BRB No. 91-0812 BLA

GARLAND LAYNE)
)
Claimant-Petitioner)
)
v.)
)
KENTLAND-ELKHORN COAL)
CORPORATION)
) DATE ISSUED:
Employer-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 Charles W. Campbell, Administrative Law Judge, United States Department of Labor.

Herbert Deskins, Jr. (Deskins & Pafunda), Pikeville, Kentucky, for claimant.

Billy R. Shelton (Baird, Baird, Baird & Jones, P.S.C.), Pikeville, Kentucky, for employer.

Before: STAGE, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge and LIPSON, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (89-BLA-0913) of Administrative Law Judge Charles W. Campbell 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). Based on the date of filing, August 2, 1979, the administrative law judge adjudicated the claim pursuant to 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)(Supp. V 1987).

regulations found at 20 C.F.R. Part 727. After crediting claimant with 32 years of coal mine employment, the administrative law judge considered the evidence and determined that claimant established invocation of the interim presumption on the basis of the blood gas study evidence pursuant to 20 C.F.R. §727.203(a)(3). The administrative law judge, however, further found that the weight of the medical opinion evidence supports a finding of rebuttal under 20 C.F.R. § 727.203(b)(3). The administrative law judge then considered the claim under 20 C.F.R. Part 718. The administrative law judge determined that claimant failed to establish that he suffered from pneumoconiosis, and thus concluded that he is not entitled to benefits under 20 C.F.R. Part 718. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred by failing to find invocation of the interim presumption established, in finding that rebuttal of the interim presumption had been established and in failing to find that the evidence established the existence of pneumoconiosis and total disability. Claimant further argues that he is "entitled to prove his pneumoconiosis and derivative disability with the assistance of the presumptions expressed in 20 C.F.R. §718.305(e)." See Claimant's Brief at 2. Employer responds in support of the administrative law judge's decision and order. The Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond in this matter.

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).

Contrary to claimant's contention, the administrative law judge found the evidence sufficient to establish invocation of the presumption pursuant to Section 727.203 (a)(3). Moreover, as the administrative law judge's finding that claimant established invocation of the interim presumption pursuant to Section 727.203(a)(3) is not challenged on appeal, it is affirmed. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

In making his determination that rebuttal of the interim presumption had been established pursuant to Section 727.203(b)(3)[1], the administrative law judge stated that he found Dr. Dahhan's opinion that claimant has no pulmonary disability secondary to coal dust exposure to be the most persuasive. Dr. Dahhan's opinion of February 7, 1990 states that claimant "has the physiological capacity from a respiratory standpoint to continue his previous coal mining employment." See Employer's Exhibit 7. The administrative law judge concluded that the opinion of Dr. Dahhan was entitled to greater weight because it was the most recent of record and because invocation was based on the arterial blood gas studies he conducted. See

[1]As there was no evidence that claimant is working and the medical opinion evidence failed to indicate that claimant is able to do his usual coal mine work, the administrative law judge properly found that rebuttal was not established pursuant to 20 C.F.R.§ 727.203(b)(1) and (b)(2).

Decision and Order at 14. This finding is within the discretion of the administrative law judge. See Wilt v. Wolverine Mining Co., 14 BLR 1-70 (1990). The administrative law judge further noted that Dr. Dahhan's opinion is supported by the opinions of Drs. Broudy, Anderson, Lane and Fino, and permissibly accorded less weight to the opinions of the doctors who found that claimant's disability arose at least in part out of coal mine employment because these opinions were rendered as many as ten years before Dr. Dahhan's. See Decision and Order at 14; Wilt, supra; Wetzel v. Director, OWCP, 8 BLR 1-139 (1985). Thus, the administrative law judge's finding that employer established rebuttal pursuant to Section 727.203(b)(3) is supported by substantial evidence and is affirmed.

Upon considering the claim pursuant to 20 C.F.R. Part 718, the administrative law judge properly found that the x-ray evidence of record is negative for pneumoconiosis and that there is no biopsy evidence in the record. Thus, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. § 718.202(a)(1) and (a)(2). The administrative law judge then considered the evidence to determine if the presumptions listed in 20 C.F.R.§ 718.202(a)(3) are applicable to claimant. The administrative law judge properly found that the presumption at 20 C.F.R.§ 718.304 does not apply because this is not a case involving complicated pneumoconiosis. The administrative law judge properly found that the presumption at 20 C.F.R.§ 718.306 does not apply because this claim involves a living miner.

Next, the administrative law judge considered the evidence pursuant to 20 C.F.R.§ 718.204 and permissibly determined that claimant has not established the existence of a totally disabling respiratory or pulmonary impairment and, thus, does not qualify for the presumption at 20 C.F.R.§ 718.305. In making this finding, the administrative law judge permissibly found that the one qualifying blood gas study, see Employer's Exhibit 7, was outweighed by the contrary probative evidence in the record. See Fields v. Island Creek Coal Co., 10 BLR 1-19; Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195 (1986).

Finally, the administrative law judge considered the evidence under 20 C.F.R.§ 718.202(a)(4) and permissibly found that the preponderance of the medical opinion evidence of record does not support a finding that claimant suffers from pneumoconiosis. See Fields, supra; Shedlock, supra. Thus, the administrative law judge's finding that claimant is not entitled to benefits under 20 C.F.R. Part 718 is supported by substantial evidence and is affirmed. Consequently, as the administrative law judge's denial of benefits is rational and supported by substantial evidence, it is affirmed.

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

SHELDON R. LIPSON
Administrative Law Judge