U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0212 BLA
and 20-0212 BLA-A

RICKY S. NEECE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FRED ARRINGTON TRUCKING, INCORPORATED	)	DATE ISSUED: 08/12/2021
	)	
and	)	
	)	
UNITED STATES FIDELITY & GUARANTY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Denying Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Ricky S. Neece, Dante, Virginia.

David L. Murphy (Murphy Law Offices, PLLC), Louisville, Kentucky, for Employer.

Kathleen H. Kim (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; 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: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals, and Employer and its Carrier (Employer) cross-appeal, Administrative Law Judge Richard M. Clark's Decision and Order Denying Benefits (2017-BLA-05017) rendered on a claim filed on May 8, 2015 pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with 13.64 years of coal mine employment and therefore found he did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). Considering whether Claimant established entitlement to benefits without the benefit of the presumption, he found Claimant established he is totally disabled by a respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), but failed to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a). He therefore denied benefits.

On appeal, Claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief to Claimant's appeal. On cross-appeal, Employer challenges the administrative law judge's determination that it is the responsible operator. The Director responds in support of the administrative law judge's finding that Employer is the responsible operator.

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested that the Board review the administrative law judge's decision on Claimant's behalf, but Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4)(2018), as implemented by 20 C.F.R. §718.305.

In an appeal a claimant files without the assistance of counsel, the Benefits Review Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

Section 411(c)(4) Presumption: Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis, Claimant must establish he worked at least fifteen years in underground coal mines, or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination on length of coal mine employment based on a reasonable method of calculation that is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The administrative law judge considered Claimant's application for benefits, CM-911a Employment History form, Coal Truck Driver Questionnaire, Social Security Administration (SSA) earnings records, deposition testimony, and hearing testimony. Decision and Order at 6-7; Director's Exhibits 7, 33, 51; Hearing Tr. at 12-16, 20-21, 23-33. The administrative law judge noted Claimant alleged approximately thirty years of coal mine employment as a truck driver with three different companies owned and operated by Fred Arrington. Decision and Order at 7; Director's Exhibits 33, 51; Hearing Tr. at 11-12. According to Claimant's SSA earnings records, he worked for Fred Arrington Trucking Company (Arrington Trucking) from 1980 to 1993,[4] Arrington Oil Company (Arrington Oil) from 1993 to 1997, and Dry Bulk Transportation (Dry Bulk) from 1997 to 2012. Decision and Order at 7; Director's Exhibit 7.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 14 n.3; Director's Exhibit 2.

[4] At his November 6, 2015 deposition, Claimant testified he was moved to Arrington Oil in either 1987 or 1989 but his checks still came from Fred Arrington Trucking. Director's Exhibit 33 at 29-30; Decision and Order at 5.

Claimant testified his job duties for Arrington Trucking primarily involved transporting raw coal from mine sites to the tipple and performing maintenance on the trucks he drove. Director's Exhibit 51 at 34-36. According to Claimant, when he moved to Arrington Oil, he switched to hauling oil and equipment but still hauled coal on "some days," though he could not recall how often he did this. Director's Exhibit 33 at 29-30. When Claimant worked for Dry Bulk, he worked as a dispatcher and, when other drivers were off, he hauled cement, fly ash, and fracking sand. *Id.* at 33. He added that he sometimes hauled coal from a "blending yard" to a power plant, and at other times picked up coal at a mine and took it to a tipple. Hearing Transcript at 26. However, he could not remember how often he hauled coal at Dry Bulk. *Id*. at 26-26.

The administrative law judge also considered Claimant's testimony that before working for Fred Arrington, he worked for Little B Coal Company (Little B) in 1977 and 1978 operating a pan and a loader at a strip mine. Decision and Order at 5. Claimant estimated he worked at Little B for "a little over a year," but later testified he could not recall how long he worked there.[5] Director's Exhibit 33 at 18; Hearing Transcript at 11. Claimant also indicated he worked for Stewart Construction Company for "several months" in 1979, during part of which he worked around active coal mines cleaning out slurry ponds.[6] Director's Exhibit 33 at 19; 51 at 36-37. At his November 6, 2015 deposition, Claimant further testified that when he was briefly laid off from Arrington Trucking in 1980, he worked for Giles C. Francisco Trucking driving a coal truck for about three weeks.[7] Director's Exhibit 33 at 21-22.

Based on the hearing and deposition testimony, the administrative law judge found Claimant worked in qualifying coal mine employment with Arrington Trucking from 1980 to 1993, but that Claimant's testimony was too vague to establish whether or for how long he worked as a "miner" while working for Arrington Oil or Dry Bulk. Decision and Order at 7. Dividing Claimant's reported earnings with Arrington Trucking by the average daily wage found in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*, the administrative law judge determined

[5] The record reflects Claimant had reported earnings of $7,473.76 with Little B Coal Company in 1978. Director's Exhibit 7 at 3.

[6] The record reflects Claimant had reported earnings of $1,416.42 with Stewart Construction Company in 1979. Director's Exhibit 7 at 3.

[7] The record reflects Claimant had reported earnings of $1,269.56 with Giles C. Francisco Trucking in 1980. Director's Exhibit 7 at 4.

Claimant established 13.64 years of coal mine employment.[8] Decision and Order at 7; *see* 20 C.F.R. §725.101(a)(32)(iii).

Under the Act, a "miner" is:

> any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.

30 U.S.C. §902(d); *see* 20 C.F.R. §§725.101(a)(19), 725.202(a). The definition of "miner" comprises a "situs" requirement (that the claimant worked in or around a coal mine or coal preparation facility) and a "function" requirement (that the claimant worked in the extraction or preparation of coal). *Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41-42 (4th Cir. 1991); *Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 70 (4th Cir. 1981); *Whisman v. Director, OWCP*, 8 BLR 1-96, 1-97 (1985). To satisfy the function requirement, the claimant's work must be integral or necessary to the extraction or preparation of coal and not merely incidental or ancillary. *See Krushansky*, 923 F.2d at 42; *Whisman*, 8 BLR at 1-97.[9]

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[8] The regulation the administrative law judge applied provides that if the beginning and ending dates of a miner's employment cannot be ascertained, or the miner's employment lasted less than a calendar year, the administrative law judge may determine the length of the miner's work history by dividing his yearly income by the average daily earnings of employees in the coal mining industry, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS wage information is published in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*. The administrative law judge did not set forth his calculations but, from a review of his Decision and Order in light of Claimant's SSA earnings records and Exhibit 610, it is apparent he credited Claimant with a year of coal mine employment if he had at least 125 working days in a given year. For years in which he worked for less than 125 days, the administrative law judge credited him with a partial year based upon the number of days he worked in coal mine employment divided by a 125-day work year.

[9] Additional requirements apply to transportation workers. Transportation workers are considered to be "miners" under the Act if they are exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b). Such workers are entitled to a rebuttable presumption that they were exposed

Based on Claimant's description of his coal hauling work with Arrington Trucking, the administrative law judge found this work constituted the work of a "miner." *See Krushansky*, 923 F.2d at 42; *Whisman*, 8 BLR at 1-97; Decision and Order at 7.[10] Turning to Claimant's employment with Arrington Oil and Dry Bulk, the administrative law judge noted Claimant's testimony regarding the extent to which his job duties with both of them involved working with or around coal to be "exceedingly vague." Decision and Order at 7. Claimant testified his job duties involved working as a dispatcher, but he would also drive trucks as needed. Decision and Order at 5-6; Employer's Exhibit 51 at 28-31. When he drove trucks, he testified he hauled oil, coal, flash, sand, and cement. Decision and Order at 5-6; Director's Exhibit 33 at 28-29, 34. When he hauled coal, he had to load the truck with a front-end loader, and the conditions were dusty. Decision and Order at 5-6; Director's Exhibit at 31-32. However, he was unable to explain what portion of his job duties involved hauling coal, the amount of time he spent hauling coal on any given day or week in which his work duties did involve coal, or the regularity with which his duties involved coal.[11] Decision and Order at 7; *see* Director's Exhibit 33 at 30-34; Hearing Tr.

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to coal mine dust during all periods of such employment. 20 C.F.R. §725.202(b)(1). The presumption may be rebutted 1) by evidence which demonstrates that the individual was not regularly exposed to coal mine dust during his or her work in or around a coal mine or coal preparation facility; or 2) by evidence which demonstrates that the individual did not work regularly in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b)(2)(i), (ii).

[10] This finding is uncontested by Employer in its cross-appeal.

[11] The following exchange from Claimant's November 6, 2015 deposition is an example of Claimant's vagueness and inability to describe with any specificity his involvement in the extraction or preparation of coal while working for Arrington Oil and Dry Bulk:

Q Okay. So even when you were receiving payment under Arrington Oil you would have been hauling equipment, hauling oil and…sometimes hauling coal?
A Yes sir.
Q Okay. And you can't remember the percentage of the times hauling coal?
A No sir, no sir.
Q Okay. Would it have been something that you did everyday (*sic*)?
A No sir.
Q Okay. Can you remember if you would have done it every week?
A Some weeks.
Q Okay. Some weeks you would have hauled coal?

at 24-32. Based on these facts, the administrative law judge permissibly concluded there is insufficient evidence to determine the period of time that Claimant's work for either Arrington Oil or Dry Bulk constituted the work of a "miner." *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (it is the administrative law judge's role to weigh the evidence and determine witness credibility).

The administrative law judge credited Claimant with 13.64 years of coal mine employment with Arrington Trucking. The administrative law judge's determination potentially overstates Claimant's years of coal mine employment as a consequence of using 125 as his divisor, which is contrary to precedent that the Board applies in cases arising out of the Fourth Circuit.[12] *See Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2017); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). However, error in this regard is harmless, as substantial evidence supports the administrative law judge's determination that Claimant did not establish sufficient qualifying coal mine employment to invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4).[13] *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

A I would have hauled coal some days during that week.
Q Okay. Would you have hauled coal every single week though?
A No, I don't recall.

Director's Exhibit 33 at 31-32.

[12] The administrative law judge's determination of the end date of Claimant's employment with Arrington Trucking is inaccurate and may have resulted in a further overstatement of Claimant's coal mine employment. The administrative law judge credited Claimant with 13.64 years of coal mine employment between 1980 and 1993. As the administrative law judge noted, Claimant testified that although his paychecks still came from Arrington Trucking, he moved to Arrington Oil at some time "around" 1989. Decision and Order at 5; Director's Exhibit 33 at 29. The administrative law judge did not find any of Claimant's work with Arrington Oil constituted coal mine employment. However, any error the administrative law judge made in overstating Claimant's coal mine employment is harmless as he credited Claimant with fewer than fifteen years of coal mine employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[13] The administrative law judge did not include in his coal mine employment determinations Claimant's strip mine work for Little B or his work for Stewart Construction and Giles C. Francisco Trucking. Decision and Order at 5; Director's Exhibit 7. Assuming Claimant's work for all three employers constituted qualifying coal mine employment, and applying the same calculation method the administrative law judge

We thus affirm the administrative law judge's finding Claimant established fewer than fifteen years of coal mine employment as supported by substantial evidence. *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-203-05 (2016); *Muncy*, 25 BLR at 1-27. Because Claimant did not establish at least fifteen years of coal mine employment, we further affirm the administrative law judge's finding that he is unable to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i).

Entitlement Under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(4) presumption, claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). The administrative law judge denied benefits based on his determination that claimant did not establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a).

The administrative law judge considered seven interpretations of three x-rays dated June 22, 2015, June 30, 2016, and March 8, 2017. Drs. DePonte and Meyer, both dually qualified as B readers and Board-certified radiologists, read the June 22, 2015 x-ray as negative for pneumoconiosis, Director's Exhibits 10, 20, while Dr. Miller, also dually qualified, read it as positive for simple pneumoconiosis. Claimant's Exhibit 3. Dr. Miller read the June 30, 2016 x-ray as positive for simple pneumoconiosis while Dr. Meyer read it as negative. Claimant's Exhibit 3; Employer's Exhibit 4. Dr. Miller and Dr. Kendall, also dually qualified, read the March 8, 2017 x-ray as negative for pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 3.

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utilized, would yield an additional .74, .13, and .12 of a year of coal mine employment, respectively, for a total of approximately one year. Alternatively, if the administrative law judge had simply credited Claimant's testimony regarding the length of his employment with these companies, Claimant would establish at most one year and some months of employment. Thus, even utilizing the administrative law judge's overstated employment with Arrington Trucking, Claimant would not have established at least fifteen years of qualifying employment had the administrative law judge considered this additional period of employment. Thus, any error in failing to consider whether Claimant has qualifying coal mine employment with these employers again was harmless. *See Larioni*, 6 BLR at 1-1278.

The administrative law judge permissibly found the June 22, 2015 x-ray negative because two dually-qualified radiologists read this x-ray as negative and one dually-qualified radiologist read it as positive. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); Decision and Order at 15. He permissibly found the readings of the June 30, 2016 x-ray in equipoise because an equal number of dually-qualified radiologists read it as positive and negative for pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); Decision and Order at 16. He found the March 8, 2017 x-ray negative for pneumoconiosis because two dually-qualified radiologists read it as negative for pneumoconiosis and there were no contrary interpretations. Decision and Order at 16. Having determined the x-ray evidence consists of two negative x-rays and one equivocal x-ray, he found the x-ray evidence does not establish the existence of pneumoconiosis. *Id.* at 15-16. Because substantial evidence supports the administrative law judge's findings, we affirm his determination that the x-ray evidence does not establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1).

We further affirm the administrative law judge's determination that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), as the record contains no biopsy or autopsy evidence. Decision and Order at 16. In addition, the administrative law judge correctly determined that, because there is no evidence of complicated pneumoconiosis in the record, the 20 C.F.R. §718.304 presumption is inapplicable. *Id.*

The administrative law judge next reviewed the computed tomography (CT) scan evidence. 20 C.F.R. §718.107. Drs. Mosely and Meyer both interpreted a CT scan taken on May 17, 2013. The administrative law judge correctly noted Dr. Meyer opined that the CT scan is negative for the existence of pneumoconiosis, while Dr. Mosely did not make any findings regarding pneumoconiosis. Decision and Order at 16; Employer's Exhibits 8, 13. He therefore rationally concluded the CT scan does not establish the existence of pneumoconiosis.

Finally, the administrative law judge considered the medical opinions of Drs. Ajjarapu, Dahhan, and Rosenberg. 20 C.F.R. §718.202(a)(4); Decision and Order at 16-17. Dr. Ajjarapu noted the June 22, 2015 x-ray is negative for pneumoconiosis but opined Claimant has legal pneumoconiosis in the form of chronic bronchitis due to his work in the mines. Decision and Order at 16-17; Director's Exhibit 10 at 4, 8-9. Dr. Dahhan noted the x-ray evidence does not support a diagnosis of clinical pneumoconiosis and opined Claimant's restrictive impairment is caused by morbid obesity and sleep apnea, unrelated to coal mine dust exposure. Director's Exhibit 19; Employer's Exhibit 10. Dr. Rosenberg likewise diagnosed Claimant with a restrictive impairment but, citing Claimant's March 8, 2017 x-ray showing decreased lung volumes with crowding of the lungs, attributed

Claimant's impairment to "morbid obesity" and concluded further evaluation of Claimant's impairment is required. Employer's Exhibits 7, 11.

The administrative law judge credited the opinions of Drs. Dahhan and Rosenberg[14] that Claimant's impairment is restrictive in nature and permissibly discredited the opinion of Dr. Ajjarapu because she did not explain why Claimant's chronic bronchitis is related to his history of coal mine dust exposure or why Claimant's morbid obesity did not cause Claimant's impairment. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 17.

The administrative law judge noted Dr. Dahhan "considered all of the clinical and test evidence," and explained why he concluded Claimant's restrictive impairment is due "not to a process in his lungs, but to his morbid obesity and his sleep apnea." Decision and Order at 17. The administrative law judge thus permissibly credited the opinion of Dr. Dahhan that pneumoconiosis is not present on the basis that it is "well-reasoned and supported by the objective medical evidence." *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 17.

Substantial evidence supports the administrative law judge's finding that the medical opinion evidence did not establish the existence of either clinical or legal pneumoconiosis. 20 C.F.R. §718.202(a)(4). The administrative law judge's finding is therefore affirmed. Thus, we affirm the administrative law judge's finding that Claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement. *Anderson*, 12 BLR at 1-112. We therefore affirm the denial of benefits. Consequently, we need not address Employer's argument on cross-appeal that it should be dismissed as the responsible operator.

[14] Though the administrative law judge credited Dr. Rosenberg's opinion that Claimant's impairment is restrictive in nature, he concluded the remainder of the doctor's opinion on the existence of pneumoconiosis is equivocal and not entitled to significant weight because, although he explained why obesity could play a role in Claimant's restrictive impairment, he did not explain why Claimant's restrictive impairment could not also be related to his history of coal mine dust exposure. Decision and Order at 17-18.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge