

BRB No. 88-1096 BLA

ASBERRY STAMPER)
)
 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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Asberry Stamper, Boneville, Kentucky, pro se.

Karen L. Baker (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: SMITH and McGRANERY, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (85-BLA-6651) of Administrative Law Judge Daniel J. Roketenetz 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). Claimant filed for benefits on January 18, 1973 and the

*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)(1988).

administrative law judge, after crediting claimant with at least three but not more than eight years of coal mine employment, considered the claim pursuant to 20 C.F.R. Part 410. Upon considering the evidence, the administrative law judge determined that claimant failed to establish entitlement pursuant to 20 C.F.R. Part 410, Subpart D, as claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §410.414. The administrative law judge further found that claimant did not establish entitlement pursuant to 20 C.F.R. §410.490 because the x-ray evidence failed to establish the existence of pneumoconiosis. Accordingly, benefits were denied. Claimant now appeals that denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's Decision and Order denying benefits.

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).

The administrative law judge first considered the x-ray evidence of record, which consists of eight interpretations of three x-rays, pursuant to 20 C.F.R. §410.414(a)(1). Of these eight interpretations, only one is positive for the existence of pneumoconiosis. See Director's Exhibits 11, 12, 24-26. The administrative law judge permissibly gave more weight to the most recent x-ray interpretations which were read by B-readers, and found that the preponderance of the x-ray evidence did not establish the existence of pneumoconiosis. See Decision and Order at 5; Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989); Vance v. Eastern Associated Coal Corp., 8 BLR 1-68 (1985). As the administrative law judge also found there is no autopsy or biopsy evidence in the record, his finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §410.414(a)(1) is affirmed as it is supported by substantial evidence.¹

The administrative law judge next considered the blood gas studies, pulmonary function studies, and medical opinions of record pursuant to 20 C.F.R. §410.414(c). None of the blood gas studies or pulmonary function studies of record

¹The provisions of 20 C.F.R. §410.414(b) do not apply in this claim as claimant has not established fifteen years of coal mine employment.

produced qualifying results. See Director's Exhibits 6, 7, 10, 22, 24. The medical opinions of record consist of two handwritten notes by Dr. Cornett and the medical reports of Drs. Williams and Cooper. Dr. Cornett stated in his two notes that claimant has a "coal worker's type, totally disabling" lung disease, while both Dr. Williams and Dr. Cooper found no significant disease. See Director's Exhibits 8, 9, 23. The administrative law judge permissibly assigned the opinions of Dr. Cornett less weight than the opinions of Drs. Williams and Cooper as Dr. Cornett gave no clinical basis for his findings and because the opinions of Drs. Williams and Cooper are well-reasoned and well-documented. See Decision and Order at 7; King v. Consolidation Coal Co., 8 BLR 1-262 (1985). As a result, the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §410.414(c) and that claimant failed to establish entitlement pursuant to 20 C.F.R. Part 410, Subpart D are affirmed as they are supported by substantial evidence.

The administrative law judge further properly determined that claimant failed to establish entitlement pursuant to 20 C.F.R. §410.490 because the x-ray evidence of record is insufficient to establish the existence of pneumoconiosis. See Phipps v. Director, OWCP, BLR , BRB No. 89-3919 BLA (November 13, 1992)(en banc)(Smith, J., concurring; McGranery, J., concurring and dissenting); Decision and Order at 8. As a result, the administrative law judge's finding that claimant failed to establish entitlement pursuant to 20 C.F.R. §410.490 is affirmed as it is supported by substantial evidence.²

²As claimant has failed to establish entitlement pursuant to 20 C.F.R. Part 410, Subpart D and 20 C.F.R. §410.490, he is entitled to have his claim considered pursuant to 20 C.F.R. Part 718. See generally Knuckles v. Director, OWCP, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989). However, as the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis is affirmed, thus precluding claimant's entitlement pursuant to Part 718, any error would be harmless. See Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); Larioni v. Director, OWCP, 6 BLR 1-1276 (1984).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge