BRB No. 92-0803 BLA

MIKE BOLOCK)
)
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 Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Mike Bolock, Fairbank, Pennsylvania, *pro se*.

Helen H. Cox (Judith E. Kramer, Acting 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: STAGE, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (90-BLA-2881) of Administrative Law Judge Mollie W. Neal 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*. Claimant filed a claim on March 31, 1983, which was denied on December 28, 1983. Claimant filed a second claim on March 9, 1989 which the administrative law judge considered pursuant to the duplicate claim provisions of 20 C.F.R. §725.309(d). The administrative law judge credited claimant with at least eight years and two months of coal mine

employment and noted that the original claim was denied on the grounds that claimant did not establish the existence of pneumoconiosis or that he was totally disabled. The administrative law judge then weighed the evidence of record and found that the evidence adduced after December 28, 1983 also does not establish the existence of pneumoconiosis and that there is no reasonable

possibility that this evidence would change the prior administrative result. 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).

Based on the date of filing of the second claim, the administrative law judge considered all of the evidence of record pursuant to 20 C.F.R. Part 718.[1] Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered the x-ray evidence of record, which consists of seven interpretations of three x-rays. All of the interpretations are negative for the existence of pneumoconiosis. As a result, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §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.[2]

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[1]Although the administrative law judge noted that the instant claim must be considered pursuant to 20 C.F.R. §725.309, she first considered all of the evidence of record pursuant to 20 C.F.R. Part 718 prior to finding that claimant failed to established a material change in conditions pursuant to 20 C.F.R. §725.309. *See* Decision and Order at 8. The administrative law judge erred by failing to first determine whether the evidence submitted with the second claim was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 as the report of Dr. Corrado diagnosing pneumoconiosis may be sufficient to establish a material change in conditions. *See generally Spese v. Peabody Coal Co.*, 11 BLR 1-174, 1-176 (1988), *dismissed with prejudice*, No. 88-3309 (7th Cir., Feb. 6, 1989)(unpub.). This error is harmless, however, as the administrative law judge's findings on the merits are supported by substantial evidence. *See Spese*, *supra*; *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 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).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of record, which consist of three medical reports dated after December 28, 1983. Dr. Cho, in a report dated March 25, 1991, and Dr. McCollum, in a report dated November 11, 1986, both found no evidence of pneumoconiosis. Dr. Corrado, in a report dated May 2, 1989, diagnosed small airways disease secondary to cigarette smoking and coal dust exposure, which the administrative law judge determined was not sufficient to establish pneumoconiosis. *See* Decision and Order at 8. This determination however is in error as Dr. Corrado's diagnosis is sufficient to establish the statutory definition of pneumoconiosis pursuant to 20 C.F.R. §718.201. However, as the administrative law judge's finding that the weight of the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is supported by the evidence of record, her finding regarding Dr. Corrado's report is harmless. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). As a result, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is affirmed.[3] 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).

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

[3]The administrative law judge also properly found that the evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). *See* Decision and Order at 8.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge