BRB Nos. 92-1395 BLA
and
92-1395 BLA-A

CURTIS A. PINSON)
)
Claimant-Petitioner)
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v.)
)
UTILITY COALS, INC.)
)
Employer-Respondent) DATE ISSUED:
)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order of Charles W. Campbell, Administrative Law Judge, United States Department of Labor.

Curtis A. Pinson, Meta, Kentucky, *pro se*.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.

Helen H. Cox (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: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, and employer cross-appeals the Decision and Order (85-BLA-4039) of Administrative Law Judge Charles W. Campbell 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 case is before the Board for the second time. Claimant filed his claim for benefits on November 29, 1973.

The Department of Labor (DOL) issued a Notice of Initial Finding of Liability on January 3, 1980, naming Deskins Branch Coal Company (Deskins) as the putative responsible operator. Deskins thereafter filed a Notice of Controversion contesting the issues of liability and responsible operator. Following a hearing on August 22, 1984, Administrative Law Judge Parlen L. McKenna issued an Order of Remand in which he held that the transfer provisions of the 1981 Amendments to the Act did not apply because this claim had never been finally denied, and in which he remanded the case back to the deputy commissioner to identify the correct responsible operator since there was no evidence that claimant ever worked for Deskins. On January 18, 1985, DOL issued a revised Notice of Initial Finding naming Utility Coals, Inc. (employer) as the responsible operator. Employer filed a Notice of Controversion on February 4, 1985 contesting the issues of liability and responsible operator and requested a hearing on these issues. Following a hearing on April 20, 1988, Administrative Law Judge W. Ralph Musgrove dismissed both Deskins and employer as responsible operators, transferred liability for payment of benefits to the Black Lung Disability Trust Fund, and remanded the case to the Director, Office of Workers' Compensation Programs (the Director), for continued payment of benefits. The Director appealed the administrative law judge's Order of Remand and the Board, on appeal, affirmed the administrative law judge's dismissal of Deskins as responsible operator and reversed the administrative law judge's dismissal of employer as responsible operator and his transfer of liability to the Black Lung Disability Trust Fund. The Board also remanded the case to the administrative law judge for consideration of the claim on the merits. *See Pinson v. Utility Coals, Inc.*, BRB No. 89-2485 BLA (Jul. 9, 1991)(unpub.). On remand, the administrative law judge determined that the claim was not a "claim denied" within the meaning of Section 402(i) of the Act, 30 U.S.C. §901(i), and therefore, that any liability for payment does not transfer to the Trust Fund under the 1981 Amendments and that employer was properly designated as the responsible operator. Upon considering the claim on the merits, the administrative law judge found that claimant established thirteen years of coal mine employment and invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2). The administrative law judge, however, further found that employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3) and (4). The administrative law judge then determined that claimant failed to establish entitlement pursuant to 20 C.F.R. Part 718 as he failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied. Claimant appeals this denial. On cross-appeal, employer contends that the administrative law judge erred in finding that it is the responsible operator. Employer also responds in support of the administrative law judge's denial of benefits. 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).

In making his findings at 20 C.F.R. Part 727, the administrative law judge first determined that the pulmonary function study evidence of record was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2).[1] *See* Decision and Order at 12; Director's Exhibit 51. The administrative law judge then determined that employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3) and (4). In making his findings at 20 C.F.R. §727.203(b)(3) and (4), the administrative law judge considered the medical opinions of eight physicians. Dr. Odom, in a 1974 report, diagnosed pneumoconiosis and found that claimant is totally and permanently disabled for arduous labor, coal mining and work in a dusty environment. *See* Director's Exhibit 30. Dr. Varney, in a 1974 report, stated that claimant is totally disabled for work due to pneumoconiosis, chronic obstructive airway disease, and old injury to his back. *See* Director's Exhibit 32. Dr. Page, in a 1975 report, stated that claimant has coal workers' pneumoconiosis and should be removed from the dusty atmosphere of mining and should not be permitted or required to work in a dust related industry. *See* Director's Exhibit 32. Upon considering these opinions, the administrative law judge permissibly found that Dr. Varney's report deserved less weight as it was made without any documentation of testing or examination and no indication of claimant's coal mine employment history or smoking history. *See* Decision and Order at 17; *DeBusk v. Pittsburg & Midway Coal Co.*, 12 BLR 1-15 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge also permissibly accorded less weight to the opinions of Drs. Odom and Page as they relied mainly on positive chest x-ray interpretations and as they relied on an exaggerated coal mine employment history of twenty-eight years, when

[1]As the administrative law judge's finding on this issue is favorable to claimant, and since employer has not contested the administrative law judge's finding of invocation pursuant to 20 C.F.R. §727.203(a)(2) on appeal, this finding is affirmed. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983). Moreover, as the administrative law judge's finding that the evidence of record is insufficient to establish invocation pursuant to 20 C.F.R. §727.203(a)(1) and (3) is supported by the record, it is affirmed. *See* Decision and Order at 10-12; Director's Exhibits 35, 50.

claimant has established only thirteen years of coal mine employment. *See* Decision and Order at 17; *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Of the remaining relevant medical opinions, none of the physicians diagnosed pneumoconiosis. *See* Director's Exhibits 36, 51, 63; Responsible Operator's Exhibits 2, 3. The administrative law judge permissibly accorded the most weight to the reports of Drs. Anderson, Lane, and Tuteur, all of whom found that claimant's pulmonary defect is the result of his cigarette smoking and not his coal mine employment, as they are well reasoned, well documented, and more in accordance with the objective evidence of record. *See* Decision and Order at 17; Director's Exhibit 63; Responsible Operator's Exhibits 2, 3; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Mabe*, *supra*; *King*, *supra*. The administrative law judge further found that these opinions are supported by the opinions of Dr. Sutherland, who stated that the etiology of claimant's condition is unknown and Dr. O'Neill, who stated that he could not conclusively diagnose pneumoconiosis and that claimant's chronic bronchitis and his mild obstructive airway disease were caused by his cigarette smoking, and by the weight of the x-ray interpretations and blood gas study results. *See* Decision and Order at 17; Director's Exhibits 34, 51, 57. As a result, the administrative law judge's findings that the medical evidence establishes that claimant's disability did not arise in whole or in part out of claimant's coal mine employment and that claimant does not have pneumoconiosis pursuant to 20 C.F.R. §727.203(b)(3) and (4), as well as the administrative law judge's finding that claimant failed to establish entitlement pursuant to 20 C.F.R. Part 727, are affirmed as they are supported by substantial evidence. Further, as we have affirmed the administrative law judge's finding pursuant to 20 C.F.R. §727.203(b)(4) that claimant does not have pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718, the administrative law judge's finding that claimant is not entitled to benefits under 20 C.F.R. Part 718 is affirmed. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).[2]

[2]Employer's arguments on cross-appeal regarding its designation as the responsible operator are moot as the administrative law judge's Decision and Order denying benefits is affirmed. However, the Board notes that the administrative law judge properly found that the claim is not a "claim denied" within the meaning of Section 402(i) of the Act, as claimant filed a request for a hearing subsequent to the last denial of the claim in 1976, and that liability for payment does not transfer to the Trust Fund. *See* Decision and Order at 6; Director's Exhibit 66. Also, the administrative law judge properly found that employer is the responsible operator as employer is the most recent operator for whom claimant worked at least one year. *See* Decision and Order at 8; Director's Exhibits 19, 20; *Boyd v. Island Creek Coal Co.*, 8 BLR 1-458 (1986). Thus, the administrative law judge's findings regarding employer's designation as the responsible operator are proper and supported by the

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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evidence of record.