U.S. Department of Labor

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

BRB No. 21-0415 BLA

LOUIS F. WORKMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
G E X, KENTUCKY, INCORPORATED	)	
	)	
and	)	
	)	
AETNA CASUALTY & SURETY	)	DATE ISSUED: 01/12/2023
TRAVELERS CASUALTY & SURETY	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Louis F. Workman, Louisa, Kentucky.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville Kentucky, for Employer.

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

PER CURIAM:

Claimant appeals, without representation,[1] the Decision and Order Denying Benefits (2018-BLA-05784) of Administrative Law Judge (ALJ) Joseph E. Kane rendered on a miner's subsequent claim filed on February 6, 2017,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 13.33 years of coal mine employment. Because Claimant established fewer than fifteen years of coal mine employment, he did not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to 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, the ALJ found Claimant established the existence of simple clinical pneumoconiosis and total disability, and thereby demonstrated a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).[4] However, the ALJ found the evidence insufficient to establish that Claimant is totally disabled due to legal pneumoconiosis and denied benefits. 20 C.F.R. §718.204(c).

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

[2] Claimant filed a prior claim for benefits on August 5, 2010, which the district director denied on August 9, 2011, for failure to establish total disability. Director's Exhibit 2. Claimant also filed a claim on August 5, 2014, but withdrew it on May 14, 2015. Director's Exhibit 1. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[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 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 "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)(1); *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 Claimant did not establish total disability in his prior claim, he had to submit evidence establishing this element to obtain review of the merits of his current claim. *Id*.

On appeal, Claimant generally challenges the ALJ's denial of his claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief in this appeal.

In an appeal filed by an unrepresented claimant, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the ALJ's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[5] 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 (1965).

Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), 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 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;[6] or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. In determining whether a claimant has invoked the irrebuttable presumption, the ALJ must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The ALJ considered nine interpretations of three x-rays. 20 C.F.R. §718.304(a); Decision and Order at 9-10. He found that all the interpreting physicians are dually-qualified B readers and Board-certified radiologists. Decision and Order at 9. Both Drs. DePonte and Seaman read the April 5, 2017 x-ray as negative for complicated pneumoconiosis. Director's Exhibits 11 at 18; 13. There are no other readings of this x-

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his most recent coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Director's Exhibit 5; Hearing Transcript at 11.

[6] There is no biopsy for consideration at 20 C.F.R. §718.304(b) in this case.

ray. Dr. DePonte read the November 15, 2017 x-ray as positive for complicated pneumoconiosis, while Drs. Kendall and Seaman read it as negative for complicated pneumoconiosis. Director's Exhibit 14; Claimant's Exhibits 2, 3. Based on the preponderance of the readings, the ALJ permissibly found the April 5, 2017 and November 15, 2017 x-rays negative for complicated pneumoconiosis. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); Decision and Order at 10; Director's Exhibit 14; Claimant's Exhibits 2, 3.

Dr. Crum read the June 25, 2018 x-ray as positive for complicated pneumoconiosis, while Drs. Kendall and Seaman read it as negative for complicated pneumoconiosis. Claimant's Exhibits 1, 4; Employer's Exhibit 1. The ALJ permissibly found this x-ray inconclusive.[7] Because it is supported by substantial evidence, we affirm the ALJ's finding that all of the x-rays are either negative or inconclusive and thus Claimant did not establish complicated pneumoconiosis based on the x-ray evidence at 20 C.F.R. §718.304(a); Decision and Order at 9-10.

At 20 C.F.R. §718.304(c), the ALJ properly found none of the computed tomography (CT) scan, medical opinions, or treatment records established complicated pneumoconiosis. Decision and Order at 10-14; Director's Exhibits 11, 15; Claimant's Exhibits 7-10; Employer's Exhibits 2-5, 7. Weighing all the evidence, the ALJ permissibly found the evidence did not establish complicated pneumoconiosis; we therefore affirm this finding that Claimant did not invoke the irrebuttable presumption. *See* 20 C.F.R. §718.304*; Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59-60 (6th Cir. 1995); Decision and Order at 15.

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

Length of Coal Mine Employment

Claimant bears the burden of establishing the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of computation and is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

[7] Although the ALJ did not specifically weigh Dr. Seaman's negative interpretation, this reading does not undermine the ALJ's determination that the June 25, 2018 x-ray does not support Claimant's burden to establish complicated pneumoconiosis.

Claimant alleged twelve years of coal mine employment on his claim form. Director's Exhibit 4 at 1. During his 2017 deposition he testified that he had "twelve [years] or so . . . [but] probably a little more." Director's Exhibit 50 at 18. At the hearing, Claimant indicated he had at least twelve years of coal mine employment. Hearing Transcript at 11.

The ALJ noted Claimant alleged coal mine employment with the following employers from 1975-81, 1984-86, and 1989: GEX Kentucky; Silvertree Consulting; Tro-Cal; A-Tech Core Drilling; Belfry Coal; Cumberland Village Mining; White Ash Mining; Atticus Coal Company; Ridgeway Fuel; Triple B; and Harold Vanhoose. Decision and Order at 5. Because the beginning and ending dates of Claimant's employment for these employers were unknown, he compared Claimant's annual wages for each year with the annual wages for miners who worked 125 days in coal mine employment as set forth in Exhibit 610.[8] Based on this method, the ALJ permissibly credited Claimant with eleven full years of coal mine employment because he earned more than the average yearly earnings in coal mine employment for these years. *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-02 (6th Cir. 2019), *reh'g denied*, No. 17-4313 (6th Cir. May 3, 2019); Decision and Order at 6; Director's Exhibit 8. For 1974, 1987-88, and 1990, the ALJ also permissibly credited Claimant with an additional 2.33 years by dividing Claimant's earnings in each year by the average daily earnings, and then dividing that number by 125 to determine the fractional year of coal mine employment. *Shepherd*, 915 F.3d at 401-02; Decision and Order at 6-7; Director's Exhibit 8. Because it is supported by substantial evidence, we affirm the ALJ's finding of 13.33 years of coal mine employment and that Claimant did not invoke the Section 411(c)(4) presumption.[9]

[8] If the beginning and ending dates of a miner's coal mine employment cannot be ascertained, or if the miner's coal mine employment lasted less than a calendar year, the ALJ may determine the length of the miner's work 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 (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS wage information is published in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual.*

[9] The ALJ noted Claimant worked seven years for Borders & Hinkle Construction (Borders & Hinkle) and H&P, but Claimant did not allege these were coal mining jobs. Decision and Order at 5. He testified that his work involved reclaiming abandoned mines as a contractor for "OSM," i.e., the "federal Office of Surface Mining [Reclamation and Enforcement]," and he was exposed to "very little, if any" or "no" coal dust in these jobs. Director's Exhibits 49 at 9, 12-13; 50 at 8-10, 13-14. Under these circumstances, the ALJ permissibly found these jobs do not constitute the work of a "miner" under the Act. 20

Entitlement under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3) and (c)(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). 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.[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).

The ALJ found Claimant established simple clinical pneumoconiosis based on the x-ray evidence at 20 C.F.R. §718.202(a)(1) and in consideration of the medical opinions at 20 C.F.R. 718.202(a)(4).[11] Further, all of the physicians, Drs. Ajjarapu, Rosenberg, Vuskovich, and Tuteur, are in agreement that Claimant has a totally disabling gas exchange impairment at 20 C.F.R. §718.204(b). Decision and Order at 21; Director's Exhibit 11 at 4-5; 15 at 1; Claimant's Exhibit 7 at 3-4; Employer's Exhibits 3 at 7-9; 4 at 8. The ALJ also noted that Dr. Ajjarapu "is the only physician to diagnose legal pneumoconiosis in the form of chronic bronchitis." Decision and Order at 19. In addressing disability causation at 20 C.F.R. §718.204(c), however, the ALJ found that none of the physicians specifically

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C.F.R. §725.202; *but see Amax Coal Co. v. Fagg*, 865 F.2d 916, 920 (7th Cir. 1989) (reclamation bulldozer operator who performed his work "alongside a working strip mine" and "was bulldozing spoil at the same time that new coal was being mined in the pit beside him" was a miner).

[10] We affirm the ALJ's findings that Claimant established simple clinical pneumoconiosis and has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15, 19.

[11] "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. This definition includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

attributed Claimant's respiratory disability to either clinical or legal pneumoconiosis. He explained:

> The Sixth Circuit has held that to prove disability causation, Claimant must show that his *pneumoconiosis* is a "substantially contributing cause" of his total disability. Here, Dr. Ajjarapu stated that "coal dust exposure" had a material adverse effect on Claimant's lung function. Thus, she attributed Claimant's impairment to "coal dust," not pneumoconiosis. Moreover, Claimant is disabled due to a gas exchange impairment, but Dr. Ajjarapu opined that his legal pneumoconiosis is in the form of chronic bronchitis. Because Dr. Ajjarapu did not opine that Claimant's gas exchange impairment, in the form of legal pneumoconiosis, is a substantially contributing cause of his total disability, I find that her opinion is insufficient to carry Claimant's burden of proof. Even if I were to credit Dr. Ajjarapu's medical opinion, and find that Claimant has clinical and legal pneumoconiosis, there is no evidence of record showing that his pneumoconiosis is a substantially contributing cause of his disability.
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> Finally, I am aware that the Sixth Circuit and the Board have held that where (1) chronic obstructive pulmonary disease ("COPD") causes a miner's disabling impairment, and (2) the Administrative Law Judge finds that the miner's COPD is legal pneumoconiosis, and (3) no other condition contributes to the miner's total disability, then the miner has satisfied his burden to establish disability causation as a matter of law. However, in this case, all of the physicians agree that Claimant does not have an obstructive or restrictive impairment. Rather, Claimant's totally disabling pulmonary impairment is in the form of a gas exchange impairment. The record shows multiple possible causes of Claimant's gas exchange impairment, including, *inter alia*, obesity, exposure to cigarette smoke, exposure to occupational dust, advanced liver disease, portal hypertension, esophageal varices, and gastrointestinal bleeding. Because various factors potentially contribute to Claimant's totally disabling hypoxemia, I cannot conclude that it is due to pneumoconiosis as a matter of law.

Decision and Order at 20-21. Thus, concluding that the evidence was insufficient to establish that either clinical or legal pneumoconiosis substantially contributed to Claimant's total disability, the ALJ found Claimant did not establish disability causation at 20 C.F.R. §718.204(c) and denied benefits.

We vacate the ALJ's denial of benefits because he failed to adequately consider Dr. Ajjarapu's opinion and fully address whether it is sufficient to satisfy Claimant's burden of proof.

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(a)(2), (b). The United States Court of Appeals for the Sixth Circuit has held that 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." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

To establish disability causation, Claimant must prove pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling respiratory or pulmonary impairment 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).

Dr. Ajjarapu conducted the Department of Labor's complete pulmonary evaluation and opined Claimant has chronic bronchitis based on respiratory symptoms of shortness of breath, cough and sputum production. She attributed Claimant's chronic bronchitis to both smoking and coal dust exposure. Additionally, Dr. Ajjarapu opined Claimant had severe disabling hypoxemia based on his qualifying blood gas studies, which all the physicians agree to be true. Director's Exhibits 11 at 4; 15 at 1. Regarding the etiology of Claimant's disabling impairment, Dr. Ajjarapu specifically opined that it was due to both smoking and coal mine dust exposure.[12] Director's Exhibits 11 at 5; 15 at 1. The ALJ erred by failing to consider whether Dr. Ajjarapu's opinion as to Claimant's hypoxemia constituted a credible diagnosis of legal pneumoconiosis; and whether Dr. Ajjarapu's opinion as to total disability causation constituted a credible opinion that Claimant is totally disabled due to legal pneumoconiosis. *See Cumberland River Coal Co., v. Banks*, 690 F.3d 477, 489-90 (6th Cir. 2012) (substantially contributing cause standard met where a physician concludes

[12] Dr. Ajjarapu stated, "Both cigarette smoking and coal dust contributed to his pulmonary impairment, however his coal dust exposure has [a] material adverse effect on his lung function." Director's Exhibit 15 at 1.

the miner's smoking and coal mine dust exposure both contributed to his disabling lung disease); *see also Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 820 F.3d 833, 847 (6th Cir. 2016) (physician's opinion that a miner has a totally disabling pulmonary impairment supports disability causation if that impairment is found to be legal pneumoconiosis); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); 20 C.F.R. §718.204(c).

Because the ALJ failed to consider Dr. Ajjarapu's opinion in its entirety and determine its credibility in relation to the other contrary medical opinions, we vacate the ALJ's finding at 20 C.F.R. §718.204(c), and the denial of benefits. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) ("When the ALJ fails to make important and necessary factual findings, the proper course for the Board is to remand the case . . . rather than attempting to fill the gaps in the ALJ's opinion."). Further, having found Claimant established the existence of simple clinical pneumoconiosis, the ALJ erred by failing to consider whether Claimant's simple clinical pneumoconiosis was totally disabling. 20 C.F.R. §718.204(c).

Remand Instructions

The ALJ must reconsider Claimant's entitlement to benefits under 20 C.F.R. Part 718. He must consider whether the medical opinion evidence establishes the existence of legal pneumoconiosis based on the opinions of Drs. Ajjarapu, Rosenberg, Vuskovich, and Tuteur. 20 C.F.R. §718.202(a)(4). The ALJ must resolve the conflict in the medical opinions by addressing the physicians' explanations of their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Rowe*, 710 F.2d at 255. If the ALJ determines Claimant established legal pneumoconiosis under 20 C.F.R. §718.202(a)(4), he must determine whether Claimant has established he is totally disabled due to legal pneumoconiosis.[13] 20

[13] Because all the physicians agree Claimant has totally disabling hypoxemia, if the ALJ determines it is a respiratory or pulmonary impairment significantly related to, or substantially aggravated by coal mine dust exposure, Claimant will have established he has totally disabling legal pneumoconiosis, thus satisfying both disease and disability causation. *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 1-255-57 (2019). Contrary to the ALJ's assessment, the rationale underpinning such a conclusion is not limited to obstructive impairments, nor is it undermined if other causes contributed to the impairment, so long as the respiratory or pulmonary impairment is totally

C.F.R. §718.204(c). Regardless of whether the ALJ finds Claimant established legal pneumoconiosis, he must consider whether Claimant has proven he is totally disabled due to clinical pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.203, 718.204(c). If Claimant establishes he is totally disabled due to either clinical or legal pneumoconiosis arising out of coal mine employment, he is entitled to benefits. If he fails to establish total disability due to clinical or legal pneumoconiosis, benefits are precluded. *See Anderson*, 12 BLR at 1-112.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits, and we remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

disabling and is significantly related to or substantially aggravated by coal mine dust exposure. Decision and Order at 21.