U.S. Department of Labor

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

BRB No. 20-0077 BLA

ROGER K. BARNETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TARA K COAL COMPANY, INCORPORATED	)	DATE ISSUED: 01/27/2021
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Roger K. Barnett, Big Stone Gap, Virginia.

Laura Metcoff Klaus and Michael A. Pusateri (Greenberg Traurig LLP), Washington, D.C., for Employer/Carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals Administrative Law Judge Larry S. Merck's Decision and Order Denying Benefits in a Subsequent Claim (2018-BLA-05542) rendered on a 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 April 21, 2016.[2]

The administrative law judge credited Claimant with 13.28 years of coal mine employment and therefore found he could not invoke the rebuttable 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 whether Claimant established entitlement to benefits without the presumption, the administrative law judge found the new evidence does not establish the existence of either clinical[4] or legal pneumoconiosis[5] at 20 C.F.R. §718.202(a)(1), (4). He

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

[2] On September 14, 1999, Administrative Law Judge Jeffrey Tureck issued a Decision and Order denying Claimant's first claim, filed on March 10, 1997, because he failed to establish the existence of pneumoconiosis. Director's Exhibit 1. Claimant took no further action until filing the present claim on April 21, 2016. Director's Exhibit 3.

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

[4] "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).

[5] "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).

therefore found Claimant did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c) and denied benefits.

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

In an appeal by a claimant without the assistance of counsel, the Benefits Review Board considers whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law 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 Associates, Inc.*, 380 U.S. 359 (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 mines, 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).

In determining the length of Claimant's coal mine employment, the administrative law judge considered his Social Security Administration (SSA) earnings records, employment history form, and hearing testimony.[7] Decision and Order at 10; Director's Exhibits 3, 6; Hearing Tr. at 29-35. Relying on Claimant's SSA earnings records to determine the length of his coal mine employment between 1969 and 1974, the administrative law judge permissibly credited Claimant with a full quarter of a year for

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 6; Hearing Tr. at 18, 29.

[7] Claimant testified he worked approximately twenty years in underground coal mine employment. Hearing Tr. at 29. Employer's counsel stated Administrative Law Judge Tureck "found only 11 years of coal mine employment" and the district director found "12.47 years." Hearing Tr. at 13-14. Employer's counsel stated Employer could "agree that the Claimant worked for that period of time." *Id*.

each quarter in which he earned at least $50.00 from coal mine employment,[8] for a total of nineteen quarters or 4.75 years of coal mine employment.[9] *See Shrader v. Califano*, 608 F.2d 114, 117 n.3 (4th Cir. 1979) (crediting a miner with a full quarter of coal mine employment when the miner earned $50.00 or more during that time period is "an appropriate yardstick for determining quarters which will be fully credited to a black lung claimant"); *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); *Combs v. Director, OWCP*, 2 BLR 1-904, 1-905 (1980). Decision and Order at 10-11; Director's Exhibit 6. As this finding is supported by substantial evidence, it is affirmed. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); Decision and Order at 11.

In calculating Claimant's coal mine employment from 1978 to 1989,[10] the administrative law judge found Claimant's SSA earnings records the most probative evidence regarding the length of his coal mine employment. Decision and Order at 10. He found these records demonstrate Claimant had full calendar years of coal mine employment with a single employer in 1981, 1982, 1984, 1985, and 1986. Decision and Order at 12. Applying the method of calculation at 20 C.F.R. §725.101(a)(32)(iii)[11] for these years, the

[8] Prior to 1978, the Social Security Administration (SSA) reported annual earnings on a quarterly basis.

[9] The administrative law judge noted Claimant's SSA earnings records do not show any coal mine employment in 1975, 1976, and 1977. Decision and Order at 11; Director's Exhibit 6. We also see no error in the administrative law judge's determination Claimant's employment with Rutmann Construction Company, with whom he earned $150 in the fourth quarter of 1966 and $347 in the first quarter of 1969, was not coal mine employment. *See* Hearing Tr. at 31-32; Director's Exhibit 4. Although Claimant initially testified he built a silo "around the mines," he then stated it was not coal mine employment and was not an "above-the-ground mine or an underground mine." *See* 20 C.F.R. §725.101(a)(19) (definition of "miner" includes individuals who "worked in coal mine construction . . . in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment"); *see also* 20 C.F.R. §725.202(b).

[10] Claimant stopped working in 1989 due to a back injury. *See* Hearing Tr. at 26.

[11] Pursuant to 20 C.F.R. §725.101(a)(32)(iii):

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal

administrative law judge calculated Claimant's coal mine employment by dividing his annual earnings by the average yearly wage for 125 days as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*.[12] Decision and Order at 12-14. Because Claimant's wages exceeded the 125-day average, the administrative law judge credited him with five full years of coal mine employment during these years. *Id*. at 11-12. Thus this calculation is affirmed. 20 C.F.R. §725.101(a)(32) ("year" is defined as a calendar year "during which the miner worked in or around a coal mine or mines for at least 125 'working days'"); *see Muncy*, 25 BLR at 1-27.

For the remaining years the administrative law judge found the specific beginning and ending dates were not known but the SSA records suggest Claimant was not employed continuously for the full calendar year because he changed employers most of the years and retired in 1989. Decision and Order at 12. He again applied the formula at 20 C.F.R. §725.101(a)(32)(iii) to determine the number of days Claimant worked and credited him with years of employment based on an estimated 250-day work year. *Id*. at 12-13. Using this framework, he found Claimant established 3.53 years of coal mine employment in 1978, 1979, 1980, 1983, 1987, 1988 and 1989. *Id*. When added to his other work, Claimant established 13.28 years of coal mine employment. We affirm as supported by substantial evidence the administrative law judge's finding that Claimant established fewer than fifteen years of coal mine employment.[13] *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-

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> mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

20 C.F.R. §725.101(a)(32)(iii). The BLS data is reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*.

[12] The "average yearly earnings" figures appear in the center column of Exhibit 610 and reflect multiplication of the "average daily wage" by 125 days.

[13] Based on a 250-day work year, the administrative law judge found Claimant worked for 0.35 of a year in 1978, 0.91 of a year in 1979, 1.0 year in 1980, 0.39 of a year in 1983, 0.38 of a year in 1987, 0.31 of a year in 1988, and 0.19 of a year in 1989. Decision and Order at 12-13. We need not address whether the administrative law judge should have credited Claimant with employment based on a 125-day work year during these partial calendar years, *see Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019), as applying that method and adding the results to the remaining years found by the administrative law judge still yields fewer than the fifteen years necessary to invoke the Section 411(c)(4) presumption.

203-05 (2016); *Muncy*, 25 BLR at 1-27. As Claimant did not prove at least fifteen years of coal mine employment, we 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) (2012); 20 C.F.R. §718.305(b)(1)(i).

Part 718 - Pneumoconiosis

Without the benefit of any statutory presumptions, a 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).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must also deny the subsequent claim unless he finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." *See* 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). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis; therefore, to obtain review of the merits of his claim, he had to establish this element of entitlement. Director's Exhibit 1.

The administrative law judge addressed whether Claimant met his burden to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a).

Clinical Pneumoconiosis

The record consists of eleven interpretations of five x-rays dated March 23, 2015, May 16, 2016, December 14, 2016, May 14, 2018, and July 19, 2018. Dr. DePonte, dually qualified as a B reader and Board-certified radiologist, read the March 23, 2015 x-ray as negative for pneumoconiosis. Employer's Exhibit 3. Dr. DePonte and Dr. Adcock, a dually-qualified radiologist, read the May 16, 2016 x-ray as negative for pneumoconiosis while Dr. Miller, also a dually-qualified radiologist, read the same x-ray as positive. Director's Exhibits 10, 14; Claimant's Exhibit 3. Dr. Tarver, a dually-qualified radiologist, and Dr. Fino, a B reader, read the December 14, 2016 x-ray as negative for pneumoconiosis while Dr. DePonte read the same x-ray as positive. Director's Exhibits 11, 13, 14; Employer's Exhibit 1. Dr. DePonte and Dr. Kendall, a dually-qualified radiologist, read the May 14, 2018 x-ray as negative for pneumoconiosis. Claimant's Exhibit 2; Employer's

Exhibits 5, 7. Finally, Dr. Adcock read the July 19, 2018 x-ray as negative for pneumoconiosis while Dr. DePonte read the same x-ray as positive. Employer's Exhibit 10; Claimant's Exhibit 1.

The administrative law judge permissibly found the May 16, 2016 and July 19, 2018 x-rays in equipoise as equally credentialed doctors gave conflicting readings of each x-ray. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); Decision and Order at 17. Because, as the administrative law judge found, the record contains two negative and two inconclusive x-rays, we affirm his finding the new x-ray evidence does not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1).[14]

We also affirm the administrative law judge's finding that Claimant did not establish the existence of pneumoconiosis based on biopsy evidence, as the record contains no such evidence. 20 C.F.R. §718.202(a)(2); Decision and Order at 16. Further, the presumptions at 20 C.F.R. §§718.304, 718.305 are not applicable because there is no evidence Claimant has complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.202(a)(3).

The administrative law judge next considered the medical opinions of Drs. Ajjarapu, Fino, and Rosenberg.[15] In addressing whether Claimant has simple clinical pneumoconiosis, Dr. Ajjarapu stated the inhalation of coal dust "triggers a cascade of immune reactions leading to macules and nodules formation which can appear on chest x-ray as rounded or irregular opacities." *Id*. Drs. Fino and Rosenberg opined Claimant does

[14] The administrative law judge identified the conflicting readings of the December 14, 2016 x-ray but did not specifically discuss them in his analysis. As he noted, Dr. Tarver, dually qualified as a B reader and Board-certified radiologist, and Dr. Fino, a B reader, read the December 14, 2016 x-ray as negative for pneumoconiosis while Dr. DePonte, a dually-qualified radiologist, read the same x-ray as positive. Director's Exhibits 11, 13, 14; Employer's Exhibit 1. Based on the administrative law judge's determination that the other x-rays with conflicting readings by dually-qualified radiologists are in equipoise, his error in failing to discuss the December 14, 2016 x-ray is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 17.

[15] The administrative law judge also addressed Claimant's treatment records from St. Charles Breathing Center, Wellmont Health Systems, and Drs. DePonte, Chester, and Kendall. Decision and Order at 18-19; Claimant's Exhibit 4; Employer's Exhibits 3, 4, 5. None of the records from the treating doctors contain a diagnosis of clinical pneumoconiosis. Claimant's Exhibit 4; Employer's Exhibits 3, 4, 5.

not have clinical pneumoconiosis. Director's Exhibits 10, 13; Employer's Exhibit 6. The administrative law judge noted Dr. Ajjarapu incorrectly stated Dr. DePonte's reading of the May 16, 2016 x-ray was positive and then gave an ambiguous statement defining simple pneumoconiosis. *See* DX 10. He thus permissibly found Dr. Ajjarapu's opinion was confusing and entitled to little weight. *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 18. He also found both Dr. Fino's and Dr. Rosenberg's opinions well-reasoned and supported by the objective medical evidence. *See Compton*, 211 F.3d at 211-12; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Further, the administrative law judge correctly noted the only diagnosis of clinical pneumoconiosis contained in the treatment records, as opposed to the reports created by physicians examining Claimant in conjunction with his claim for benefits, was by Ms. Dean, a nurse practitioner at St. Charles Breathing Center. Decision and Order at 18-19. Noting Ms. Dean is not a physician and she based her opinion solely on a physical examination, the administrative law judge permissibly accorded little weight to her diagnosis of clinical pneumoconiosis. *See Compton*, 211 F.3d at 211-12; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 18-19. As it is based on substantial evidence in the record, we affirm the administrative law judge's finding that the new medical opinions and treatment records do not establish clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has 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 administrative law judge considered the medical opinions of Drs. Ajjarapu, Fino, and Rosenberg.[16] Dr. Ajjarapu initially opined Claimant has legal pneumoconiosis in the form of chronic bronchitis related to his coal mine dust exposure and smoking history. Director's Exhibit 10. In a subsequent letter, however, she clarified her opinion, diagnosing chronic bronchitis entirely related to coal dust exposure as Claimant stated he had never smoked. Director's Exhibit 10. Dr. Fino opined Claimant does not have legal pneumoconiosis but has severe emphysema and obstruction due to smoking. Director's Exhibit 13. Similarly, Dr. Rosenberg opined Claimant does not have legal pneumoconiosis

[16] There is no evidence in the treatment records that Claimant has legal pneumoconiosis. Claimant's Exhibit 4; Employer's Exhibits 3, 4, 5; *see* n.15, *supra*.

but has severe airflow obstruction resulting in emphysema and chronic bronchitis related solely to smoking. Employer's Exhibit 6. The administrative law judge found Dr. Ajjarapu's view that Claimant never smoked contrary to his determination "Claimant smoked over thirty years and had at least a history of 22.50 pack-years."[17] Decision and Order at 21. He permissibly found Dr. Ajjarapu's opinion not well-reasoned and documented because it was based on an incorrect understanding of Claimant's smoking history. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986); Decision and Order at 21. Thus we affirm the administrative law judge's finding that the new medical opinions do not establish the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 21. Consequently, as Claimant failed to establish he has pneumoconiosis, we affirm the administrative law judge's finding that Claimant did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and, consequently, the denial of benefits.

[17] The administrative law judge found Claimant has a smoking history of at least three-fourths of a pack of cigarettes a day for over thirty years or "at least 22.50 pack years." Decision and Order at 17.

Accordingly, we affirm the administrative law judge's Decision and Order Denying Benefits in a Subsequent Claim.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge