

BRB No. 90-0619 BLA

ELBA MONEY)
)
 Claimant-Petitioner)
)
 v.)
)
 NALLY & HAMILTON ENTERPRISES,)
 INCORPORATED)
)
 and) DATE ISSUED:
)
 OLD REPUBLIC INSURANCE COMPANY)
)
 Employer/Carrier-)
 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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

John C. Dixon, Barbourville, Kentucky, for claimant.

Robert M. McDowell, Washington, D.C., for employer.

Before: DOLDER and MCGRANERY, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (88-BLA-2858) of Administrative Law Judge Robert L. Hillyard denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine and Safety Act of 1969, as amended,

*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).

seq. (the Act). Based on the date of filing, October 6, 1987, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. After crediting claimant with 13 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), total disability pursuant to 20 C.F.R. §718.204(c), or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in making his findings pursuant to 20 C.F.R. §718.202(a) and 20 C.F.R. §§718.204(b) and (c). 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 fourteen interpretations of four x-rays. Of the fourteen interpretations, only three are positive for the existence of pneumoconiosis. Nine of the eleven negative interpretations were by B readers. See Director's Exhibits 12-18, 23, 24, 39, 40. The administrative law judge permissibly found the x-ray evidence insufficient to establish the existence of pneumoconiosis. See Decision and Order at 8; 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 8; Mabe, supra; Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989). Claimant asserts that the x-ray evidence should be weighed in his

favor as the evidence is equally probative but contradictory, however, as the administrative law judge permissibly found the negative x-rays and the most recent x-rays to be more probative, the true doubt rule does not apply in this case. See Stanford v. Director, OWCP, 7 BLR 1-541 (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)(1) is affirmed as it 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

The administrative law judge next considered the medical opinion evidence of record, which consists of the reports of Drs. Clarke, Williams, Wells, and Broudy, pursuant to 20 C.F.R. §718.202(a)(4). Drs. Clarke and Wells diagnosed pneumoconiosis, while Drs. Williams and Broudy stated that there was insufficient evidence for such a diagnosis. See Director's Exhibits 8, 9, 22, 38. The administrative law judge permissibly did not credit the opinions of Drs. Clarke and Wells as Dr. Clarke's report indicated no smoking history and Dr. Wells failed to adequately consider claimant's 40 year smoking history in making his finding. See Decision and Order at 9; Director's Exhibits 8, 22; Stark v. Director, OWCP, 9 BLR 1-36 (1986). 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. Since claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement, the administrative law judge's denial of benefits pursuant to 20 C.F.R. Part 718 is affirmed. See Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989).²

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).

²The administrative law judge also permissibly concluded that the objective medical opinion evidence of record was insufficient to establish total disability or total disability due to pneumoconiosis. See Decision and Order at 10; Lafferty v. Cannelton Industries, Inc., 12 BLR 1-190 (1989). As a result, the administrative law judge's findings pursuant to 20 C.F.R. §718.204 are affirmed as they are supported

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

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge

by substantial evidence.