BRB No. 90-1431 BLA

PHYLLIS KINDER)
(Widow of TOM KINDER))
)
Claimant-Petitioner)
)
v.)
)
JEWELL RIDGE COAL COMPANY)
) 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 John H. Bedford, Administrative Law Judge, United States Department of Labor.

Phyllis Kinder, Cedar Bluff, Virginia, pro se.

Monroe Jamison (Penn, Stuart, Eskridge & Jones), Abingdon, Virginia, for respondent.

Before: STAGE, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and BONFANTI, Administrative Law Judge.*

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (84-BLA-3463) of Administrative Law Judge John H. Bedford 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). After crediting

the miner with sixteen and one-quarter years of coal mine employment, the administrative law judge found the evidence of record insufficient to establish invocation of the interim

*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) (Supp. V 1987).

presumption pursuant to 20 C.F.R. §727.203(a)(1)-(a)(4). The administrative law judge further found that claimant was not entitled to benefits pursuant to 20 C.F.R. Part 410, Subpart D and 20 C.F.R. §410.490. Accordingly, benefits were denied. Claimant generally contends that the administrative law judge erred in denying benefits. Employer responds urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in 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 substnatial 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).

In determining that the evidence of record was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), the administrative law judge properly found that the three x-ray readings of record were all negative for the existence of pneumoconiosis. Decision and Order at 3, 4; Director's Exhibits 15, 24. The administrative law judge also properly found that a majority of the physicians found no persuasive autopsy\biopsy evidence of the existence of pneumoconiosis. Decision and Order at 3, 4; Director's Exhibits 19, 25, 26, 30; Employer's Exhibit 1. Pursuant to 20 C.F.R. §727.203(a)(2) the administrative law judge properly determined that the one ventilatory study of record did not establish any pulmonary or respiratory impairment. See Decision and Order at 4; Director's Exhibit 14.

The administrative law judge then properly determined that the record contained no other evidence establishing a totally disabing resiratory or pulmonary impairment sufficient to involve the interim presumption pursuant to 20 C.F.R. §§727.203(a)(3) or (a)(4). See Decision and Order at 4. Thus, the administrative law judge's determination that invocation of the interim presumption was not established pursuant to 20 C.F.R. §§727.203(a) is affirmed as it is supported by substantial evidence of record.

Additionally, the administrative law judge properly determined that the miner did not meet the qualifications for entitlement under 20 C.F.R. Part 410, Subpart D, as the evidence of record, failed to establish the existence of pneumoconiosis. See Decision and Order at 5; Shaw v. Cementation Company of America, 10 BLR 1-114 (1987). Further, the regulations set forth at 20 C.F.R. §410.490 do not apply to this claim as it has been properly adjudicated pursuant to 20 C.F.R. Part 727. See

Pauley v.
Bethenergy Mines, Inc., 111 S.Ct. 2524, 15 BLR 2-155 (1991). The administrative law judge's findings pursuant to Section 410.490 are therefore vacated. See also Whiteman, 15 BLR 1-11 (1991).

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

RENO E. BONFANTI
Administrative Law Judge