U.S. Department of Labor

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

BRB No. 22-0375 BLA

JOHN A. GOBLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PONTIKI COAL CORPORATION, self-insured through ALLIANCE COAL, LLC	)	
	)	DATE ISSUED: 8/24/2023
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Denise Hall Scarberry and Paul E. Jones (Jones & Jones Law Office, PLLC), Pikeville, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits in an Initial Claim (2020-BLA-05398) rendered on a claim filed August 3, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 15.02 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, and therefore

invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.204(b)(2), 718.305. He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding at least fifteen years of coal mine employment and thus invoking the Section 411(c)(4) presumption. It also argues he erred in finding it did not rebut the presumption.[2] Claimant and the Director, Office of Workers' Compensation Programs, have not filed response briefs.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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, 362 (1965).

Invocation of the Section 411(c)(4) Presumption - Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mine employment or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in coal mine employment. *See 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. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

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

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204; Decision and Order at 14.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 45; Director's Exhibit 5.

Employer argues the ALJ erred in finding at least fifteen years of underground coal mine employment. Employer's Brief at 4-10. We disagree.

The ALJ considered Claimant's hearing and deposition testimony, employment history forms, and Social Security Administration (SSA) earnings records. Decision and Order at 3-7; Hearing Transcript at 22-23, 29-32, 42-46; Director's Exhibits 4-6, 50. For the years 1979 to 1993, the ALJ applied the calculation method at 20 C.F.R. §725.101(a)(32)(iii) to ascertain the number of days Claimant worked.[4] Decision and Order at 3-7. He divided Claimant's yearly earnings as reported in his SSA earnings records 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 Claimant'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 Claimant 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*. Based on this method of calculation, the ALJ credited Claimant with 14.54 years of coal mine employment from 1979 to 1993.

For the year 1978, the ALJ noted Claimant's SSA earnings records show no coal mine employment-related earnings. Decision and Order at 6. He further noted, however, that Claimant stated on his employment history forms that he worked for Turner Elkhorn Coal Corporation (Turner Elkhorn) from 1978 to 1979. *Id*. at 4, 6; *see* Director's Exhibits 4, 5. Considering Claimant's deposition testimony, the ALJ found Claimant "consistently and credibly testified that he worked for Turner Elkhorn for three months during the summer in 1978" and there is "no evidence to contradict" Claimant.[5] Decision and Order at 6; *see* Director's Exhibit 50 at 20-53. Based on Claimant's written statement that he worked for Employer for five to six days a week and the absence of any evidence in the record that Claimant ever worked part-time for any entity, the ALJ found Claimant worked five days a week for Turner Elkhorn, or twenty-days in a month. Decision and Order at 6; *see* Director's Exhibit 5. The ALJ therefore credited Claimant with sixty working days in 1978 by multiplying twenty days a month by three months. Decision and Order at 6. As

[4] 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).

[5] The ALJ noted Claimant testified that he was seventeen years old when he worked for Turner Elkhorn which, because he was not an adult, the ALJ found explains why Claimant's employment with Turner Elkhorn is not reflected in his Social Security Administration earnings records. Decision and Order at 4; *see* Director's Exhibit 50 at 53.

he credited Claimant with a fractional year based on the ratio of the actual number of days worked to 125, the ALJ found Claimant established 0.48 years of coal mine employment in 1978. *Id*.

Employer argues the ALJ erred in crediting Claimant's testimony for the year 1978 because Claimant was not consistent in discussing his employment with Turner Elkhorn. Employer's Brief at 5-9. It argues Claimant sometimes described this employment as having taken place in the summer rather than over three months and other times described it as having taken place between the years 1978 and 1979 rather than in one year. *Id*. Furthermore, it argues there is no corroborating evidence to support Claimant's testimony. *Id*. In addition, it asserts Claimant's testimony was not adequately specific to establish three months of employment in 1978. *Id*.

The ALJ evaluates the credibility and weight of the evidence, including witness testimony. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (an ALJ is granted broad discretion in evaluating the credibility of the evidence, including witness testimony); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (declining to reweigh witness testimony on smoking history in spite of alleged inconsistencies that the employer identified); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989). The Board will not disturb an ALJ's credibility findings unless they are inherently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc). Employer's argument amounts to a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Further, we conclude the ALJ permissibly found Claimant worked for Turner Elkhorn for five days a week, or twenty days a month, because there is no evidence he ever worked as a part time employee for Turner Elkhorn and he indicated he worked for Employer full time five to six days a week. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012) (it is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 6. Because it is supported by substantial evidence and is based on a reasonable method of calculation, we affirm the ALJ's finding that Claimant established 0.48 years of coal mine employment in 1978. *Shepherd v. Incoal, Inc*., 915 F.3d 392, 402-05 (6th Cir. 2019); Decision and Order at 6-7.

Employer also argues the ALJ erred in crediting Claimant with 0.0001 of a year of coal mine employment in 1979. Employer's Brief at 9. Employer has not explained why the alleged error requires remand. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

As Employer raises no further challenge to the ALJ's calculation of Claimant's length of coal mining employment, we affirm his finding the evidence establishes at least fifteen years of coal mine employment. Decision and Order at 7. We further affirm, as unchallenged on appeal, the ALJ's finding that all of Claimant's coal mine employment took place at underground coal mines. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8. Thus we affirm his finding Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[6] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[7]

To disprove legal pneumoconiosis, Employer must establish Claimant does not have 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(a)(2), (b); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The Sixth Circuit has held this standard requires Employer to establish Claimant's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id*. at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

[6] "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). The definition includes "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 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).

[7] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 17.

Employer relies on the opinions of Drs. Dahhan and Broudy to rebut the presumption. Director's Exhibits 21, 24, 54; Employer's Exhibits 4, 6. It argues the ALJ erred in discrediting their opinions. Employer's Brief at 10-14. We disagree.

Drs. Dahhan and Broudy both opined Claimant has a totally disabling restrictive lung impairment caused by his obesity and unrelated to coal dust exposure. Director's Exhibits 21, 24, 54; Employer's Exhibits 4, 6. Dr. Dahhan opined Claimant's restrictive impairment can be explained by his obesity and thus it is unrelated to coal mine dust exposure. Director's Exhibit 24 at 3. He also stated Claimant's normal diffusing capacity and lack of interstitial opacities seen on chest x-ray are most consistent with a restrictive impairment due to diseases such as obesity or muscular disorders and not interstitial disease caused by coal dust exposure. Employer's Exhibit 4 at 14-17.

Dr. Broudy explained coal mine dust did not cause Claimant's restrictive impairment because Claimant has a "disease or conditions of the general public, namely his morbid obesity." Director's Exhibit 54 at 10. In addition, he testified that a restrictive impairment caused by coal mine dust exposure results in reduced diffusion capacity "[m]ost of the time[.]" Employer's Exhibit 6 at 20. Because Claimant has a normal diffusion capacity, he opined coal mine dust did not cause the impairment. *Id*.

The ALJ permissibly found Dr. Dahhan's opinion unpersuasive because the regulations provide legal pneumoconiosis may be present even in the absence of a positive x-ray for clinical pneumoconiosis. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012) (ALJ properly concluded the regulations provide legal pneumoconiosis may exist in the absence of clinical pneumoconiosis); 20 C.F.R. §§718.201, 718.202(a)(4), 718.202(b); Decision and Order at 18. The ALJ also found both doctors explained why they believe obesity to be the most likely cause of Claimant's disabling restrictive impairment, but permissibly discredited their opinions because they did not adequately explain why coal mine dust exposure did not contribute to, or aggravate, his obesity related restrictive impairment. *See Young*, 947 F.3d at 405; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 18.

Employer argues Drs. Dahhan and Broudy provided credible explanations and thus their opinions rebut the presumption of legal pneumoconiosis. Employer's Brief at 10-14. Employer's arguments again are a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113.

Because the ALJ permissibly discredited the opinions of Drs. Broudy and Dahhan, we affirm his finding Employer failed to disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 19. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

The ALJ next considered whether Employer established that "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The ALJ rationally discredited the opinions of Drs. Broudy and Dahhan because they did not diagnose legal pneumoconiosis, contrary to his finding Employer failed to disprove the disease. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015); Decision and Order at 20.

Employer raises no specific allegations of error regarding the ALJ's findings other than its assertion that Claimant does not have legal pneumoconiosis, which we have rejected. Employer's Brief at 14-15. Thus we affirm the ALJ's determination that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Skrack*, 6 BLR at 1-711; Decision and Order at 20.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge