer and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in 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. *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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 718.202(a)(1), the administrative law judge found that of the nineteen interpretations of the five x-rays of record, Director's Exhibits 11-12, 25; Claimant's Exhibit 2; Employer's Exhibits 1-3, only two -- of a film taken on April 5, 1993-- were positive, Director's Exhibits 11-12, and that this film was reread as negative by three physicians, Decision and Order at 3; Employer's Exhibit 1. The

administrative law judge concluded that because four of the five x-rays do not support a finding of pneumoconiosis, and the fifth "is not persuasive," claimant failed to establish "by a preponderance of the x-ray evidence that he has pneumoconiosis." Decision and Order at 4.

Inasmuch as the administrative law judge may rely on the numerical superiority of the negative x-ray interpretations, *see Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990), we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

We affirm the administrative law judge's findings that Section 718.202(a)(2)-(3) is unavailable to claimant inasmuch as the record contains no autopsy or biopsy evidence and the presumptions set forth at Section 718.202(a)(3) are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 3; Director's Exhibit 1; *see* 20 C.F.R. §§718.202(a)(2), (3); 718.304, 718.305(e), 718.306.

Pursuant to Section 718.202(a)(4), the administrative law judge found that of the three medical opinions and one hospital discharge summary of record, only one physician diagnosed pneumoconiosis. Director's Exhibits 9, 25; Claimant's Exhibit 5; Employer's Exhibit 5; Decision and Order at 4. The administrative law judge noted Dr. Rasmussen's opinion that it was "reasonable to diagnose" pneumoconiosis but

claimant definitively "does have significant and disabling lumbar disc syndrome." Decision and Order at 4; Director's Exhibit 9. The administrative law judge then found "meaning in the different ways in which Doctor Rasmussen stated his two conclusions" and determined that Dr. Rasmussen's report is not "altogether persuasive in establishing the existence of pneumoconiosis." Decision and Order at 4. The administrative law judge concluded that claimant failed to establish the existence of pneumoconiosis by a preponderance of the evidence. Decision and Order at 4.

Inasmuch as the administrative law judge may question opinions which he finds to be equivocal or qualified, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987), and may rely on the numerical superiority of the medical opinions finding no coal workers' pneumoconiosis, *see Edmiston*, *supra*, we affirm the administrative law judge's findings pursuant to Section 718.202(a)(4). Further, because claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement pursuant to 20 C.F.R. Part 718, we affirm the denial of benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *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.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge