U.S. Department of Labor

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

BRB No. 22-0287 BLA

WILMA HORN (o/b/o GALLIE HORN, JR.)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JEWELL RIDGE COAL CORPORATION	)	
	)	
and	)	DATE ISSUED: 8/15/2023
	)	
PITTSTON COMPANY c/o SMART CASUALTY CLAIMS	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Denying Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Wilma Horn, Pilgrims Knob, Virginia.

Timothy W. Gresham (Penn, Stuart, & Eskridge), Abingdon, Virginia, for Employer.

William M. Bush (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, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel,[2] appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Denying Benefits (2020-BLA-05683) rendered on a claim filed on December 24, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with 13.24 years of coal mine employment and thus found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] Considering entitlement under 20 C.F.R. Part 718, she found Claimant established the Miner had a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), but did not establish the existence of pneumoconiosis. 20 C.F.R. §718.202. Thus, she denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to vacate the denial of benefits and remand the case for the ALJ to reconsider whether Claimant has legal pneumoconiosis.[4]

In an appeal filed without representation, 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 ALJ's findings of fact and conclusions of law if

[1] The Miner died on November 15, 2020. Hearing Transcript at 7. Claimant, the Miner's widow, is pursuing the claim on his behalf.

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

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had 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.

[4] We affirm, as unchallenged on appeal, the ALJ's finding Claimant established total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b); Decision and Order at 9.

they are rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated 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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines, or surface coal mines in conditions "substantially similar" to underground mines. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing the length of 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 and supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

Based on our review of the record and the ALJ's findings, we conclude substantial evidence supports her determination that the Miner worked for less than fifteen years in coal mine employment. Jewell Ridge Coal submitted an employment form stating the Miner worked for it from April 21, 1970 to May 21, 1982. Director's Exhibit 6. The Miner also stated he worked for Alfred White Coal in 1983. Director's Exhibit 5. For these years of coal mine employment, the ALJ applied the calculation at 20 C.F.R. §725.101(a)(32)(iii) to ascertain the number of days the Miner worked.[6] Decision and Order at 4-5. She divided his yearly earnings as reported in his Social Security Administration earnings record by the coal mine industry's average daily earnings, as reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*. *Id.* If the Miner's earnings reflected 125 or more working days in a given year, the ALJ credited him with one year of coal mine employment. *Id*. If the Miner had less than 125 working days, the ALJ credited him with a fractional year based on the ratio of the actual number of days worked to 125. *Id.* at 4-5. Based on this method of calculation, she found the Miner had a total of 13.24 years of employment from 1970 to 1983. *Id.*

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[6] If an ALJ cannot ascertain the beginning and ending dates of a miner's coal mine employment, or the miner's employment lasted less than a calendar year, the ALJ may divide the miner's annual earnings by the average daily earnings for a coal miner as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*. 20 C.F.R. §725.101(a)(32)(iii).

As the ALJ's length of coal mine employment calculation is based on a reasonable method and is supported by substantial evidence, we affirm her finding Claimant established less than fifteen years of coal mine employment.[7] *See Muncy*, 25 BLR at 1-27; Decision and Order at 5. Thus we affirm her finding Claimant did not invoke the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i).

Entitlement Under 20 C.F.R. Part 718

To be entitled to benefits under the Act without the application of the Section 411(c)(3) or (4) presumptions, 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).[8] 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any 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).

[7] The Miner's Social Security Administration (SSA) earnings record reflects additional earnings in the fourth quarter of 1966 and first three quarters of 1967 from Ball Brothers Coal Company. Director's Exhibit 10. The ALJ's failure to include these earnings in her calculation is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Even if the ALJ had included these earnings in her calculation, the Miner's earnings of $452.37 in 1966 and $1,710.43 in 1967 would only add 0.6 year of coal mine employment based on application of the formula at 20 C.F.R. §725.101(a)(32)(iii). Director's Exhibit 5. Alternatively, had the ALJ credited him with a quarter-year of coal mine employment for each pre-1978 quarter in which his SSA earnings record shows he earned at least $50.00 from coal mine operators, the Miner would be entitled to credit for only an additional year of coal mine employment. *Shrader v. Califano,* 608 F.2d 114, 117 n.3 (4th Cir. 1979) (income exceeding fifty dollars is "an appropriate yardstick for determining quarters which will be fully credited to a black lung claimant in determining the duration of his coal mine employment"); Director's Exhibit 10. In either case, Claimant still would not have established at least fifteen years of coal mine employment.

[8] The record contains no evidence of complicated pneumoconiosis and thus Claimant cannot invoke the irrebuttable presumption that the Miner was totally disabled due to pneumoconiosis. *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

Clinical Pneumoconiosis

"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 lungs and 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).

The ALJ considered five interpretations of two x-rays dated January 24, 2019, and August 21, 2019. Decision and Order at 5, 7-8. All the physicians who interpreted these x-rays are dually-qualified B readers and Board-certified radiologists. Director's Exhibits 24, 27, 29, 30; Claimant's Exhibit 1. Dr. Ramakrishnan read the January 24, 2019 x-ray as positive for clinical pneumoconiosis, 1/1, whereas Drs. DePonte and Adcock read it as negative. Director's Exhibits 24, 27, 29. Dr. DePonte read the August 21, 2019 x-ray as positive for clinical pneumoconiosis, 1/0, but Dr. Adcock read it as negative for the disease. Director's Exhibit 30; Claimant's Exhibit 1.

The ALJ permissibly found the January 24, 2019 x-ray does not support a finding of clinical pneumoconiosis because a greater number of dually-qualified radiologists read it as negative. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 272-76 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); Decision and Order at 8. She permissibly found the interpretations of the August 21, 2019 x-ray in equipoise based on the equal number of positive and negative readings from dually-qualified readers. *Id.* Having found one x-ray negative and one x-ray inconclusive, the ALJ permissibly found the preponderance of the x-ray evidence insufficient to establish clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1); *see Ondecko*, 512 U.S. at 280-81; *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins*, 958 F.2d at 52; Decision and Order at 8.

The ALJ also accurately noted the record contains no biopsy or autopsy evidence. 20 C.F.R. §718.202(a)(2); Decision and Order at 7-8. Further, no physician diagnosed clinical pneumoconiosis as part of a medical report submitted in this case. 20 C.F.R. §718.202(a)(4). Director's Exhibits 24, 30. Therefore, substantial evidence supports the ALJ's determination that Claimant failed to establish clinical pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08, 211 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order at 7-8.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must demonstrate the Miner had a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has

held a claimant can establish legal pneumoconiosis by showing coal dust exposure contributed "in part" to a miner's respiratory or pulmonary impairment. *See Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311 (4th Cir. 2012); *see also Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (A miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment.").

The ALJ considered the medical opinions of Drs. Habre and Fino. Decision and Order at 6-9. Dr. Habre diagnosed the Miner with legal pneumoconiosis in the form of chronic bronchitis arising from coal mine dust exposure. Director's Exhibit 24. Dr. Fino opined the Miner had "reductions in the FVC and FEV1" on the August 21, 2019 pulmonary function study, which he opined are attributable to obesity and unrelated to coal mine dust exposure. Director's Exhibit 30 at 9-10. The ALJ afforded "some weight" to each opinion and found them "in equipoise." Decision and Order at 8. Thus, she determined the medical opinion evidence does not establish legal pneumoconiosis. *Id.*

The Director argues the ALJ erred by failing to explain her findings. Director's Brief at 2-3. We agree.

The ALJ made no determination as to whether the medical opinions are reasoned and documented. Decision and Order at 7-9. Although she assigned each of them "some weight," she did not explain the basis for this finding. *Id.* at 8. Thus, she erred by failing to critically analyze the physicians' opinions, render any findings as to whether their opinions are reasoned and documented, or otherwise explain, as the Administrative Procedure Act[9] requires, why she found both opinions credible. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Addison*, 831 F.3d at 252-53 (ALJ must conduct an appropriate analysis of the evidence to support her conclusions and render necessary credibility findings); *Hicks*, 138 F.3d at 533 (ALJ erred by failing to adequately explain why he credited certain evidence and discredited other evidence); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

While the burden remains on Claimant to establish the existence of legal pneumoconiosis, the ALJ did not explain why she found Drs. Habre's and Fino's opinions in equipoise. *Wojtowicz*, 12 BLR at 1-165; 20 C.F.R. §718.201(a)(2), (b); Decision and

[9] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that 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).

Order at 8. As discussed above, the ALJ's finding both medical opinions entitled to "some weight" is unexplained, and the mere presence of conflicting medical opinions is not a valid basis to conclude Claimant failed to meet her burden to establish the existence of legal pneumoconiosis. *See Ondecko*, 512 U.S. at 281; Decision and Order at 8. The ALJ has a duty to resolve any conflicts in the evidence and explain her basis for doing so. *Addison*, 831 F.3d at 256-57; *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803 (4th Cir. 1998); *Gunderson v. U.S. Dep't of Lab.*, 601 F.3d 1013, 1024 (10th Cir. 2010); *Wojtowicz*, 12 BLR at 1-165.

Based on this error, we vacate the ALJ's finding Claimant did not establish the existence of legal pneumoconiosis and the denial of benefits and remand the case for further consideration of the medical opinion evidence on this issue. 20 C.F.R. §718.202(a)(4); Decision and Order at 8.

Remand Instructions

On remand, the ALJ must first consider whether Claimant established legal pneumoconiosis based on the medical opinions. 20 C.F.R. §§718.201(a)(2), (b), 718.202(a)(4). If she finds legal pneumoconiosis established, she then must determine if the evidence establishes legal pneumoconiosis is a substantially contributing cause of the Miner's totally disabling respiratory or pulmonary impairment.[10] 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); *Robinson v. Pickands Mather and Co.*, 914 F.2d 35 (4th Cir. 1990).

In weighing the medical opinions, the ALJ must consider the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co.*

[10] If the totally disabling impairment is itself found to be legal pneumoconiosis, the disability causation requirement is also satisfied. *See Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 1-256 (2019) (inquiry regarding disability causation is satisfied when the disabling impairment constitutes the miner's legal pneumoconiosis).

v. Akers, 131 F.3d 438, 441 (4th Cir. 1997). In so doing, she must set forth her findings in detail, including the underlying rationale. *Wojtowicz*, 12 BLR at 1-165.

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 opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge