U.S. Department of Labor

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

BRB No. 20-0079 BLA

WILLIAM D. ADKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RAY COAL COMPANY, INCORPORATED, c/o SUN COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 01/27/2021
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 of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

William D. Adkins, Viper, Kentucky.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals Administrative Law Judge Larry A. Temin's Decision and Order Denying Benefits (2018-BLA-05044) rendered on a subsequent claim[2] filed on June 23, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with 8.82 years of coal mine employment and found he did not establish total disability. He therefore found Claimant did 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) (2018), or establish entitlement to benefits under 20 C.F.R. Part 718. The administrative law judge thus denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer and its Carrier (Employer) respond, urging affirmance of the denial of benefits.[4] The Director,

[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] This is Claimant's fourth claim for benefits. A memorandum in the record indicates the three prior claims were denied on November 9, 1979, December 30, 1988, and June 15, 2000, but records from these claims were moved to the Federal Records Center and subsequently destroyed. Decision and Order at 2; Director's Exhibit 1. The administrative law judge proceeded under an assumption that the prior claims were denied based on Claimant's failure to establish any element of entitlement. Decision and Order at 17-18. Moreover, he found the evidence from the prior claims "is so old it is of little probative value," and the absence of the evidence from the prior claims does not render "the current proceeding prejudicial or procedurally unfair or violate any party's due process rights." *Id*. at 17 n. 46.

[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] In its response, Employer contends the administrative law judge erred in determining the destruction of the records from Claimant's prior claims does not constitute a due process violation. Employer's Brief at 3 n.1. It argues the destruction of any file "unacceptably jeopardizes the parties' rights and deprives the [administrative law judge] and the parties" of potentially relevant information. *Id*. In light of the administrative law judge's finding the evidence from the prior claim is of "little probative value," Employer

Office of Workers' Compensation Programs, declined to file a substantive response in this appeal.

In an appeal filed without the assistance of counsel, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the administrative law judge's Decision and Order if it is 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 Associates, Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption – 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. *Mills v. Director, OWCP*, 348 F.3d 133, 136 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985).

The administrative law judge noted Claimant alleged ten and one-half years of coal mine employment on his application for benefits. Decision and Order at 4; Director's Exhibit 3. Claimant specifically indicated he worked as a hydraulics repairman and master mechanic from 1965 to 1996. Director's Exhibit 3. During this time, he repaired equipment for numerous coal mine operators. *Id*.

Applying the situs-function test that the United States Court of Appeals for the Sixth Circuit has adopted, the administrative law judge evaluated whether Claimant established this work constituted qualifying coal mine employment. Decision and Order at 4-7, *citing Director, OWCP v. Consol. Coal Co.* [*Petracca*], 884 F.2d 926, 929-30 (6th Cir. 1989); *see also Navistar, Inc. v. Forester*, 767 F.3d 638, 641 (6th Cir. 2014) (to satisfy the situs-function test, a miner must have worked in or around a coal mine or coal preparation facility, and done work necessary to the extraction or preparation of coal). The

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has not set forth any specific prejudice resulting from the destruction of the evidence from the prior claims. Decision and Order at 17 n. 46; *see Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (the "mere failure to preserve evidence . . . that may have been helpful" in "some future hypothetical proceeding" did not violate party's due process rights).

[5] Claimant's coal mine employment occurred in Kentucky. Director's Exhibit 5; Hearing Tr. at 21. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

administrative law judge found this work met the function requirement because "servicing and repairing mining equipment is integral to the coal production process." Decision and Order at 5; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Petracca*, 884 F.2d at 929-31.

With respect to the situs requirement, the administrative law judge first noted Claimant worked for Blue Diamond Coal Company from 1965 to 1970[6] and Ray Coal Company from 1978 to 1980. Decision and Order at 5. Claimant testified he repaired equipment for these companies either in an underground mine or at a repair shop located on the mine site or within one-hundred to two-hundred feet of the mine site. Hearing Tr. at 21-23, 29-34; Director's Exhibit 26 at 4-12. Based on Claimant's testimony, the administrative law judge found his work for Blue Diamond Coal and Ray Coal met the situs test and thus constituted qualifying coal mine employment. *Napier*, 301 F.3d at 713-14; *Petracca,* 884 F.2d at 931-936; Decision and Order at 5.

In calculating the length of Claimant's employment with Blue Diamond Coal and Ray Coal, the administrative law judge permissibly applied the method of calculation at 20 C.F.R. §725.101(a)(32)(iii).[7] *Shepherd v. Incoal, Inc*., 915 F.3d 392, 405-06 (6th Cir. 2019); Decision and Order at 6-8. He divided Claimant's annual earnings for these operators as set forth in his Social Security Administration records by the yearly average wage for 125 days as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*.[8] Decision and Order at 6-8; Director's

[6] Claimant's Social Security Administration records list earnings from Stearns Mining Company in 1965. Director's Exhibit 7. The administrative law judge noted Claimant "did not recall working for Stearns Mining Company, but stated it may have been owned by a company he worked for." Decision and Order at 8 n. 21, *citing* Hearing Tr. at 27. The administrative law judge found the evidence established Stearns Mining Company is the same entity as Blue Diamond for purposes of determining Claimant's coal mine employment. *Id.*

[7] 20 C.F.R. §725.101(a)(32)(iii) provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the administrative law judge 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.

[8] Exhibit 610 to the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, entitled "Average Wage Base," contains the average daily earnings of

Exhibits 5-6. Where Claimant's wages exceeded the 125-day average, the administrative law judge credited him with a full year of coal mine employment. *Id*. Where Claimant's earnings fell below the 125-day average, the administrative law judge credited him with a fractional year. *Id*. Applying this method of calculation, he rationally found Claimant established 5.82 years of employment for Blue Diamond Coal and three years for Ray Coal. *Shepherd*, 915 F.3d at 405-06; Decision and Order at 6-8.

The administrative law judge next noted that from 1970 to 1974 and 1980 to 1996, Claimant was "self-employed" as an equipment repairman and owned a company called "Adkins Hydraulics or A&A Hydraulics." Decision and Order at 5; *see* Hearing Tr. at 24-26; Director's Exhibits 5, 6, 26 at 8-14. Claimant testified he had his own "little hydraulic repair shop" and contracted with various coal companies to repair their equipment. Director's Exhibit 26 at 8-9. His company would "pick up [a piece of equipment] at the mine site, take it back to [his] shop, repair it, and deliver it back to the mine site." Hearing Tr. at 24-26. He occasionally went underground to conduct repairs, but only on "very rare occasions." *Id*. When he was self-employed from 1980 to 1996, Claimant had two employees who also helped pick up and return equipment to the mines. Director's Exhibit 26 at 12.

The administrative law judge permissibly found the evidence insufficient to establish "the proximity" of Claimant's repair shop to the mines "he contracted to work for." Decision and Order at 5-6; *see Napier*, 301 F.3d at 713-14; *Petracca*, 884 F.2d at 931-936. Moreover, the administrative law judge permissibly found the trips to "pick up, evaluate, and drop off equipment" were also "insufficient to establish that [Claimant] spent a significant portion of his time at a coal mine site." Decision and Order at 5-6; *see Napier*, 301 F.3d at 713-14; *Petracca*, 884 F.2d at 931-936. Thus he rationally found Claimant's self-employment from 1970 to 1974 and 1980 to 1996 did not meet the situs requirement and therefore did not constitute qualifying coal mine employment. *See Napier*, 301 F.3d at 713-14; *Petracca*, 884 F.2d at 931-936; Decision and Order at 5-6.

Finally, the administrative law judge noted Claimant also worked as an equipment repairman for Brinkley Supply and Service Company from 1975 to 1977 and AAA Mine Service from 1989 to 1991. Decision and Order at 6. When the administrative law judge asked if the Brinkley repair shop was at a mine site, Claimant stated "it wasn't exactly at the coal mine." Hearing Tr. at 30-31. The administrative law judge permissibly found Claimant's work for Brinkley does not meet the situs test to constitute qualifying coal mine employment because "the evidence is insufficient to establish that he spent a significant portion of his time" in or around a coal mine. Decision and Order at 6; *see Napier*, 301

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employees in coal mining and yearly earnings for those who worked 125 days during a year, and is referenced in 20 C.F.R. §725.101(a)(32)(iii).

F.3d at 713-14; *Petracca*, 884 F.2d at 931-936. As for AAA Mine Service, the administrative law judge noted "Employer submitted a form completed by Claimant" in which he "indicated that he spent no time at a mine site and did not go underground" when working for this company. Decision and Order at 6; *see* Director's Exhibit 24. Based on this evidence, the administrative law judge permissibly found Claimant's work for AAA Mine Service also does not meet the situs test and does not constitute qualifying coal mine employment.[9] *Napier*, 301 F.3d at 713-14; *Petracca*, 884 F.2d at 931-936; Decision and Order at 6.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding Claimant established 8.82 years of coal mine employment, and thus failed to establish fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption. Decision and Order at 8.

Total Disability

In order to prove entitlement, 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 Claimant in establishing the elements of entitlement, but failure to establish any element precludes an award of benefits.[10] *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).

A miner is totally disabled if he has a pulmonary or respiratory impairment which, 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 pulmonary function studies, arterial blood gas studies, evidence of

[9] The administrative law judge acknowledged Claimant "had minimal earnings from Hi-Energy, Inc. in 1980," but found Claimant failed to establish any qualifying coal mine employment with this entity because it "is not listed on his employment history form and Claimant did not testify about [the nature of] his work" for this company. Decision and Order at 6; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Director's Exhibit 8.

[10] There is no evidence of complicated pneumoconiosis in the record. Therefore Claimant cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge 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).

Pulmonary Function Studies

The administrative law judge considered five pulmonary function studies taken on April 14, 2016, July 27, 2016, March 27, 2017, April 12, 2018, and July 16, 2018. Decision and Order at 11-12, 18-19. He noted the studies listed varying heights for Claimant ranging from sixty-two-and-one-half to sixty-four inches.[11] *Id*. at 18-19. He found Claimant's height is sixty-three-and-one-half inches based on an average of the reported heights. *Id.* at 11 n.40.

The administrative law judge also considered Claimant's age at the time the studies were conducted: seventy-nine at the time of the April 14, 2016 and July 27, 2016 studies; eighty at the March 27, 2017 study; and eighty-one at the April 12, 2018 and July 16, 2018 studies. Decision and Order at 11-12. Citing the Board's holding in *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008), he indicated pulmonary function studies performed on a miner who is over the age of seventy-one are qualifying[12] if the values the miner produced would be qualifying for a seventy-one year old, the oldest age accounted for in the Department of Labor's pulmonary function tables at 20 C.F.R. Part 718, Appendix B. Decision and Order at 21.

The administrative law judge next addressed whether the studies produced valid results. Decision and Order at 19-20; 20 C.F.R. §§718.101(b), 718.103(c). He found "all five tests of record contain reliable and valid FEV1 and FVC values." Decision and Order at 19-20. He permissibly concluded, however, the MVV results for the April 14, 2016, March 27, 2017, and July 16, 2018 studies are not in substantial compliance with the quality standards as they do not reflect that Claimant performed the requisite number of

[11] Claimant's height was listed as sixty-two-and-one-half inches on the July 16, 2018 pulmonary function study, as sixty-three inches on the July 27, 2016 study, and sixty-four inches on the April 14, 2016, March 27, 2017, and April 12, 2018 studies. Director's Exhibits 11, 15; Claimant's Exhibit 4; Employer's Exhibits 3, 7 at 21.

[12] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

MVV maneuvers.[13] *Napier*, 301 F.3d at 713-14; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Siwiec*, 894 F.2d 635, 638 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1326 (3d Cir. 1987); Decision and Order at 19-20. Thus he stated he would "not consider any of the reported MVV values" from the April 14, 2016, March 27, 2017, and July 16, 2018 studies when determining whether they establish total disability. *Id*. at 21.

Using values for a seventy-one year old miner with an associated height of sixty-three-and-one-half inches,[14] and disregarding the MVV values from the April 14, 2016, March 27, 2017, April 12, 2018, and July 16, 2018 studies, the administrative law judge found the July 27, 2016 and April 12, 2018 studies produced qualifying values pre-bronchodilator. Decision and Order at 22-23. He found the April 14, 2016, March 27, 2017, and July 16, 2018 studies produced non-qualifying values pre-bronchodilator. *Id*. Finally, he found none of the studies produced qualifying values post-bronchodilator.[15] *Id*. Although the administrative law judge credited the pre-bronchodilator results over the post-bronchodilator results, he permissibly found Claimant failed to establish total disability because "the preponderance of the pre-bronchodilator results (from April 14, 2016, March

[13] The regulations specify that pulmonary function test results submitted in connection with a claim for benefits shall be accompanied by three tracings of the flow versus volume and the electronically derived volume versus time tracings. If the MVV is reported, two tracings of the MVV whose values are within 10% of each other shall be sufficient. 20 C.F.R. §718.103(b). The April 14, 2016, March 27, 2017, and July 16, 2018 studies each included one MVV maneuver. Director's Exhibit 15; Employer's Exhibits 3, 7 at 21.

[14] As there is no value for a height of sixth-three-and-one-half inches in the charts at 20 C.F.R. Part 718, Appendix B, the administrative law judge used the "closest table value of 63.4 inches" to determine whether the pulmonary function studies produced qualifying results. *Id*. This was error. When a miner's height falls between two heights listed in the table, an administrative law judge should use the greatest closest height to evaluate whether the results are qualifying. *See Toler v. E. Associated Coal Corp*., 43 F.3d 109, 116 n.6 (4th Cir. 1995) (the Office of Workers' Compensation Programs directs use of the closest greater height when a miner's actual height falls between heights listed in the table). The administrative law judge's error, however, is harmless because use of the greatest closest height does not result in any of the non-qualifying pulmonary function studies becoming qualifying. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[15] The April 14, 2016, March 27, 2017, and April 12, 2018 studies did not include post-bronchodilator testing. Director's Exhibit 15; Claimant's Exhibit 4; Employer's Exhibits 7 at 21.

27, 2017, and July 16, 2018) are non-qualifying." *Id*.; *see Napier*, 301 F.3d at 713-14. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the pulmonary function testing does not establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 22-23.

Arterial Blood Gas Studies

The administrative law judge accurately found Claimant's arterial blood gas studies conducted on July 16, 2016 and July 27, 2016 are non-qualifying.[16] Decision and Order at 12, 18; Director's Exhibit 11; Employer's Exhibit 4. Thus we affirm his finding the blood gas study evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 18.

Cor Pulmonale

The record contains no evidence of cor pulmonale with right-sided congestive heart failure. Thus Claimant cannot establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

Medical Opinions

The administrative law judge next weighed Dr. Ajjarapu's opinion that Claimant is totally disabled from his usual coal mine employment. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 23-24; Director's Exhibit 11. He permissibly discredited Dr. Ajjarapu's opinion because it "is not supported by the objective testing results in the record, a preponderance of which produced non-qualifying values." Decision and Order at 23-24; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185. He also permissibly found that, because Dr. Ajjarapu did not review the most recent non-qualifying July 16, 2018 pulmonary function study, her opinion is entitled to diminished weight.[17] *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 23-24. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 23-24.

[16] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[17] The administrative law judge rejected the opinions of Drs. Rosenberg and Vuskovich that Claimant is not totally disabled because he found they did not adequately explain their opinions. Decision and Order at 22-23

Because Claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's determination that Claimant did not establish entitlement under 20 C.F.R. Part 718. *See* 30 U.S.C. §921(c)(4); *Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge