

BRB No. 91-1972 BLA

MATTIE HARRIS)
(Widow of LEDFORD HARRIS))
)
 Claimant-Petitioner)
)
 v.)
)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order on Remand of Aaron Silverman,
Administrative Law Judge, United States Department of Labor.

David G. Mawn (Appalachian Research and Defense Fund of
Kentucky, Inc.), Barbourville, Kentucky, for claimant.

Russell A. Shultis (Thomas S. Williamson, Jr., 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 SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant, the miner's surviving spouse, appeals the Decision and Order on
Remand (89-BLA-24) of Administrative Law Judge Aaron Silverman denying benefits
on a miner's claim and 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

*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).

et seq. (the Act).¹ This case is on appeal before the Board for the third time. In his original Decision and Order, the administrative law judge credited the miner with five years of qualifying coal mine employment, but found the evidence insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §410.414(a) or total disability pursuant to 20 C.F.R. §§410.414(c) and 410.426(d). Accordingly, benefits were denied. On appeal, the Board vacated the administrative law judge's findings regarding the length of coal mine employment, and remanded this case for the administrative law judge to determine whether the miner's truck driving employment constituted the work of a miner. *Blevins v. Director, OWCP*, BRB No. 84-2661 BLA (March 17, 1986)(unpublished). On remand, the administrative law judge again credited the miner with five years of coal mine employment after finding that the miner's hauling activities did not qualify as coal mine employment, and consequently denied benefits. Claimant did not appeal that denial, but requested modification pursuant to 20 C.F.R. §725.310 on the issue of the length of coal mine employment. The administrative law judge determined that a new hearing was not warranted, and denied modification pursuant to Section 725.310 since he found that

¹ The miner filed his claim for benefits on May 13, 1975. Director's Exhibit 1. The miner died in a work-related accident on December 26, 1977, Director's Exhibit 11, and claimant, the miner's widow, filed a survivor's claim on February 7, 1978. Director's Exhibit 2.

new evidence submitted in support thereof did not provide a basis for reopening the case. On appeal, the Board affirmed the administrative law judge's findings pursuant to Section 725.310 as based on substantial evidence, and declined to remand this case for consideration pursuant to 20 C.F.R. §410.490 inasmuch as the administrative law judge's evaluation of the x-ray and pulmonary function study evidence of record precluded invocation thereunder. *Harris v. Director, OWCP*, BRB No. 89-1905 BLA (April 13, 1990)(unpublished).

On appeal to the United States Court of Appeals for the Sixth Circuit, the parties agreed that the administrative law judge did not properly evaluate the x-ray evidence of record since he failed to specifically address two positive x-ray interpretations. Consequently, this case was remanded to the Board with instructions to remand to the administrative law judge for reconsideration of claimant's application in light of all relevant evidence. On remand, the administrative law judge found that the weight of the x-ray evidence was negative for pneumoconiosis, and thus denied benefits. In the instant appeal, claimant challenges the administrative law judge's weighing of the x-ray evidence, and maintains that the administrative law judge had a duty to assist claimant in developing the record. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial

evidence, is rational, and is 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).

Turning first to the procedural issue, claimant contends that the administrative law judge erred in failing to assist her in developing the record herein. Specifically, claimant argues that since she was unrepresented by counsel during modification procedures, the administrative law judge had a duty to explain to her the distinctions between the various radiological qualifications of x-ray readers and to insure that she obtained a positive B-reader interpretation. Claimant's argument is without merit. While an administrative law judge, in order to conduct a full and fair hearing, must inform a *pro se* claimant of the right to be represented by an attorney of choice, without charge, the administrative law judge is under no duty to assist claimant in developing the claim. *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984). Moreover, the Director correctly notes that claimant was represented by counsel during development of the claim before the district director and at the time of the hearing on the merits before the administrative law judge. See Director's Exhibits 23, 25, 43. Consequently, we reject claimant's request for a remand to allow claimant to further develop the record herein.²

² We note that claimant has the option to submit to the district director new x-ray interpretations of the existing films with a request for modification pursuant to 20

C.F.R. §725.310.

Claimant next asserts that the four positive x-ray interpretations of record are sufficient to establish invocation pursuant to Section 410.490(b), and the single negative interpretation of Dr. Sargent should be barred in light of the rereading prohibition at Section 413(b) of the Act, 30 U.S.C. §923(b). Contrary to claimant's argument, however, Dr. Sargent's negative rereading does not violate Section 413(b) of the Act inasmuch as the record does not contain a prior, positive x-ray reading by a Board-eligible or Board-certified radiologist. 30 U.S.C. §923(b). The administrative law judge accurately determined that the record did not reflect any special radiological qualifications at the time of interpretation for the four physicians who provided positive readings, and permissibly accorded determinative weight to Dr. Sargent's negative interpretation of the most recent film based on Dr. Sargent's dual qualifications as a Board-certified radiologist and B-reader. Decision and Order on Remand at 2, 3; Director's Exhibits 15-19; *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). We, therefore, affirm the administrative law judge's weighing of the x-ray evidence of record, as based on substantial evidence, and we affirm his denial of benefits.

Accordingly, the Decision and Order on Remand of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge