BRB No. 91-2134 BLA

MICHAEL SOROKA)
)
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 of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Michael Soroka, Ashley, Pennsylvania, *pro se*.

Robert P. Hines (Thomas S. Williamson, Jr., 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: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (90-BLA-2914) of Administrative Law Judge Ainsworth H. Brown 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).

*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)(1988).

This claim is before the Board for the second time. Claimant filed his first claim on December 20, 1979 and it was denied on December 15, 1980. Claimant did not appeal the denial or submit additional evidence, but instead filed a second claim on May 18, 1989. This claim was denied by the district director as a duplicate claim on October 6, 1989. On appeal, the Board, pursuant to *Lukman v. Director, OWCP*, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990) and *Dotson v. Director, OWCP*, 14 BLR 1-10 (1990)(order *en banc*), remanded the case to the Office of Administrative Law Judges for further appropriate action. *See Soroka v. Director, OWCP*, BRB No. 89-3747 BLA (Sep. 14, 1990)(unpub.). In his Decision and Order, the administrative law judge credited claimant with ten years and four months of coal mine employment and considered the claim pursuant to 20 C.F.R. Part 718. The administrative law judge then considered the evidence that was submitted with the second claim and determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Claimant appeals this denial. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's Decision and Order.

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 substantial 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).

Regarding the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1), the x-ray evidence of record consists of seven interpretations of four x-rays. Two of these interpretations, both of which were negative, were of a 1980 x-ray which was filed with the first claim. *See* Director's Exhibit 10. The administrative law judge erroneously failed to consider these interpretations in his Decision and Order. *See* Decision and Order at 4; *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992). However, any error is harmless as these interpretations would not support a finding of the existence of pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Of the remaining five interpretations, three were negative for pneumoconiosis and two were positive. *See* Director's Exhibits 8, 9, 10, 20. The administrative law judge permissibly accorded Dr. Barrett's negative reading of the 1991 x-ray greater weight than Dr. Gaia's positive reading of the same x-ray based on Dr. Barrett's superior qualifications. *See* Decision and Order at 4; Director's Exhibit 20; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989). The

administrative law judge also permissibly found Dr. Barrett's interpretation to be more credible as it is corroborated by two negative interpretations of a 1989 x-ray, which is the second most recent x-ray of record. *See* Decision and Order at 4; Director's Exhibit 8, 9; *see generally Clark*, *supra*.[1] The administrative law judge also permissibly accorded Dr. Barrett's reading greater weight than Dr. Conrad's 1989 positive reading because of Dr. Barrett's superior qualifications and the recency of his interpretation. *See Clark*, *supra*; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). As a result, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed as supported by substantial evidence.

There is no autopsy or biopsy evidence in the record in this case, thus the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(2). Also, the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(3) as there are no presumptions that apply in this case.[2]

Regarding 20 C.F.R. §718.202(a)(4), the medical opinion evidence of record consists of four opinions. Dr. Aquilina's opinion of November 21, 1980 is the only

[1]The administrative law judge erroneously stated that the August 21, 1989 x-ray was taken August 21, 1990, however, any error is harmless as the x-ray is the next most recent x-ray of record. *See* Decision and Order at 4; Director's Exhibits 8, 9; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[2]The presumption at 20 C.F.R. §718.304 is not applicable as there is no evidence that the miner suffered from complicated pneumoconiosis. The 15 year presumption contained in 20 C.F.R. §718.305 is inapplicable here as claimant's application for benefits was filed after January 1, 1982. 20 C.F.R. §718.305(e). The presumption at 20 C.F.R. §718.306 applies only to survivor's claims filed prior to June 30, 1982 wherein the miner died on or before March 1, 1978. 20 C.F.R. §718.306(a).

report that was submitted with the first claim. In this report, Dr. Aquilina concludes that claimant's x-ray is normal, but that he suffers from hypertension that is unrelated to his coal mine employment. *See* Director's Exhibit 16. The administrative law judge erroneously failed to consider this opinion in his Decision and Order. *See* Decision and Order at 5-6; *Shupink*, *supra*. However, any error is harmless as this opinion would not support a finding of the existence of pneumoconiosis. *See Larioni*, *supra*. The remaining three reports were submitted with claimant's most recent claim. Dr. Talati, in a 1989 report, diagnosed possible simple coal workers' pneumoconiosis. *See* Director's Exhibit 5. Dr. Karlavage, in a 1991 deposition, stated that claimant's chest x-ray was positive for pneumoconiosis. *See* Claimant's Exhibit 3 at 8. The administrative law judge permissibly accorded less weight to Dr. Talati's diagnosis as it was equivocal and based on a negative x-ray, and to Dr. Karlavage's opinion because it lacked clinical
support. *See* Decision and Order at 6; Director's Exhibit 5; Claimant's Exhibit 3; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984). Dr. Sahillioglu, in a 1991 report, stated that claimant was a "normal healthy individual", that his chest x-ray was normal and that claimant does not have any respiratory impairment to prevent him from performing his last coal mine employment. *See* Director's Exhibit 20. The administrative law judge permissibly accorded the most weight to Dr. Sahillioglu's opinion as it is more consistent with the objective medical data. *See* Decision and Order at 6; Director's Exhibit 20; *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). As a result, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is affirmed as it is supported by substantial evidence. Further, as claimant has not established the existence of pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718, the administrative law judge's denial of benefits is affirmed. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).[3]

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

SO ORDERED.

[3]It is noted that the administrative law judge erred in failing to make a determination as to whether claimant established a material change in conditions. However, any error is harmless as the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis is affirmed. *See Larioni*, *supra*.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge