U.S. Department of Labor

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

BRB No. 19-0300 BLA

ROGER ALLEN BARKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BROCK & BROCK CONTRACTING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 06/25/2020
	)	
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.

Roger Allen Barker, South Cumberland, Kentucky.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2017-BLA-05269) of Administrative Law Judge Scott R. Morris, rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on September 21, 2015.

The administrative law judge credited claimant with 12.62 years of coal mine employment [2] and thus found he 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) (2012). Turning to whether claimant is entitled to benefits under 20 C.F.R. Part 718, the administrative law judge found he did not establish pneumoconiosis and thus denied benefits. 20 C.F.R. §718.202(a).

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

As claimant filed this appeal without the assistance of counsel, the Board considers whether substantial evidence supports the decision and order. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 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).

To be entitled to benefits under the Act, claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a

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

[2] Claimant's most recent coal mine employment occurred in Kentucky. Director's Exhibit 5. Accordingly, the Board will apply the law 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).

[3] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption he is totally disabled due to pneumoconiosis if he establishes 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) (2012); 20 C.F.R. §718.305.

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 claimants in establishing the elements of entitlement if certain conditions are met,[4] but failure to establish any 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).

Section 411(c)(4) – Length of Coal Mine Employment

The administrative law judge's determination of the length of coal mine employment is relevant to whether claimant can invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. Claimant bears the burden of proof to establish 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, 1-710-11 (1985). The Board will uphold an administrative law judge's determination on length of coal mine employment based on a reasonable method of calculation that is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The administrative law judge calculated claimant's employment with thirty-three coal mine operators from 1970 to 2010. Decision and Order at 5-9. He noted claimant alleged on his employment history forms a total of twenty-five years of coal mine employment for the specific dates April 1970 to December 2010.[5] Decision and Order at 6; Director's Exhibit 5. He permissibly declined to rely on the self-reported employment history because he found claimant's yearly earnings as set forth in his Social Security Administration (SSA) earnings records contradicted it. *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 398 (6th Cir. 2019); Decision and Order at 6; Director's Exhibits 5, 9. Specifically, he explained claimant's actual earnings on his SSA records were significantly lower than what claimant should have earned if he actually worked full-time during these years as

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

[5] Claimant indicated he did not work in coal mine employment from November to December 1973, April 1976 to February 1977, February 1984 to December 1985, January 1987 to March 1988, January to February 1989, July 1992 to June 2005, and in July 2007. Director's Exhibit 5.

claimant alleges.[6] Decision and Order at 5-6. He was not persuaded that at least thirty-two of the thirty-three operators that employed claimant during these years underreported his wages to the SSA and thus found claimant inflated his employment history on his self-reported employment forms. *Id*.

The administrative law judge also noted claimant testified "that he worked 'under the table' starting in 1974 and ending in 1985." Decision and Order at 8-9, *quoting* Hearing Transcript at 14-17. He permissibly found that, with the exception of claimant's work performed in 1982 and 1983, "the level of detail from [c]laimant's testimony is not persuasive" and thus insufficient to establish the "degree of his 'under the table'" coal mine employment. *Id*.; *see Shepherd*, 915 F.3d at 398; Decision and Order at 8-9. He found, however, claimant's testimony credibly establishes two years of "under the table" work performed for Smith Coal Company in 1982 and 1983. Decision ad Order at 8-9.

In calculating claimant's coal mine employment from 1970 to 1981, and then from 1984 to 2010, the administrative law judge permissibly found claimant's SSA earnings records "are the most accurate evidence regarding the dates and the extent of his coal mine employment in a given year." Decision and Order at 6; *see Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984); Director's Exhibit 9. He further found the evidence does not establish the exact beginning and ending dates of claimant's coal mine employment during these years. Decision and Order at 6. Applying the method of calculation at 20 C.F.R. §725.101(a)(32)(iii)[7] for these years, the administrative law judge calculated claimant's

[6] One example the administrative law judge highlighted involved claimant's statement that he worked for Golden Glow Coal on a full-time basis from October 1972 to October 1973. Decision and Order at 6; Director's Exhibit 5. But the administrative law judge noted claimant's Social Security Administration (SSA) earnings records "only reflect earnings from this company in the years 1972 and 1973 as $244.00 and $273.00 respectively." *Id*. Although the administrative law judge acknowledged the possibility that Golden Glow Coal failed to fully report claimant's earnings to the SSA, the administrative law judge found it unlikely that all of claimant's other coal mine employers also underreported his wages. *Id*.

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

coal mine employment by dividing his annual earnings by the average yearly wage in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*.[8] Decision and Order at 5-9. Applying this method of calculation, he found claimant established 10.62 years of coal mine employment for the years from 1970 to 1981, and then from 1984 to 2010. *Id*. When added to the two years claimant worked for Smith Coal Company in 1982 and 1983, he found claimant established a total of 12.62 years.

As it is based on a reasonable method of calculation and supported by substantial evidence, we affirm the administrative law judge's finding that claimant established less than fifteen years of coal mine employment. *Shepherd*, 915 F.3d at 400-06; *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-203-05 (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 claimant 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 assistance of any statutory presumptions, the administrative law judge addressed whether claimant met his burden to establish the existence of pneumoconiosis.[9] 20 C.F.R. §718.202(a).[10]

With respect to the issue of clinical pneumoconiosis, the administrative law judge correctly found the record contains no positive x-ray readings.[11] Decision and Order at 23-

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The BLS data is reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*.

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

[9] 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." 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).

[10] The administrative law judge found claimant established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2).

[11] Dr. DePonte read x-rays taken on October 2, 2015, and May 12, 2017, as negative for pneumoconiosis; Dr. Miller read an x-ray taken on August 28, 2016, as negative for pneumoconiosis; Dr. Kendall read x-rays taken on June 30, 2016, and January 23, 2017, as

24. Thus we affirm his finding that the x-ray evidence is insufficient to establish clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1). We also affirm his finding 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 24. Further, as discussed above, the presumptions at 20 C.F.R. §§718.304 and 718.305 are not applicable. 20 C.F.R. §718.202(a)(3).

The administrative law judge correctly found Drs. Ajjarapu, Tuteur, and Jarboe all agreed claimant does not have clinical pneumoconiosis. Decision and Order at 25; Director's Exhibit 18; Employer's Exhibits 2-5. The administrative law judge also correctly noted the only diagnosis of clinical pneumoconiosis contained in claimant's treatment records, as opposed to the reports from physicians who examined claimant in conjunction with this claim, was a report from Dr. Almatari who "diagnosed [c]laimant with pneumoconiosis on the basis of [an] unknown [x]-ray . . . ." Decision and Order at 26; *see* Claimant's Exhibit 5. The administrative law judge permissibly discredited this treatment record because it conflicts with his finding that the x-ray evidence in this claim does not establish pneumoconiosis. *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 26. Thus, based upon substantial evidence in the record, we affirm his finding the medical opinions and claimant's treatment records do not establish clinical pneumoconiosis. Decision and Order at 25-26.

With respect to the issue of legal pneumoconiosis, Dr. Ajjarapu diagnosed chronic bronchitis.[12] Director's Exhibit 18. She attributed the disease to claimant's "work in the mines and his tobacco abuse." *Id.* She assumed claimant had a coal mine employment history of more than twenty-four years. *Id.* The administrative law judge permissibly rejected this diagnosis of legal pneumoconiosis because he found Dr. Ajjarapu overestimated claimant's coal mine employment. *See Creech v. Benefits Review Board*, 841 F.2d 706, 709 (6th Cir. 1988); *Worhach v. Director*, OWCP, 17 BLR 1-105, 1-110 (1993); Decision and Order at 25. Thus we affirm the administrative law judge's finding that the medical opinions do not establish legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 25-26. Because claimant failed to establish pneumoconiosis, an essential element of entitlement, we affirm the denial of benefits. 20 C.F.R. §718.202(a); *Trent*, 11 BLR at 1-27.

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negative for clinical pneumoconiosis. Director's Exhibit 14; Claimant's Exhibits 2, 3; Employer's Exhibits 1, 3.

[12] Drs. Tuteur and Jarboe opined claimant does not have legal pneumoconiosis. Employer's Exhibits 2-5.

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