

BRB No. 88-4232 BLA

CHARLES WORKMAN)

)
Claimant-Petitioner)

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v.)

)
PETER CAVE COAL COMPANY,)
INCORPORATED)

)
Employer-Respondent) Date Issued:

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)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

)
Party-In-Interest) DECISION and ORDER

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

Charles Workman, Beauty, Kentucky, pro se.

Paul E. Jones, Pikeville, Kentucky, for employer.

Before: STAGE, Chief Administrative Appeals Judge, McGRANERY,
Administrative Appeals

Judge, and
NEUSNER,
Administrative Law
Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (88-BLA-0048) of Administrative Law Judge W. Ralph Musgrove 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). The administrative law judge credited claimant

*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)(Supp. V 1987).

with thirteen years of coal mine employment, and found the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied. Employer responds, seeking affirmance of the decision below. The Director, OWCP, has not filed a brief in this appeal.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the decision 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). The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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).

The administrative law judge found that, based on a review of the record and the fact that the issue of coal mine employment was uncontested by the parties, claimant established thirteen years of coal mine employment. See Director's Exhibit 1. As the administrative law judge's finding regarding the length of claimant's coal mine employment is uncontested on appeal, this finding is affirmed. See Oggero v. Director, OWCP, 7 BLR 1-860 (1985).

Regarding the administrative law judge's application of 20 C.F.R. §718.202 to the facts of this case, the administrative law judge permissibly found the evidence of record insufficient to establish pneumoconiosis. Under Section 718.202 (a)(1) the administrative law judge considered twenty-four interpretations of nine different x-rays and found one to be positive and the remainder negative for the existence of pneumoconiosis. The administrative law judge assigned two of the interpretations no weight as they did not conform with Section 718.102(b). See Decision and Order at 8; Director's Exhibits 10, 12. Consequently, the administrative law judge's finding under Section 718.202(a)(1) that the weight of the x-ray evidence is negative for the existence of pneumoconiosis is supported by substantial evidence, and therefore this finding is affirmed. See Decision and Order at 8; Director's Exhibits 10, 12, 13, 16, 17, 25, 26, 29; Claimant's Exhibits 1, 2; Employer's Exhibits 2, 3, 4. See also Kuchwara v. Director, OWCP, 7 BLR 1-167 (1984).

Pursuant to Section 718.202(a)(2), biopsy or autopsy evidence may be the basis for a finding of the existence of pneumoconiosis. No biopsy or autopsy evidence exists in the record in this case and thus we affirm the administrative law judge's determination that the existence of pneumoconiosis has not been established pursuant to §718.202(a)(2). See Decision and Order at 8.

The administrative law judge also properly found that the existence of pneumoconiosis was not established under Section 718.202(a)(3). Section 718.202(a)(3) permits a finding of the existence of pneumoconiosis if one of the presumptions described in Sections 718.304, 718.305, or 718.306 is applicable. The presumption of Section 718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in this case. The presumption of Section 718.305 does not apply to this claim filed after January 1, 1982. The presumption of Section 718.306 applies only in certain cases in which the miner is deceased. Therefore, the existence of pneumoconiosis cannot be established in this case under Section 718.202(a)(3). See Decision and Order at 9.

Under Section 718.202(a)(4) the administrative law judge considered eleven medical reports. See Decision and Order at 6-7; Director's Exhibits 10, 11, 12, 13, 14, 25, 29; Employer's Exhibit 1. Two of the reports indicated the presence of pneumoconiosis, however the remaining nine were negative for the existence of pneumoconiosis. Of all the reports, only one was based on an examination performed after 1983. This report, the August 5, 1987 report of Dr. Mettu, was assigned the greatest weight by the administrative law judge. See Decision and Order at 9. The administrative law judge's crediting of this report was proper as, due to the progressive nature of pneumoconiosis, it is reasonable to assign the most recent medical report the greatest weight. Call v. Director, OWCP, 2 BLR 1-146 (1979). See also Cosalter v. Mathies Coal Co., 6 BLR 1-1182 (1984). This report indicated that there was no evidence of pneumoconiosis and that claimant's pulmonary function studies were normal. See Director's Exhibit 29. As all of the medical opinions of record were properly examined and weighed, we affirm the administrative law judge's finding that the existence of pneumoconiosis could not be established pursuant to Section 718.202(a)(4). Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); see also Perry v. Director, OWCP, 9 BLR 1-1 (1986). Moreover, as claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement under Part 718, we also affirm the administrative law judge's denial of benefits. Perry, supra.

Accordingly, the administrative law judge's denial of benefits on the grounds of failure to establish the existence of pneumoconiosis is affirmed as it is rational and supported by substantial evidence.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

FREDERICK D. NEUSNER
Administrative Law Judge