

BRB No. 88-3581 BLA

PAYTON W. HARVEY)
)
 Claimant-Petitioner)
)
 v.)
)
 WESTMORELAND COAL COMPANY)
) 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 on Remand of John J. Forbes,
Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe and Farmer), Norton, Virginia, for claimant.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for
employer.

Before: STAGE, Chief Administrative Appeals Judge, DOLDER, Administrative
Appeals Judge and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (88-BLA-0065) of Administrative
Law Judge John J. Forbes 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). Based on the date of filing, December
19, 1986, the administrative law judge considered the claim pursuant to

*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).

20 C.F.R. Part 718. After crediting claimant with 34 years of coal mine employment, the administrative law judge determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202 and that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge's findings pursuant to 20 C.F.R. §718.202 and 20 C.F.R. §718.204(c) are not supported by substantial evidence. Employer responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has chosen not to respond in this case.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are 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).

Upon considering the evidence pursuant to 20 C.F.R. §718.202, the administrative law judge considered the x-ray evidence of record which consists of eleven interpretations of four x-rays. Of the eleven interpretations, all of which were read by B readers, only two are positive for the existence of pneumoconiosis. See Director's Exhibits 13, 14, 22; Claimant's Exhibit 1; Employer's Exhibits 1-4; Employer's post hearing exhibits. The administrative law judge permissibly found the x-ray evidence insufficient to establish the existence of pneumoconiosis. See Decision and Order at 4; Mabe v. Bishop Coal Co., 9 BLR 1-67 (1986). In making this finding, the administrative law judge permissibly found the weight of the evidence to be negative for pneumoconiosis and that the most recent evidence is negative for pneumoconiosis. See Decision and Order at 3; Mabe, supra; Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989). He further permissibly found the reading of Dr. Wheeler, which is negative for the existence of pneumoconiosis, to be most persuasive as he is highly qualified. See Decision and Order at 4; Trent v. Director, OWCP, 11 BLR 1-26 (1987). 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.

The administrative law judge next considered the medical opinion evidence of record pursuant to 20 C.F.R. §718.202(a)(4). The only medical opinion of record is that of Dr. Garcia, who examined claimant on January 14, 1987. Dr. Garcia diagnosed "obesity, no evidence of coal workers' pneumoconiosis and cirrhosis of liver, unknown etiology by history" and checked "no" to indicate that claimant's condition was not related to his coal mine employment. See Director's Exhibit 11. The administrative law judge then permissibly found that this evidence is insufficient

to establish the existence of pneumoconiosis. See Decision and Order at 4; Mabe, supra. As a result, the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) is affirmed as it is supported by substantial evidence.¹ Since claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement, we further affirm the administrative law judge's denial of benefits under Part 718. See Trent v. Director, OWCP, 11 BLR 1-26 (1987).²

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

¹While the administrative law judge did not make a finding pursuant to 20 C.F.R. §718.202(a)(2), any error is harmless as this section does not apply because there is no autopsy or biopsy evidence of record. See Larioni v. Director, OWCP, 6 BLR 1-1276 (1984). The administrative law judge further properly found that the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(3) as the presumptions at 20 C.F.R. §§718.304, 718.305, and 718.306 do not apply in this case. See Decision and Order at 3.

²The administrative law judge also permissibly concluded that the objective and medical opinion evidence of record was insufficient to establish total disability. See Decision and Order at 4-5; Director's Exhibit 10, 11, 12; McMath v. Director, OWCP, 12 BLR 1-6 (1988); Mabe, supra. The administrative law judge's findings pursuant to 20 C.F.R. §§718.204(c)(1), (2), and (4) are affirmed as they are supported by substantial evidence.

The administrative law judge did not make a finding pursuant to 20 C.F.R. §718.204(c)(3), however the record does not contain any evidence of cor pulmonale with right sided congestive heart failure. See Larioni, supra.

LEONARD N. LAWRENCE
Administrative Law Judge