BRB No. 06-0176 BLA

DAVID E. BROCK)
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Claimant-Petitioner)
)
v.)
)
RALPH FELOSI TRUCKING) DATE ISSUED: 09/29/2006
)
and)
)
EMPLOYERS INSURANCE OF WASSAU)
)
Employer/Carrier-)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

David E. Brock, Ages, Kentucky, *pro se.*

Philip J. Reverman, Jr. (Boehl, Stopher & Graves, LLP), Louisville, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denial of Benefits (03-BLA-5693) of Administrative Law Judge Thomas F. Phalen, Jr., on a subsequent 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 found that the newly submitted evidence established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and that claimant had, therefore,

established a change in an applicable condition of entitlement, *i.e.*, an element previously adjudicated against him. 20 C.F.R. §725.309(d). The administrative law judge found, however, on considering all the evidence, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and failed to establish that total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(c). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's decision denying benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not file a response brief.

In an appeal by a claimant filed without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and 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).

On considering the x-ray evidence of record, the administrative law judge determined that there were six negative x-rays, one positive, and five, including the two most recent x-rays, which were inconclusive because they had been read as both positive and negative by equally qualified readers. Decision and Order at 20. The administrative law judge went on to state that of the films taken after August of 2001, three were read positive by dually-qualified readers, while three were read negative by dually-qualified readers. The administrative law judge further noted that the x-rays taken in 2003 were inconclusive as they were read both positive and negative by equally qualified readers. In conclusion, therefore, according greater weight to the 2003 x-rays evidence, rather than the pre-2003 x-ray evidence, by comparably qualified physicians, the administrative law judge found that the existence of pneumoconiosis was not established. Decision and Order at 20. This was reasonable. *See Staton v. Norfolk and Western Railway Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *see Worhach v. Director, OWCP*, 17 BLR 1- 105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc)*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). We affirm, therefore, the administrative law judge's finding that the x-ray evidence of record did not establish the presence of pneumoconiosis at Section 718.202(a)(1).

The administrative law judge also correctly found that there was no biopsy or autopsy evidence pursuant to Section 718.202(a)(2) and that none of the applicable presumptions

associated with subsection (a)(3) were applicable. Decision and Order at 20-21. Accordingly, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2) and (3). 20 C.F.R. §718.202(a)(2), (3).

The administrative law judge concluded further that the medical opinion evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(4). Considering all of the medical opinion evidence of record, both old and new, the administrative law judge, according greater weight to the newly submitted evidence in light of the progressive nature of pneumoconiosis, found that a preponderance of the newly submitted medical opinion evidence did not support a diagnosis of clinical pneumoconiosis, and that the opinions of those physicians, other than Dr. Repsher,[1] discussing the existence of legal pneumoconiosis were unreasoned. Accordingly, the administrative law judge found that the medical opinion evidence failed to establish the existence of either clinical or legal pneumoconiosis. This was proper. *See Eastover Mining Co. v. Williams*, 338 F.2d 501, 22 BLR 2-625 (6th Cir. 2003); *Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Worhach*, 17 BLR 1-105; B*obick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Clark*, 12 BLR at 1-155; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos.88-3531, 88-3578 (6th Cir. May 11, 1989) (unpub.); *McMath*, 12 BLR 1-6 (1988); *Cooper v. Director, OWCP*, 11 BLR 1-95 (1988)(Ramsey, CJ, concurring); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985).

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[1] The administrative law judge noted that even if he had not found good cause to consider Dr. Repsher's opinion, in excess of the evidentiary limitation of 20 C.F.R. §725.414(c), he would have still found that claimant failed to prove the existence of legal pneumoconiosis by a preponderance of the evidence. Decision and Order at 24; *see generally Larioni v. Director, OWCP*, 6 BLR 1-1276 (1986).

We affirm, therefore, the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(4). Because, we affirm the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis, an essential element of entitlement, we must affirm the denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).[2]

Accordingly, the administrative law judge's Decision and Order– Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[2] We need not address the administrative law judge's findings that the evidence fails to establish total disability due to pneumoconiosis at Section 718.204(c), as this finding is rendered moot by our disposition of the case. *See Cochran v. Director, OWCP*, 16 BLR 1-101 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).