

BRB No. 87-1688 BLA

LETIZIA ANDREOLI)
(Widow of CARLO ANDREOLI))
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order - Upon Remand of Eric Feirtag,
Administrative Law Judge, United States Department of Labor.

Milena Ciccacci, Vineland, New Jersey, Lay Representative for claimant.

Roscoe C. Bryant, III (Marshall J. Breger, 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,¹ without legal representation, appeals the Decision and Order -

¹ Claimant is the widow of the deceased miner, Carlo Andreoli, who died on May 6, 1978. Director's Exhibit 5.

Upon Remand (81-BLA-680) of Administrative Law Judge Eric Feirtag denying benefits on a miner's claim and a survivor's claim² 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 on appeal before the Board for the second time. In his original Decision and Order, Administrative Law Judge V. M. McElroy credited the miner with seven years of qualifying coal mine employment, and found that evidence filed subsequent to the miner's death was sufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, the Board vacated the administrative law judge's award of benefits pursuant to 20 C.F.R. Part 410, Subpart D, and remanded this case for the administrative law judge to adequately analyze the conflicting evidence of record and explain the bases for his findings in compliance with the provisions of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a). Andreoli v. Director, OWCP, BRB No. 83-476 (March 10, 1986)(unpublished).

On remand, this case was assigned to Judge Feirtag since Judge McElroy

² The miner filed his claim for benefits on September 10, 1970. Director's Exhibit 1. Claimant filed her survivor's claim for benefits on March 20, 1979. Director's Exhibit 2.

was no longer with the Office of Administrative Law Judges. Judge Feirtag found the evidence of record insufficient to establish either the existence of pneumoconiosis or a totally disabling chronic respiratory impairment arising out of coal mine employment pursuant to 20 C.F.R. §410.414. Consequently, benefits were denied on both claims. In the instant appeal, claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. McFall v. Jewell Ridge Coal Corp., 12 BLR 1-176 (1989); Stark v. Director, OWCP, 9 BLR 1-36 (1986). If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); O'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Initially we note that, subsequent to the issuance of the administrative law judge's Decision and Order - Upon Remand, the United States Supreme Court issued Pauley v. Bethenergy Mines, Inc., 111 S.Ct. 2524, 15 BLR 2-155 (1991), and Pittston Coal Group v. Sebben, 109 S.Ct. 414, 12 BLR 2-89 (1988), and the United States Court of Appeals for the Third Circuit, wherein appellate jurisdiction of these

claims lies, issued Caprini v. Director, OWCP, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987). In light of said decisions, inasmuch as the miner established less than ten years of coal mine employment and the instant claims were filed prior to March 31, 1980, but adjudicated after that date, these claims are properly considered pursuant to the regulations at 20 C.F.R. §410.490 and 20 C.F.R. Part 718 rather than Part 410, Subpart D. Pauley, supra; Sebben, supra; Caprini, supra; see also Phipps v. Director, OWCP, BLR , BRB No. 89-3919 BLA (Nov. 13, 1992)(en banc)(J. Smith, concurring, J. McGranery, concurring and dissenting). Where the administrative law judge, however, has made the necessary findings of fact after discussing all of the relevant evidence of record, the Board will review the case by applying those findings to the appropriate regulations. Campbell v. Director, OWCP, 11 BLR 1-16 (1987).

In finding that claimant failed to establish entitlement pursuant to Part 410, Subpart D, the administrative law judge accurately reviewed the medical evidence of record, which consisted of eight x-ray interpretations of three films by six physicians; the miner's death certificate; and three pulmonary function studies. Decision and Order - Upon Remand at 1; Director's Exhibits 5-14; Claimant's Exhibit 2. The administrative law judge found that the death certificate was insufficient to establish either the existence of pneumoconiosis or any respiratory impairment, as it listed "acute myocardial infarction" as the sole cause of death. Decision and Order - Upon Remand at 1; Director's Exhibit 5.

The administrative law judge properly determined that only four physicians opined that the x-ray films they interpreted were of readable quality; of these, a Board-certified radiologist and a physician with no particular radiological qualifications submitted positive interpretations, whereas a B-reader and a Board-certified radiologist found no evidence of pneumoconiosis. Decision and Order - Upon Remand at 1; Director's Exhibits 9, 12, 14; Claimant's Exhibit 2. The administrative law judge then acted within his discretion as trier-of-fact in according greater weight to the physicians with superior qualifications, and found that the weight of the x-ray evidence was negative for pneumoconiosis. See Melnick v. Consolidation Coal Co., 16 BLR 1-31 (1991)(en banc); Trent v. Director, OWCP, 11 BLR 1-26 (1987); Roberts v. Bethlehem Mines Corp., 8 BLR 1-211 (1985).

The administrative law judge further found that the three pulmonary function studies of record were insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment, as the 1970 study produced normal results, see Director's Exhibit 8, and the two 1973 studies were unreliable since the miner either refused or was unable to complete the tests. See Director, OWCP v. Siwiec, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); Decision and Order - Upon Remand at 2; Director's Exhibits 6, 7.

Lastly, the administrative law judge properly found that the lay evidence of record was insufficient to establish total respiratory disability since it was not supported by the medical evidence, see Woolwine v. Director, OWCP, 6 BLR 1-1023

(1984); and further found that the record contained no evidence that any respiratory impairment arose out of coal mine employment. Decision and Order - Upon Remand at 2.

We affirm the administrative law judge's finding that the evidence of record is insufficient to establish either the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment arising out of coal mine employment, as supported by substantial evidence. Consequently, claimant is precluded from entitlement to benefits under the Act on both the miner's and the survivor's claims. See Neeley v. Director, OWCP, 11 BLR 1-85 (1988); Trent, supra.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge