

BRB No. 89-1158 BLA

EDMOND PENNINGTON)

)
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 Richard Mills, Administrative Law Judge,
United States Department of Labor.

Donnie C. Gadd, Berea, Kentucky, for claimant.

Nicholas J. Levintow (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: BROWN and McGRANERY, Administrative Appeals Judges, and BONFANTI, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, with the assistance of a lay representative, the Decision and Order (87-BLA-2583) of Administrative Law Judge Richard Mills denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

*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).

Act of 1969, as amended, 30 U.S.C. §901 et seq. (the Act). Based on the date of filing, March 19, 1986, the claim was adjudicated pursuant to 20 C.F.R. Part 718. After crediting claimant with nine 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(a). Accordingly, benefits were denied. The Director, Office of Workers' Compensation Programs, 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).

In order to establish entitlement, a claimant must establish that the miner had pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204, 718.205; Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989). The existence of pneumoconiosis may be established by x-ray, by biopsy or autopsy, by operation of a presumption or by medical opinion evidence. See 20 C.F.R. §718.202(a).

With respect to the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1), the record contains eleven interpretations of three x-rays. Of these eleven x-ray interpretations, ten were read by "B"-readers and only one of these ten is positive for the existence of pneumoconiosis. See Director's Exhibit 20. As the two most recent x-rays are negative for the existence of pneumoconiosis and the weight of the x-ray evidence is negative for pneumoconiosis, the administrative law judge permissibly determined that the x-ray evidence fails to establish the existence of pneumoconiosis. See Kuchwara v. Director, OWCP, 7 BLR 1-167 (1984). As a result, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is supported by substantial evidence.

There is no autopsy or biopsy evidence in the record in this case, thus 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.¹

¹The 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).

The medical opinion evidence of record consists of the reports of Drs. Jackson, Sembillo, Varney and Jarboe. See Director's Exhibits 8, 20, 29; Claimant's Exhibit 1. In his April 16, 1986 report, Dr. Jackson diagnosed hypoxemia and stated that this condition was not related to claimant's coal mine employment. See Director's Exhibit 8. Dr. Sembillo's report of January 13, 1987 diagnoses pneumoconiosis "stages 2&3". See Director's Exhibit 20. Dr. Varney's report of March 16, 1988 states that "[i]t is my impression that Mr. Pennington did suffer from the occupational disease of coal worker's pneumoconiosis with resultant pulmonary dysfunction." See Claimant's Exhibit 1. Dr. Jarboe, in his report of May 10, 1988, diagnoses chronic bronchitis with mild to moderate airway obstruction. He states that there is "no pneumoconiosis on film". See Director's Exhibit 29.

Upon considering this evidence, the administrative law judge determined that Dr. Varney's report is not well reasoned because he failed to adequately explain the rationale for his finding that claimant suffers from pneumoconiosis. He then found that Dr. Sembillo's report is outweighed by Dr. Jarboe's report which is both the most recent and supported by the x-ray and other objective evidence of record. The administrative law judge then permissibly found that the weight of the evidence failed to support a finding of pneumoconiosis. See Decision and Order at 7; Lafferty v. Cannelton Industries, Inc., 12 BLR 1-190 (1989). Consequently, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is affirmed as it is supported by substantial evidence.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

RENO E. BONFANTI
Administrative Law Judge