

BRB No. 89-3735 BLA

JOHN RESTIC)
)
 Claimant-Petitioner)
)
 v.)
)
 BETHLEHEM MINES CORPORATION)
)
 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 George P. Morin, Administrative Law Judge, United States Department of Labor.

Daniel G. Walter (Pawlowski, Creany & Tulowitzki), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

Before: BROWN and DOLDER, Administrative Appeals Judges, and NEUSNER, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (84-BLA-6555) of Administrative Law Judge George P. Morin 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 reviewed this

*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).

claim pursuant to the provisions of 20 C.F.R. Part 718, and credited claimant with twenty-two years and nine months of qualifying coal mine employment. The administrative law judge found that claimant established invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, see 30 U.S.C. §921(c)(4), 20 C.F.R. §718.305(a), but further found that employer affirmatively established rebuttal of this presumption by proving that claimant did not have pneumoconiosis and that his totally disabling respiratory impairment did not arise out of or in connection with his coal mine employment pursuant to Section 718.305(d). Accordingly, benefits were denied. Claimant appeals, challenging the administrative law judge's findings on rebuttal pursuant to Section 718.305(d). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.¹

¹ The administrative law judge's findings under 20 C.F.R. §§718.202(a)(1) and (a)(2), i.e., that claimant failed to establish the existence of pneumoconiosis by x-ray, autopsy or biopsy evidence, his finding that claimant established invocation of the

presumption at Section 718.305(a) by satisfying the criteria for proving disability pursuant to 20 C.F.R. §718.204(c), and his findings with regard to length of coal mine employment are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. 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 by 30 U.S.C. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); Trent v. Director, OWCP, 11 BLR 1-26 (1987).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence, consistent with applicable law, and must be affirmed. Claimant contends that the administrative law judge erred in relying in part on negative x-ray evidence to support his finding of rebuttal pursuant to Section 718.305(d). We disagree. Although negative x-rays alone are insufficient to establish the absence of pneumoconiosis, see Sakach v. Director, OWCP, 8 BLR 1-237 (1985), the

administrative law judge could properly rely on reasoned and documented medical opinions in conjunction with the negative x-ray evidence of record to conclude that claimant does not have pneumoconiosis. Decision and Order at 24. See generally Kurcaba v. Consolidation Coal Co., 9 BLR 1-73 (1986). Claimant further maintains that the administrative law judge failed to shift the burden of proof on rebuttal to employer. We disagree. The administrative law judge accurately summarized all of the evidence of record, considered the chronological sequence of the evidence, the qualifications of the physicians and the documentation underlying their conclusions, and acted within his discretion in finding that the opinions of Drs. Strother, Katter and Bradley, who stated that claimant did not have pneumoconiosis and that his impairment was unrelated to coal mine employment, were better reasoned and more persuasive than the opinions of Drs. Klemens, Mastrine and Srivastava, who found that claimant was totally disabled due to pneumoconiosis. See generally Roberson v. Norfolk and Western Railway Co., 13 BLR 1-6 (1989); Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); Wetzel v. Director, OWCP, 8 BLR 1-139 (1985); Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985). Claimant's assignment of error goes only to the weight of the evidence, which is the province of the administrative law judge. See Price v. Peabody Coal Co., 7 BLR 1-671 (1985). The administrative law judge's findings and inferences are rational and based on substantial evidence, and we may not substitute our judgment. See Anderson, supra. Inasmuch as claimant has failed to establish a requisite element of entitlement under 20 C.F.R.

Part 718, i.e., the existence of pneumoconiosis, we affirm the administrative law judge's finding that claimant is not entitled to benefits. See Trent, supra.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

FREDERICK D. NEUSNER
Administrative Law Judge