

BRB No. 91-1794 BLA

WENDELL L. MULLINS )  
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 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 Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Wendell L. Mullins, Pound, Virginia, pro se.

Deborah E. Mayer (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: STAGE, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and BONFANTI, Administrative Law Judge.\*

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (88-BLA-1489) of Administrative Law Judge Clement J. Kichuk 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, May 4, 1987, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. After crediting claimant with twelve years of coal mine employment, the administrative law judge considered the medical evidence of record and determined that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found, however, that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. The Director, Office of Workers' Compensation Programs (the Director), 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).

In regards to the administrative law judge's finding at 20 C.F.R. §718.202(a)(1), the record contains twenty-four interpretations of six x-rays. Of these twenty-four interpretations only the two most recent were read as positive for the existence of pneumoconiosis. See Claimant's Exhibit 2. Upon considering this evidence, the administrative law judge permissibly held that, "as the most recent evidence is interpreted by two B-readers as positive for pneumoconiosis", claimant has established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). See Decision and Order at 11; Clark v. Karst-Robbins Coal Co. 12 BLR 1-149 (1989). This finding is within the discretion of the administrative law judge, is supported by substantial evidence, and is affirmed. Further, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(a)(4).

The administrative law judge also properly found that claimant is aided by the rebuttable presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) due to his twelve years of coal mine employment. As the administrative law judge determined that there is no persuasive evidence to rebut the presumption, this finding is supported by substantial evidence.

Pursuant to 20 C.F.R. §718.204, the administrative law judge properly determined that none of the pulmonary function studies yielded qualifying results. See Director's Exhibits 9, 23, 28. The administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) is therefore supported by substantial evidence. Next, the administrative law judge properly found that the arterial blood gas study evidence, none of which yielded qualifying results, is not persuasive in establishing the existence of total disability pursuant to 20 C.F.R. §718.204(c)(2).<sup>1</sup> See Director's Exhibits 12, 23, 29. Further, as there is no evidence of cor pulmonale with right-side congestive heart failure in the record, the administrative law judge properly determined that 20 C.F.R. §718.204(c)(3) does not apply.

Upon considering the medical opinion evidence relevant to 20 C.F.R. §718.204(c)(4), the administrative law judge permissibly found that "almost all" of the physicians declare that claimant has the pulmonary and respiratory capacity to perform his usual coal mine work. See Decision and Order at 12; Director's Exhibits 23, 27, 36, 39; Perry v. Director, OWCP, 9 BLR 1-1 (1986). In fact, Drs. Tuteur, Fino, Dahan, Abernathy and Baxter found that claimant was not disabled from a pulmonary or respiratory standpoint. See Director's Exhibits 10, 27, 36, 39. Drs. Tuteur and Fino note that while claimant may be disabled due to heart disease, this disability is not related to claimant's coal dust exposure. See Director's Exhibits 36, 39. Thus, the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c) is supported by substantial evidence, and is affirmed.<sup>2</sup>

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<sup>1</sup>The administrative law judge incorrectly stated that one of the arterial blood gas studies yielded qualifying results. See Director's Exhibit 12. However, this error is harmless as the actual test results support the administrative law judge's finding of no total disability pursuant to 20 C.F.R. §718.204(c)(2). See Larioni, supra.

<sup>2</sup>The Director states that the administrative law judge erred in failing to reconcile "the conflict in the evidence of a totally disabling respiratory impairment" because he merely states that "almost all" of the physicians stated that claimant could perform his usual coal mine work from a respiratory standpoint. See Director's Brief at 5; Decision and Order at 12. However, any error would be harmless as the administrative law judge properly determined that claimant failed to establish that

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pneumoconiosis  
contributed to his total disability and thus would not be entitled to benefits. See 20  
C.F.R. §718.204(b); Larionj, supra.

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

SO ORDERED.

BETTY J. STAGE, Chief  
Administrative Appeals Judge

ROY P. SMITH,  
Administrative Appeals Judge

RENO E. BONFANTI  
Administrative Law Judge