

BRB No. 99-0658 BLA

VIRGIL NANTZ)
)
 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 On Remand of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Dorothy L. Page (Henry L. Solano, 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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (1996-BLA-1305) of Administrative Law Judge Fletcher E. Campbell, Jr. denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act

¹Claimant is Virgil Nantz, the miner, whose initial claim for benefits was filed on October 19, 1978 and denied on October 19, 1983. Director's Exhibits 43-33, 43-196. The Board affirmed the denial of benefits on April 8, 1986. *Nantz v. Director, OWCP*, BRB No. 83-2680 BLA (Apr. 8, 1986)(unpubl.). Claimant filed the instant claim on May 21, 1991. Director's Exhibit 1.

of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the fourth time and involves a duplicate claim. In the initial Decision and Order issued on the instant claim, Administrative Law Judge Bernard J. Gilday, Jr. found that claimant established seven years of qualifying coal mine employment, that the newly submitted pulmonary function evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1) and, thus, a material change in conditions pursuant to 20 C.F.R. §725.309, but that the entirety of the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's findings regarding the length of claimant's coal mine employment and that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), and thus affirmed the denial of benefits. *Nantz v. Director, OWCP*, BRB No. 95-0395 BLA (Jul. 27, 1995)(unpub.). Subsequently, claimant filed a petition for modification pursuant to 20 C.F.R. §725.310 on December 6, 1995. Director's Exhibit 59.

On modification, Administrative Law Judge Fletcher E. Campbell, Jr. found that claimant established seven years of qualifying coal mine employment and that the new evidence in addition to the old evidence failed to establish the existence of pneumoconiosis and, consequently, failed to establish either a mistake in a determination of fact or a change in conditions pursuant to Section 725.310. Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's findings regarding the length of claimant's coal mine employment and that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), but vacated the administrative law judge's findings pursuant to Section 718.202(a)(4) and remanded the case for the administrative law judge to consider Dr. Bushey's opinion pursuant to Section 718.202(a)(4) and the remainder of the evidence pursuant to 20 C.F.R. §§718.203(c) and 718.204(b), (c). *Nantz v. Director, OWCP*, BRB No. 97-0918 BLA (Mar. 30, 1998)(unpub.).

In the instant Decision and Order on Remand, the administrative law judge found that Dr. Bushey's opinion is entitled to no weight and that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in evaluating the medical opinion of Dr. Bushey. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial

evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Claimant contends that the administrative law judge erred in rejecting Dr. Bushey’s opinion because he relied upon a positive x-ray when the administrative law judge found the x-ray evidence to be negative for the existence of pneumoconiosis and because Dr. Bushey relied upon an erroneous coal mine employment history. Claimant’s Brief at 4-5. Dr. Bushey, in a report dated October 16, 1979, opined, based on claimant’s symptoms, employment history of twelve years, physical examination, and x-ray that claimant has “coal workers’ pneumoconiosis ½, t.” Director’s Exhibit 43-160.

The administrative law judge acted within his discretion in finding Dr. Bushey’s opinion entitled to no weight because the physician relied on a history of twelve years of coal mining employment, as opposed to the seven years found by the administrative law judge. Decision and Order on Remand at 2; *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985). The administrative law judge further rationally found Dr. Bushey’s opinion entitled to no weight because he did not provide the date of the x-ray on which he based his opinion and because his credentials are not in the record. Decision and Order on Remand at 2; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Massey v. Eastern Associated Coal Corp.*, 7 BLR 1-37 (1984); *Cosalter v. Mathies Coal Co.*, 6 BLR1-1182 (1984). Consequently, we affirm the administrative law judge’s finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and the denial of benefits.

Accordingly, the administrative law judge’s Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge