U.S. Department of Labor

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

BRB No. 20-0509 BLA

TIMOTHY J. RAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MIDDLE CREEK ENERGY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 07/30/2021
Employer-Respondent	)	
	)	
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 William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Timothy J. Ray, Swords Creek, Virginia.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals Associate Chief Administrative Law Judge William S. Colwell's Decision and Order Denying Benefits (2018-BLA-05648) rendered on a claim filed on April 12, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with 11.37 years of coal mine employment and therefore found he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)(2018).[2] Considering entitlement under 20 C.F.R. Part 718, the administrative law judge found Claimant failed to establish clinical or legal pneumoconiosis.[3] 20 C.F.R. §718.202(a). Therefore he denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable

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

[2] 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.

[3] "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). "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).

law.[4] 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).

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

Because the administrative law judge's determination of the length of Claimant's coal mine employment is relevant to whether Claimant can invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis, we will review his finding that Claimant worked 11.37 years in underground coal mine employment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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 administrative law judge's determination on length of coal mine employment if it is based on a reasonable method of calculation and is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

In determining the length of coal mine employment, the administrative law judge considered Claimant's employment history forms, Social Security Administration (SSA) earnings records and hearing testimony. Decision and Order at 6-9; Director's Exhibits 4-7; Hearing Tr. at 19-20, 27, 37-40. He noted Claimant alleged between fourteen and sixteen years of coal mine employment on his employment history forms and testified at the hearing that he worked in coal mine employment from 1986 to 2002. Decision and Order at 7, *citing* Director's Exhibits 1, 3; Hearing Tr. at 20, 27. The administrative law judge further noted, however, that Claimant's SSA records reflect earnings in coal mine employment only for the years 1987 to 1999. Decision and Order at 7, *citing* Director's Exhibit 7. Moreover, he found no evidence in the record to substantiate Claimant's statement that he worked in coal mine employment after 1999. Decision and Order at 7. The administrative law judge permissibly found Claimant's SSA earnings records are "the best evidence regarding the length of Claimant's employment." Decision and Order at 7; *see Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984) (administrative law judge may credit SSA records over miner's testimony and other sworn statements).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 7; Hearing Tr. at 40-41.

Finding he could not determine the beginning and ending dates of Claimant's coal mine employment, the administrative law judge calculated the length of his coal mine employment for each year from 1987 through 1999 by applying the formula set forth at 20 C.F.R. §725.101(a)(32)(iii).[5] Decision and Order at 8-9. He divided Claimant's yearly earnings from coal mine employers by the coal mine industry's average daily earnings, as reported in Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*, to determine the number of days Claimant worked each year. *Id.* at 9. Citing *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-402 (6th Cir. 2019), he next divided the number of days Claimant worked each year by 125 and credited him with a fractional year based on the calculation, or a whole year if Claimant had 125 working days. *Id*. Using this framework, he found Claimant established 11.37 years of coal mine employment. *Id.* Although this case arises within the jurisdiction of the Fourth Circuit, we need not determine whether the administrative law judge erred by relying on the Sixth Circuit's rationale in *Shepherd* to credit Claimant with coal mine employment based solely on a 125-day work-year. Any error is harmless, as calculating Claimant's employment based on a 125-day work-year without regard to whether he established a 365-day employment relationship, as the administrative law judge did, results in additional years of coal mine employment credited to Claimant, not less. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Because the administrative law judge found Claimant established only 11.37 years of coal mine employment, we affirm his finding Claimant did not invoke the Section 411(c)(4) presumption. *See Muncy*, 25 BLR at 1-27.; 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b)(1)(i).

Entitlement Under 20 C.F.R. Part 718

Without the benefit of any statutory presumptions,[6] Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a

[5] The regulation provides that if the beginning and ending dates of a miner's employment cannot be ascertained, or the miner's employment lasted less than a calendar year, the administrative law judge may determine the length of the miner's work history by dividing his yearly income by the average daily earnings of employees in the coal mining industry, 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*.

[6] The administrative law judge correctly found Claimant cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 because there is no evidence in the record that Claimant has complicated pneumoconiosis. 30 U.S.C. §921(c)(3); Decision and Order at 12 n.4.

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).

Clinical Pneumoconiosis

The administrative law judge noted the record includes interpretations of three x-rays dated March 15, 2017, June 12, 2017, and November 13, 2017. 20 C.F.R. §718.202(a)(1); Decision and Order at 12-13. He accurately found no physician read any x-ray as positive for pneumoconiosis. Decision and Order at 12-13; Director's Exhibits 14, 16; Employer's Exhibit 1, 8. Thus we affirm his finding the x-ray evidence does not establish clinical pneumoconiosis as supported by substantial evidence. 20 C.F.R. §718.202(a)(1); Decision and Order at 12-13.

We also affirm the administrative law judge's finding Claimant did not establish the existence of pneumoconiosis based on biopsy or autopsy evidence, as the record contains no such evidence. 20 C.F.R. §718.202(a)(2); Decision and Order at 12 n.3.

With respect to the medical opinions, the administrative law judge correctly found both Dr. Forehand and Dr. Broudy agree Claimant "does not suffer from clinical pneumoconiosis." Decision and Order at 13-15; Director's Exhibit 14, Employer's Exhibit 4, 6. Thus their opinions cannot establish clinical pneumoconiosis.

The administrative law judge next considered Claimant's treatment records, including Dr. Jawad's notes from his treatment of Claimant. Claimant's Exhibit 7. Dr. Jawad treated Claimant for various lung impairments between April 27, 2017 and October 4, 2017, and diagnosed "simple chronic bronchitis," lung nodules likely due to previous coal dust exposure, coal workers' pneumoconiosis, hypoxemia, and shortness of breath. *Id*. The treatment records also include office notes from physicians at Richlands Pulmonary and Breathing Center that contain the diagnosis of "black lung" on various occasions. Claimant's Exhibit 6, 7, 8; Employer's Exhibit 5. The administrative law judge permissibly found the treatment records "do not contain a well-reasoned opinion regarding the existence of pneumoconiosis" because the bases for notations and diagnoses relating to "black lung" or "coal workers pneumoconiosis" are not set forth. Decision and Order at 16; *see Island Creek Coal Co. v. Compton,* 211 F.3d 203, 211 (4th Cir. 2000)*; Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997) (an administrative law judge has the discretion to weigh the evidence and draw inferences therefrom); *Fields v. Island Creek*

Coal Co., 10 BLR 1-19, 1-22 (1987) (a reasoned opinion is one supported by the underlying documentation); Claimant's Exhibit 6, 7, 8; Employer's Exhibit 5.

The administrative law judge next weighed computed tomography (CT) scans. . Drs. Ramakrishnan read a January 26, 2017 CT scan as showing nodular changes of the upper lung fields and stated "the findings are most likely related to pneumoconiosis." Claimant's Exhibit 6. Dr. Meyer interpreted the same scan as showing "pulmonary nodules in a distribution most consistent with cellular bronchiolitis, likely secondary to aspiration or atypical mycobacterial infection," but indicated he could not entirely exclude coal workers' pneumoconiosis. Employer's Exhibit 5. The administrative law judge permissibly found Dr. Meyer's reading constitutes a negative CT scan reading and accorded more weight to Dr. Meyer's interpretation based on his superior qualifications.[7] *See Underwood*, 105 F.3d at 949; *see also Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990) (administrative law judge has discretion to assess the evidence of record and draw his own conclusions and inferences therefrom).

Because the record contains no well-reasoned diagnosis of clinical pneumoconiosis, we affirm the administrative law judge's finding that the medical opinions, Claimant's treatment records and CT scans do not establish clinical pneumoconiosis. 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).

Dr. Forehand diagnosed legal pneumoconiosis in the form of obstructive lung disease caused by exposure to coal mine dust and cigarette smoking. Director's Exhibit 14. He explained the effects of cigarette smoking and coal and silica dust exposure are additive. *Id.* He opined Claimant's "occupational dust exposure materially aggravated the part of his obstructive lung disease caused by cigarette smoking by worsening airways inflammation." *Id.* He also noted a significant irreversible component of Claimant's obstructive lung disease remained after bronchodilation and attributed that component to coal mine dust exposure. *Id*. The administrative law judge permissibly discredited Dr.

[7] The administrative law judge noted Dr. Meyer is a B-reader and Board-certified radiologist with "significant experience and expertise in the interpretation of CT scans." Decision and Order at 17.

Forehand's opinion because he relied on a coal mine employment history of sixteen years,[8] which is greater than the 11.37 years that the administrative law judge found. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); Decision and Order at15. He also noted Dr. Forehand relied on a smoking history which was shorter in duration than the 17.25 years he found.[9] Decision and Order at 15. Accordingly, he permissibly discredited Dr. Forehand's opinion. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 15. Although Claimant's treatment records include diagnoses of various lung diseases and impairments, the administrative law judge also permissibly found they "do not contain a well-reasoned opinion regarding" legal pneumoconiosis because they do not state the bases on which they are founded. *See Underwood*, 105 F.3d at 949; Decision and Order at 16. Because the administrative law judge permissibly discredited the medical opinion evidence supportive of Claimant's burden, we affirm his finding that Claimant did not establish the existence of legal pneumoconiosis.[10] 20 C.F.R. §718.202(a).

Insofar as the medical evidence of record does not establish pneumoconiosis, an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. 20 C.F.R. §718.202(a)(1)-(4); *see Trent*, 11 BLR at 1-27.

[8] Dr. Forehand noted the length of Claimant's coal mine employment as sixteen years total, with fifteen years underground. Director's Exhibit 14.

[9] The administrative law judge also noted Dr. Forehand did not review the more recent treatment or hospitalization records submitted in this case. Decision and Order at 15.

[10] As Dr. Broudy excluded legal pneumoconiosis, the administrative law judge correctly found his opinion does not assist Claimant in establishing the disease. Decision and Order at 15; Employer's Exhibit 4.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge