U.S. Department of Labor

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

BRB No. 22-0271 BLA

JACK W. MEADE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MACK COAL COMPANY, INCORPORATED/MACKWOOD COAL COMPANY, INCORPORATED	)	DATE ISSUED: 8/04/2023
	)	
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 Denying Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Jack W. Meade, Coeburn, Virginia.

David Casserly (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2020-BLA-05597) of Administrative Law Judge (ALJ) Francine L. Applewhite, rendered on a miner's claim filed on December 17, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 13.48 years of coal mine employment, and thus Claimant was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] Considering entitlement under 20 C.F.R. Part 718,[3] the ALJ determined Claimant established a totally disabling respiratory or pulmonary impairment but did not establish the existence of clinical or legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b). She therefore denied benefits.

On appeal, Claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a response, arguing the ALJ erred in her analysis of the evidence concerning clinical and legal pneumoconiosis. Employer did not file a response.[4]

In an appeal filed by a claimant who is not represented by counsel, the 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

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

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

[3] As the record contains no evidence of complicated pneumoconiosis, Claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3).

[4] We affirm, as unchallenged, the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11-12.

ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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

Because the ALJ's length of coal mine employment finding is relevant to the Section 411(c)(4) presumption, we will review her determination that Claimant worked 13.48 years in coal mine employment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

Claimant bears the burden to establish 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 ALJ's determination if it is 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 ALJ considered Claimant's testimony, Social Security Administration (SSA) earnings records, and employment history form. Decision and Order at 5; Hearing Transcript at 12; Director's Exhibits 2, 5, 6, 39. However, she indicated that she based her coal mine employment determination solely on Claimant's SSA records and employment history form. Decision and Order at 5. She then divided Claimant's yearly earnings from coal mine employers set forth in the SSA records by the coal mine industry's average daily earnings as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*[6] to determine the number of days Claimant worked.[7] Decision and Order at 5. For years when Claimant worked 125 days

[5] 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. *Shupe v. Director,* OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 2 n.2; Director's Exhibits 4, 39 at 22.

[6] Exhibit 610 to the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*, entitled "Average Wage Base," contains the average daily earnings of employees in coal mining and the earnings for those who worked 125 days during a year, and is referenced in 20 C.F.R. §725.101(a)(32)(iii).

[7] In the body of her decision, the ALJ stated she compared his yearly earnings to the average yearly coal mine earnings set forth in Exhibit 610. Decision and Order at 5. However, the table showing her calculations indicates that she divided Claimant's yearly earnings by the daily average earnings. *Id*. In addition, while the ALJ does not specifically

or more, she credited him with a full year of coal mine employment. *Id.* For years where he worked less than 125 days, she divided his working days by 125 to credit him with a portion of a year. *Id.* Using this method, she found Claimant worked in coal mine employment for a total of 13.48 years. *Id.*

Prior to applying the formula at 20 C.F.R. §725.101(a)(32)(iii), the ALJ did not initially determine, as the regulation requires, whether the beginning and ending dates of Claimant's coal mine employment could be ascertained.[8] *See* Decision and Order at 4-5. In addition, because this case arises with the Fourth Circuit, the ALJ erred in failing to consider whether Claimant established a calendar year of coal mine employment prior to applying the regulatory formula, as the Board has long interpreted Fourth Circuit case law as supporting the position that the ALJ must first determine whether the miner was engaged in an employment relationship for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-35 (4th Cir. 2007) (a one-year employment relationship must be established, during which the miner had 125 working days); *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002) (recognizing the 2001 amendments to the regulations require a one-year employment relationship during which the miner worked 125 days to establish a year of employment); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). If the threshold one-year period is met, the ALJ must then determine whether the miner worked for at least 125 working days within that one-year period.[9] 20 C.F.R. §725.101(a)(32). Proof that a miner worked at least 125 days or that a miner's earnings exceeded the industry average for 125 days of work in a given year, however, does not satisfy the requirement that such employment occurred during a 365-day period and therefore, in itself, does not establish

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indicate she is applying 20 C.F.R. §725.101(a)(32)(iii), the calculation she performs is identical to that set forth in the regulation. *See* Decision and Order at 4-5.

[8] If the beginning and ending dates of a miner's coal mine employment cannot be ascertained or the miner's coal mine employment lasted less than a calendar year, the ALJ may determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics. 20 C.F.R. §725.101(a)(32)(iii).

[9] If the threshold one-year period is met, "it must be presumed, in the absence of evidence to the contrary, that the miner spent 125 working days in such employment[,]" in which case the miner would be entitled to credit for one full year of employment. 20 C.F.R. §725.101(a)(32)(ii).

one full year of coal mine employment as defined in the regulations. *See Clark*, 22 BLR at 1-281.

Nonetheless, the ALJ's errors are harmless and remand is not required on this basis because the ALJ's method necessarily credited him with more years of coal mine employment. Consequently, we affirm the ALJ's finding that Claimant established fewer than 15 years of coal mine employment and therefore is unable to invoke the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4) (2018); *Muncy*, 25 BLR at 1-27; 20 C.F.R. §718.305(b)(1)(i).

20 C.F.R. Part 718

To be entitled to benefits under the Act, 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. Statutory presumptions may assist a claimant in establishing these elements when certain conditions are met, but failure to establish any element 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).

Claimant may establish the existence of pneumoconiosis by x-rays, autopsies or biopsies, operation of one of the presumptions described in 20 C.F.R. §§718.304-306, or a physician's opinion. 20 C.F.R. §718.202(a)(1)-(4). Further, to establish legal pneumoconiosis, Claimant must prove he has a "chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). The ALJ must consider all relevant evidence and weigh the evidence as a whole to determine if it establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The ALJ found Claimant did not establish the existence of clinical or legal pneumoconiosis.[10]

[10] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the

X-ray Evidence

The ALJ considered ten interpretations of five x-rays dated December 27, 2018, March 25, 2019, August 20, 2019, October 4, 2019, and July 16, 2020. Decision and Order at 10. All of the physicians who interpreted the x-rays are dually-qualified as Board-certified radiologists and B readers. Director's Exhibits 19-21; Employer's Exhibits 1, 5.

Dr. DePonte interpreted the December 27, 2018 x-ray as positive for simple pneumoconiosis, while Dr. Meyer interpreted it as negative. Director's Exhibits 19, 22. The ALJ found this x-ray is in equipoise and "neither supports nor refutes a finding of pneumoconiosis." Decision and Order at 10.

Drs. DePonte and Rama read the March 25, 2019 x-ray as positive for simple pneumoconiosis, while Dr. Meyer interpreted it as negative. Director's Exhibits 17, 20, 21. As two of the three interpretations are positive for pneumoconiosis, the ALJ found that this x-ray "supports a finding of pneumoconiosis." Decision and Order at 10.

Dr. Tarver interpreted the August 20, 2019 x-ray as negative for pneumoconiosis. Employer's Exhibit 5. As this was the only reading of this x-ray in the record, the ALJ found that it "does not support a finding of pneumoconiosis." Decision and Order at 10.

Dr. DePonte read the October 4, 2019 x-ray as positive for simple pneumoconiosis, while Dr. Adcock interpreted it as negative. Claimant's Exhibit 1; Employer's Exhibit 7. The ALJ found that this x-ray "neither supports nor refutes a finding of pneumoconiosis." Decision and Order at 10.

Dr. Rama interpreted the July 16, 2020 x-ray as positive for simple pneumoconiosis, while Dr. Adcock interpreted it as having 0/1 profusion, which the ALJ noted does not constitute evidence of pneumoconiosis. Claimant's Exhibit 3; Employer's Exhibit 1; Decision and Order at 10. Thus, the ALJ found this x-ray "does not support a finding of pneumoconiosis." Decision and Order at 10.

Considering the x-ray evidence as a whole, the ALJ determined Claimant failed to establish that he suffers from clinical pneumoconiosis by a preponderance of the x-ray evidence. *Id*. The Director asserts that with respect to the July 16, 2020 x-ray, the ALJ "implicitly credited Dr. Adcock's interpretation over Dr. Rama's without explaining why,

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lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

and contrary to the judge's treatment of every other x-ray interpretation in the record." Director's Brief at 1.

The regulation at 20 C.F.R. §718.102(d)(3) specifically states that "[a] chest radiograph classified under any of the foregoing [International Labour Organization] classification systems as Category 0, including subcategories 0-, 0/0, or 0/1, does not constitute evidence of pneumoconiosis." 20 C.F.R. §718.102(d)(3); *see Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1233 (1984). Thus, contrary to the Director's assertion, the ALJ properly considered Dr. Adcock's reading of the July 16, 2020 x-ray as negative and, therefore, the July 16, 2020 x-ray has an equal number of positive and negative readings by equally qualified physicians. While not again specifically stating this x-ray "neither supports nor refutes a finding of pneumoconiosis" as she did with the other x-rays she found to be in equipoise, the ALJ instead found that this x-ray "does not support a finding of pneumoconiosis," in effect again finding the readings of this x-ray were also in equipoise. Decision and Order at 10. If a reviewing court can discern "what the ALJ did and why [she] did it," the duty of explanation under the Administrative Procedure Act (APA), 5 U.S.C. § 557(c)(3)(A),[11] is satisfied. *Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999) (duty of explanation under the APA "is not intended to be a mandate for administrative verbosity or pedantry"). The overall x-ray evidence therefore includes three x-rays in equipoise, one positive, and one negative; therefore, Claimant is unable to meet his burden of proof. Consequently, we affirm the ALJ's finding that Claimant did not establish clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1).[12] Decision and Order at 10.

[11] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[12] Although the ALJ did not specifically address this issue, there is no biopsy evidence in the record and therefore Claimant cannot establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). In addition, as stated previously, Claimant cannot invoke the presumptions under 20 C.F.R. §§718.304 and 718.305 and therefore cannot establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3).

Medical Opinions

The ALJ considered the opinions of Dr. Forehand, who diagnosed legal and clinical pneumoconiosis, and Drs. Fino and McSharry, who opined Claimant does not have either disease. Decision and Order at 11; Director's Exhibit 17; Claimant's Exhibit 5; Employer's Exhibits 3, 4, 6. The ALJ briefly summarized the physicians' opinions and stated:

> Affording some weight to all three medical opinions, overall, they do not support diagnoses of legal pneumoconiosis or chronic lung disease. While Dr. Forehand did diagnose the Claimant with legal pneumoconiosis and a chronic lung disease arising out of coal dust exposure, Drs. Fino and McSharry definitively determined that the Claimant did not have legal pneumoconiosis or chronic lung disease.

Decision and Order at 11. Thus, she concluded Claimant failed to establish legal pneumoconiosis. *Id*.

The Director argues the ALJ erred in evaluating the medical opinions, as she "made no findings as to whether each doctor's opinion was well-documented or well-reasoned" and her analysis conflicts with Fourth Circuit precedent prohibiting head-counting. Director's Brief at 2. We agree.

An ALJ may not rely solely on a head count of the physicians providing assessments; she must also conduct a qualitative analysis of their opinions. *See 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); *Adkins v. Dir., OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); *see also Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016) (ALJ may not base a determination on numerical superiority of the same items of evidence). Here, the ALJ did not initially evaluate each physician's opinion to determine whether it was well-documented or well-reasoned nor did she adequately explain her reasoning for her finding as the APA[13] and Fourth Circuit precedent requires. *Akers*, 131 F.3d at 441; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 11. Consequently, we vacate her finding that the medical opinions do not support a finding of legal pneumoconiosis. Further, the ALJ erred in failing to consider the medical opinion evidence when concluding that Claimant did not establish clinical pneumoconiosis

[13] We note, however, that a physician's opinion which is merely a restatement of an x-ray interpretation is not a reasoned medical opinion. 20 C.F.R. §§718.202(a)(1), (4), 725.414(a).

overall.[14] *See* Decision and Order at 10. Thus, we vacate the ALJ's determination that Claimant did not establish pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Remand Instructions

On remand, the ALJ must first consider whether the medical opinion evidence establishes clinical or legal pneumoconiosis. 20 C.F.R. §718.202(a)(4). She must evaluate the credibility of the opinions in light of the physicians' qualifications, the explanations for their findings, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *See Hicks*, 138 F.3d at 532-34; *Akers*, 131 F.3d at 441.

If the ALJ finds the medical opinions establish legal or clinical pneumoconiosis, she must then address whether the existence of pneumoconiosis is established based on a review of all relevant evidence. 20 C.F.R. §718.202(a); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000). If the ALJ finds pneumoconiosis established, she must then determine whether it is a substantially contributing cause of Claimant's total disability. 20 C.F.R. §718.204(c)(1). Conversely, if she finds Claimant did not establish pneumoconiosis, she may reinstate the denial of benefits, as Claimant will have failed to establish a requisite element of entitlement. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-1. In reaching her conclusions on remand, the ALJ must comply with the APA. *See Wojtowicz*, 12 BLR at 1-165.

[14] Dr. Forehand diagnosed clinical pneumoconiosis based on the March 25, 2019 x-ray, which the ALJ determined was positive, and Claimant's exposure to coal mine dust. Director's Exhibit 17. Drs. Fino and McSharry determined Claimant did not have clinical pneumoconiosis. Claimant's Exhibit 5; Employer's Exhibits 3, 4, 6.

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this decision.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge