

BRB No. 91-1437 BLA

SUDIE MARSHALL)
(Widow of DAVID MARSHALL))
)
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 Charles W. Campbell, Administrative Law Judge, United States Department of Labor.

Sudie Marshall, Booneville, Kentucky, pro se.

Jill M. Otte (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 DOLDER, Administrative Appeals Judges, and LIPSON, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (89-BLA-1761) of Administrative Law Judge Charles W. Campbell denying benefits on a survivor's 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.

*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).

(the Act). Claimant filed a survivor's claim on August 4, 1986. Based on the date of filing, the administrative law judge considered the claim pursuant to the regulations found at 20 C.F.R. Part 718. Initially, the administrative law judge considered the procedural history of the case and determined that the claim was an appeal of the district director's February 5, 1988 denial of claimant's request for modification. The administrative law judge then noted that in order to modify a previous denial of benefits, claimant must establish a change in conditions or a mistake in a determination of fact.¹ The administrative law judge found that claimant established 15 years of coal mine employment and thus determined that the district director's finding of one year of coal mine employment was a mistake of fact. The administrative law judge then turned to the merits of the claim and determined that claimant failed to establish the existence of pneumoconiosis. Accordingly, the administrative law judge denied benefits. 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 in this survivor's claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis caused the miner's death. See 20 C.F.R. §§718.3, 717.202, 718.203, 718.204, 718.205.; Grant v. Director, OWCP, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988). The existence of pneumoconiosis may be established by x-ray, biopsy or autopsy, operation of the regulatory presumption contained at 20 C.F.R. §§718.304, 718.305 or 718.306, or medical opinion evidence. See 20 C.F.R. §718.202(a).

In this case, the record contains two x-rays. See Director's Exhibit 12.

¹The administrative law judge properly noted, however, that claimant could not establish a change in condition because of the death of the miner. See Decision and Order at 3.

Neither of the two x-rays, read by Dr. Taylor, were read as positive for the existence of pneumoconiosis. Of one of the x-rays, dated May 5, 1985, Dr. Taylor reported, "[p]atchiness is demonstrated involving much of the left lung and perhaps right lower lung. Does the patient show clinical evidence of pneumonitis?" Director's Exhibit 12. Of the second x-ray, dated May 6, 1985, Dr. Taylor stated, "[p]atchy infiltrate is demonstrated throughout much of the left lung, especially centrally." Director's Exhibit 12. The x-rays were later re-read by Dr. Halbert, a B-reader, who determined that the film quality was unacceptable for the interpretation of pneumoconiosis. See Director's Exhibit 13. The administrative law judge permissibly concluded that since none of the x-ray evidence of record was positive as to the existence of pneumoconiosis, the evidence was insufficient to establish pneumoconiosis pursuant to Section 718.202(a)(1). Thus, the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is supported by substantial evidence, and is affirmed.

There is no autopsy or biopsy evidence in the record in this case, thus the existence of pneumoconiosis is not established pursuant to Section 718.202(a)(2). Also, the existence of pneumoconiosis is not established pursuant to Section 718.202(a)(3) as there are no presumptions that apply in this case.²

The medical opinion evidence of record consists of the hospital records of the miner's admission on May 5, 1985. See Director's Exhibit 12. These records contain the results of a physical examination of the miner performed by Dr. Eric Lo. Dr. Lo made a principal diagnosis of "respiratory arrest from severe pneumonia and underlying chronic obstructive pulmonary disease" and a secondary diagnosis of "history of atherosclerotic heart disease." See Director's Exhibit 12. Later in the report, Dr. Lo also made a tentative diagnosis of "1) Respiratory failure due to pneumonia; 2) severe underlying chronic obstructive pulmonary disease with bronchospasm; 3) History of atherosclerotic heart disease with functional class III angina pectoris; 4) Possible Alzheimer's disease." See Director's Exhibit 12. There is no mention of pneumoconiosis in Dr. Lo's report, nor is there mention that the miner's lung disease was related in any way to his coal mine employment. Further, the miner's death certificate does not list pneumoconiosis as a cause of his death.

²The presumption at Section 718.304 is not applicable as there is no evidence that the deceased miner suffered from complicated pneumoconiosis. The fifteen year presumption contained in Section 718.305 is inapplicable here as claimant's application for benefits was filed after January 1, 1982. Section 718.305(e). The presumption at Section 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).

See Director's Exhibit 6. Thus, the administrative law judge's determination that the miner failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is affirmed as supported by substantial evidence.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed as it is rational and supported by substantial evidence of record.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

SHELDON R. LIPSON
Administrative Law Judge