U.S. Department of Labor

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

BRB No. 21-0502 BLA

ADAM H. SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEQUOIA ENERGY, LLC	)	DATE ISSUED: 12/16/2022
	)	
and	)	
	)	
NEW HAMPSHIRE INSURANCE/AIG	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Adam H. Smith, Arjay, Kentucky.

Timothy J. Walker (Fogle Keller Walker, PLLC), Lexington, Kentucky, for Employer and its Carrier.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Denying Benefits (2020-BLA-05216) rendered on a miner's claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on November 20, 2018.[2]

The ALJ found Claimant did not establish complicated pneumoconiosis and therefore could not 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) (2018); 20 C.F.R. §718.304. Although the parties stipulated to twenty years of qualifying coal mine employment, the ALJ found Claimant failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). Thus, the ALJ found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4), establish entitlement pursuant to 20 C.F.R. Part 718, or establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309.[4] He therefore denied benefits.

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

[2] Claimant filed two previous claims. The district director denied his prior claim because the evidence did not establish total disability. Director's Exhibit 2.

[3] Section 411(c)(4) 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[4] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the district director denied Claimant's prior claim for failure to establish total disability, Claimant was required to submit new evidence establishing total disability to warrant a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 2.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer and its Carrier (Employer) respond in support of the denial.[5] The Director, Office of Workers' Compensation Programs, has not filed a response.

In an appeal filed by an unrepresented Claimant, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[6] 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).

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 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).

Complicated Pneumoconiosis

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The ALJ must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis before determining whether Claimant has invoked the

[5] We affirm, as unchallenged on appeal, the ALJ's finding of twenty years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2-3.

[6] 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 14; Director's Exhibit 5.

presumption. *Gray v. SLC Corp.*, 176 F.3d 382, 389-90 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

X-ray Evidence at 20 C.F.R. §718.304(a)

The ALJ considered four interpretations of two chest x-rays. Decision and Order at 7-8. All the interpreting physicians are dually qualified B readers and Board-certified radiologists. *Id.*; Director's Exhibits 25, 26; Employer's Exhibit 1. Dr. DePonte provided the sole reading of the October 25, 2017 x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Director's Exhibit 25. Dr. DePonte read the February 25, 2019 x-ray as positive for simple and complicated pneumoconiosis, while Drs. Ramakrishnan and Tarver read it as positive for simple pneumoconiosis but negative for complicated pneumoconiosis.[7] Director's Exhibits 20 at 18, 26; Employer's Exhibit 1. The ALJ permissibly found the February 25, 2019 x-ray negative for complicated pneumoconiosis based on the preponderance of the negative readings by the dually-qualified radiologists. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); Decision and Order at 8-9. Because the ALJ performed both a quantitative and qualitative evaluation of the conflicting readings, we affirm as supported by substantial evidence the ALJ's finding that Claimant failed to establish complicated pneumoconiosis at 20 C.F.R. §718.304(a). *See Woodward*, 991 F.2d at 321; Decision and Order at 8-9.

Other Evidence at 20 C.F.R. §718.304(c) [8]

There are three medical opinions in the record. Decision and Order at 9-14. Dr. Forehand opined Claimant has complicated pneumoconiosis based on his coal dust exposure and Dr. DePonte's February 25, 2019 x-ray reading. Director's Exhibit 20 at 4.

[7] Dr. Lundberg reviewed the February 25, 2019 x-ray for quality purposes only. Director's Exhibit 23.

[8] There are no chest CT scans of record. The ALJ also correctly noted there is no biopsy evidence. 20 C.F.R. §718.304(b); Decision and Order at 6 n.10. He considered Claimant's treatment records, which contain x-rays dated July 31, 2017, and May 22, 2018, as well as a March 6, 2020 computed tomography (CT) scan of Claimant's abdomen and pelvis and accurately noted the records do not address whether Claimant has complicated pneumoconiosis. Decision and Order at 14; Employer's Exhibits 3, 4; Claimant's Exhibits 2, 3. Thus, he permissibly found Claimant's treatment records do not support a finding of complicated pneumoconiosis. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Rowe*, 710 F.2d at 255; Decision and Order at 14.

The ALJ permissibly rejected Dr. Forehand's opinion as based on Dr. DePonte's February 25, 2019 positive x-ray interpretation, which he found outweighed by the negative readings of that film. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 13-14.

Dr. Tuteur initially opined that based on Dr. DePonte's February 25, 2019 x-ray, a "diagnosis of progressive massive fibrosis [was] quite unlikely." Employer's Exhibit 2 at 7. At his August 20, 2020 deposition, he noted mixed radiographic evidence as to complicated pneumoconiosis and opined Dr. DePonte's February 25, 2019 x-ray reading was "quite questionable." Employer's Exhibit 6 at 17-19. Dr. Rosenberg initially noted mixed radiographic evidence as to complicated pneumoconiosis that needed additional review by "experienced B-reading radiologists." Employer's Exhibit 7 at 3. At his August 31, 2020 deposition, he opined Claimant does not have complicated pneumoconiosis. Employer's Exhibit 8 at 8. The ALJ permissibly found Dr. Tuteur's opinion equivocal and Dr. Rosenberg's opinion insufficient to support a finding that Claimant has complicated pneumoconiosis. Decision and Order at 14; *see Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882 (6th Cir. 2000); *Crisp*, 866 F.2d at 185; *Melnick*, 16 BLR at 1-37. We therefore affirm the ALJ's finding that Claimant did not establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).

Weighing all the evidence together, the ALJ permissibly found Claimant failed to establish complicated pneumoconiosis at 20 C.F.R. §718.304. Decision and Order at 14-15. *Gray*, 176 F.3d at 389-90; *Melnick v. Consolidation Coal Co.*, 16 BLR at 1-33. Consequently, we affirm the ALJ's finding Claimant failed to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3). *Gray*, 176 F.3d at 389-90; *Melnick*, 16 BLR at 1-33.

Invocation of the Section 411(c)(4) Presumption – Total Disability

To invoke the Section 411(c)(4) presumption or establish entitlement under 20 C.F.R. Part 718, Claimant must prove he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(i). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies, qualifying arterial blood gas studies,[9] evidence of pneumoconiosis and cor pulmonale with right-sided

[9] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718,

congestive heart failure, or medical opinions.[10] 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The ALJ found Claimant failed to establish total disability and thus denied benefits. Decision and Order at 19-20.

In considering the medical opinion evidence, the ALJ rationally found Claimant's last coal mine work as a continuous miner operator required "heavy exertion."[11] *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc) (ALJ has discretion to assess witness credibility and the Board will not disturb his findings unless they are inherently unreasonable); Decision and Order at 5-6. Thus, we affirm that finding.

The ALJ considered Dr. Forehand's opinion that Claimant is totally disabled, and the opinions of Drs. Rosenberg and Tuteur that he is not.[12] Decision and Order at 9-13, 18-19; Director's Exhibits 20; Employer's Exhibits 2, 6-8. Dr. Forehand conducted the Department of Labor's complete pulmonary evaluation of Claimant on August 12, 2017,

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Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[10] The ALJ correctly determined Claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii). He found the only pulmonary function and arterial blood gas studies are non-qualifying and there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 16-17; Director's Exhibit 20.

[11] The ALJ relied on Claimant's statements that he had to lift fifty to eighty pounds during the day and carry forty to fifty pounds about one mile each day. Decision and Order at 5-6; Director's Exhibits 5, 6; *see also* Employer's Exhibit 5 at 18-19. The ALJ also indicated that the physicians who submitted medical reports agreed that Claimant's position as a continuous miner operator required heavy exertion. Decision and Order at 6.

[12] Both Drs. Rosenberg and Tuteur opined Claimant is not totally disabled by a pulmonary or respiratory impairment based on his non-qualifying pulmonary function and blood gas study evidence. Employer's Exhibits 2 at 7, 6 at 11-16, 7 at 3, 8 at 11-12. Dr. Tuteur also opined Claimant retains the pulmonary capacity to return to his last coal mine employment but is disabled from returning to his last work by chronic low back syndrome, pancreatitis, and coronary artery disease, and that his ability to work is "complicated by suboptimally controlled hypertension, hyperlipidemia, and obesity." Employer's Exhibits 2 at 12-13, 6 at 16.

and obtained non-qualifying pulmonary function and blood gas studies. Director's Exhibit 20. He opined that Claimant is totally disabled based on Dr. DePonte's positive reading for complicated pneumoconiosis of the February 25, 2019 x-ray. *Id.* at 4-5. In addition, he stated "additional exposure to coal mine dust of any extent would further injure [Claimant's] already severely damaged lungs." *Id.* at 4. The ALJ permissibly gave Dr. Forehand's opinion little weight because it was contrary to his weighing of the x-ray evidence, which he found negative for complicated pneumoconiosis. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 18. Dr. Forehand's recommendation that Claimant not return to work in the mines to avoid further damaging his lungs is also insufficient to support a finding of total disability. S*ee Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989) (a recommendation against further dust exposure is not a diagnosis of total respiratory or pulmonary disability).

Additionally, the ALJ permissibly found Claimant's award of benefits from a Kentucky workers' compensation claim was not persuasive evidence, as it provided no explanation of the medical or legal criteria underlying the award. Decision and Order at 19; Director's Exhibit 15. Moreover, the ALJ correctly noted that the Kentucky workers' compensation award is not binding in this federal black lung claim. *See Schegan v. Waste Mgmt. & Processors, Inc*., 18 BLR 1-41, 1-46 (1994); *Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986); Decision and Order at 19.

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if the evidence is found insufficient to establish a required element of entitlement. *See Ondecko*, 512 U.S. at 281; *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because it is supported by substantial evidence, we affirm the ALJ's finding that that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv) or in consideration of the evidence as a whole. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-20-21 (1987); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 19-20. As Claimant failed to establish he has a totally disabling respiratory or pulmonary impairment, we affirm the ALJ's findings that he did not invoke the Section 411(c)(4) presumption, did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and benefits are precluded under 20 C.F.R. Part 718. *See Anderson*, 12 BLR at 1-112; 20 C.F.R. §718.204(b)(2).

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge