BRB No. 94-0575 BLA

ELLIS ADKINS )
)
Claimant-Petitioner )
)
v. )
)
CSX TRANSPORTATION, )
INCORPORATED )
) 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 Reno E. Bonfanti, Administrative Law Judge, United States Department of Labor.

Ellis Adkins, Branchland, West Virginia, *pro se*.

Mark H. Hayes (Huddleston, Bolen, Beatty, Porter & Copen), Hunington, West Virginia, for employer.

Before: , , and , Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (93-BLA-0219) of Administrative Law Judge Reno E. Bonfanti 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 involves a duplicate claim issue. Claimant filed his initial claim for benefits on

February 12, 1981 and it was denied on July 11, 1981. Claimant filed a second claim for benefits on January 10, 1992. Upon considering the duplicate claim issue pursuant to 20 C.F.R. §725.309, the administrative law judge determined that the new evidence submitted does not establish a material change in condition such as to warrant a change in the prior action. The administrative law judge then determined that claimant established one and one-half years of coal mine employment and analyzed the total record on the merits pursuant to 20 C.F.R. Part 718. Upon considering the evidence, the administrative law judge determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge then determined that claimant's work for employer, CSX Transportation, Inc., was not the work of a coal miner within the meaning of the Act and that employer is not a responsible operator under the Act. Accordingly, benefits were denied and employer was dismissed from the case. Claimant appeals this denial. Employer responds in support of the administrative law judge's Decision and Order denying benefits. The Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond to 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 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).

Initially, it is noted that the administrative law judge erred in determining that claimant failed to establish a material change in conditions pursuant to Section 725.309 as there is x-ray evidence which, if fully credited, could change the prior administrative result. *See Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992); *Rice v. Sahara Coal Co., Inc.*, 15 BLR 1-19 (1990). However, any error is harmless as the administrative law judge considered all of the evidence of record upon considering the claim on the merits. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Pursuant to Section 718.202(a)(1), the administrative law judge considered all of the x-ray evidence of record, which consists of ten interpretations of three x-rays. Of the ten interpretations, eight were read as negative by B readers. *See* Director's Exhibits 14, 15, 28; Employer's Exhibits 1-4. Of the two positive interpretations, only one was by a B reader. *See* Director's Exhibits 13, 28. The administrative law judge permissibly assigned more weight to the B readers' interpretations and permissibly found that the weight of those interpretations was negative for the existence of pneumoconiosis. *See* Decision and Order at 2; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *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 Section 718.202(a)(1) is affirmed as it is 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.[1]

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinion evidence of record which consists of the opinions of four physicians. Dr. Ranavaya, in two opinions dated February 1, 1992 and April 17, 1992, stated that claimant suffers from pneumoconiosis. *See* Director's Exhibits 10, 16. The administrative law judge permissibly rejected Dr. Ranavaya's opinion because his diagnosis was based to some extent on a history of over six years in coal mining and a positive x-ray interpretation whereas the administrative law judge found only one and one-half years of coal mine employment and that the x-ray

[1]The presumption at 20 C.F.R. §718.304 is not applicable as there is no evidence that the deceased miner suffered from complicated pneumoconiosis. The fifteen 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).

evidence does not establish the existence of pneumoconiosis. *See* Decision and Order at 3; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Long v. Director, OWCP*, 7 BLR 1-254 (1984). Dr. Fritzhand, in an opinion dated April 12, 1981, diagnosed chronic obstructive pulmonary disease and responded to the question of whether this condition was related to claimant's coal mine employment with a question mark. *See* Director's Exhibit 28. The remaining physicians of record, Drs. Spagnolo and Zaldivar, submitted opinions that claimant does not have pneumoconiosis. *See* Director's Exhibit 30; Employer's Exhibit 2. The administrative law judge permissibly found the opinions of Drs. Spagnolo and Zaldivar to be the most persuasive as they are both highly qualified internists specializing in pulmonary diseases. *See* Decision and Order at 3; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). As a result, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) is affirmed as it is supported by substantial evidence. Further, as claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement pursuant to 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

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

SO ORDERED.

Administrative Appeals Judge

Administrative Appeals Judge

Administrative Appeals Judge