BRB No. 91-0108 BLA

PHILIP V. BARNES)
)
Claimant-Petitioner)
)
v.)
)
ICO CORPORATION)
)
and)
) DATE ISSUED:
OLD REPUBLIC INSURANCE)
COMPANY)
)
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 Upon Remand of Virgil M. McElroy, Administrative Law Judge, United States Department of Labor.

I. John Rossi, Des Moines, Iowa, for claimant.

Michael J. Pollack (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Upon Remand (85-BLA-4442) of Administrative Law Judge Virgil M. McElroy 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). This claim is on appeal

before
the Board for the third time. In his first Decision and Order, the administrative law judge found that claimant established fifteen years of coal mine employment and failed to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a) and entitlement pursuant to 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §727.203(a)(1)-(4) and 20 C.F.R. Part 410, Subpart D, and thus, the

denial of benefits. *See Barnes v. ICO Corporation*, BRB No. 86-2874 BLA (June 24, 1988)(unpub.). Claimant thereafter filed a motion for reconsideration with the Board. On reconsideration, the Board remanded the case to the administrative law judge for reevaluation of the evidence pursuant to 20 C.F.R. §727.203(a)(2) as a pulmonary function study that was found to be insufficient to support invocation of the interim presumption by the administrative law judge, due to the absence of a statement of claimant's cooperation, had been validated by the Director, Office of Workers' Compensation Programs (the Director). *See Barnes v. ICO Corporation*, BRB No. 86-2874 BLA (October 21, 1988)(unpub.). On remand, the administrative law judge reconsidered the evidence pursuant to 20 C.F.R. §727.203(a)(2) and again found that the evidence was insufficient to establish invocation of the interim presumption. He also found that, had invocation been established, there was sufficient evidence to support rebuttal pursuant to 20 C.F.R. §727.203(b)(2) and (4). The administrative law judge then found that entitlement was not established pursuant to 20 C.F.R. §410.490. Accordingly, benefits were again denied. On appeal, claimant contends that the administrative law judge erred in weighing the pulmonary function study evidence pursuant to 20 C.F.R. §727.203(a)(2) and in weighing the medical opinion evidence pursuant to 20 C.F.R. §727.203(b)(2) and (4). Employer responds in support of the administrative law judge's Decision and Order denying benefits. The Director has chosen not to respond to this appeal.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are 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).

In making his finding that claimant failed to establish invocation at 20 C.F.R. §727.203(a)(2), the administrative law judge properly noted that he was precluded from considering two of the three pulmonary function studies of record, as the Board had previously determined that the non-qualifying pulmonary function studies may not be weighed on invocation as they lacked tracings. *See Barnes*, *supra*; Decision and Order Upon Remand at 2; Director's Exhibit 40. The administrative law judge then permissibly found that the remaining qualifying pulmonary function study was insufficient to establish invocation of the interim presumption as it contained no indication of claimant's understanding and cooperation and as the statement by Dr. Landry that the tests were "technically correct" was not a determination by the physician that claimant understood the directions of the test or cooperated in performing the test. *See* Decision and Order Upon Remand at 3; Director's Exhibit 16; 20 C.F.R. §410.430; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Estes v. Director, OWCP*, 7 BLR 1-414 (1984). As a result, the administrative law

judge's finding that claimant failed to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2) is affirmed as it is supported by substantial evidence.[1]

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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[1]As the administrative law judge's finding of no invocation is affirmed, claimant's contentions regarding the weighing of the evidence pursuant to 20 C.F.R. §727.203(b)(2) and (4) are moot. We note, however, that these contentions lack merit as the administrative law judge's weighing of the medical opinions was affirmed by the Board when his findings at 20 C.F.R. §727.203(a)(4) were affirmed. *See Barnes v. ICO Corporation*, BRB No. 86-2874 BLA (June 24, 1988)(unpub.). The record contains three medical opinions, none of which indicate that claimant suffers from pneumoconiosis or that claimant is totally disabled. *See* Director's Exhibits 17, 34, 40, 53. As a result, the administrative law judge's findings pursuant to 20 C.F.R. §727.203(b)(2) and (4) are affirmed as they are supported by substantial evidence.