U.S. Department of Labor

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

BRB No. 20-0369 BLA

EARL D. MCKNIGHT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
YALE MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 06/30/2021
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 Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Earl D. McKnight, Pennington Gap, Virginia.

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

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] Administrative Law Judge Jonathan C. Calianos's Decision and Order Denying Benefits (2017-BLA-06267) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on December 22, 2015.[2]

Based on the parties' stipulation of 8.86 years of coal mine employment, the administrative law judge found Claimant 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 establishes a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). Considering the claim on the merits, the administrative law judge found Claimant established total disability but did not establish clinical or legal pneumoconiosis, or total disability due to pneumoconiosis. 20 C.F.R. §§718.202, 718.204(c).[4] Thus he denied benefits.

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[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. Keene Trucking Co*., 19 BLR 1-88 (1995) (Order).

[2] This is Claimant's second claim for benefits. The administrative law judge noted Claimant filed a claim "at some point in the past," but the Federal Records Center destroyed the record of that claim in 2007. Decision and Order at 2. In adjudicating the present claim, the administrative law judge assumed the prior claim was denied based on Claimant's failure to establish any element of entitlement. *Id.* at 2 n.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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[4] 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). This definition encompasses 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). Clinical pneumoconiosis consists of "those

On appeal, Claimant generally challenges the denial of benefits. Employer and its Carrier (Employer) respond, 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 the issue raised to be 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 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 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

Claimant has never alleged he has at least fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b)(i). On his application for benefits, he alleged only ten years. Director's Exhibit 3. Moreover, the administrative law judge permissibly relied on the parties' joint stipulation of 8.86 years of coal mine employment. Decision and Order at 3; Administrative Law Judge's Exhibit 12; Hearing Transcript at 37. Because Claimant did not establish he had at least fifteen years of coal mine employment, we affirm the administrative law judge's finding he could not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(i); Decision and Order at 4.

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).

[5] We will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 12.

Part 718 Entitlement

Without the benefit of the Section 411(c)(4) presumption,[6] 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).

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is necessary to support a finding of pneumoconiosis.

Clinical Pneumoconiosis

The administrative law judge considered nine interpretations of four x-rays dated December 3, 2015, February 10, 2016, April 20, 2017, and November 6, 2018. Decision and Order at 7-8, 21-22. He noted that all the physicians who provided interpretations are dually qualified as Board-certified radiologists and B readers. *Id*. at 21. Dr. DePonte read the December 3, 2015 x-ray as positive for pneumoconiosis while Dr. Adcock read it as negative for the disease. Claimant's Exhibit 1; Employer's Exhibit 5. Drs. DePonte, Adcock, and Miller each read the February 10, 2016 x-ray as negative for pneumoconiosis. Director's Exhibit 12, 14; Claimant's Exhibit 4. Dr. DePonte read the April 20, 2017 x-ray as positive for pneumoconiosis while Dr. Tarver read the same x-ray as negative. Employer's Exhibit 1; Claimant's Exhibit 2. Dr. DePonte read the November 6, 2018 x-ray as positive for pneumoconiosis while Dr. Kendall[7] read it as negative. Employer's Exhibit 6; Claimant's Exhibit 3.

[6] The irrebutable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 is also not applicable because there is no evidence in the record Claimant has complicated pneumoconiosis. 30 U.S.C. §921(c)(3).

[7] The administrative law judge indicated Dr. Kendall's curriculum vitae (CV) did not specifically state he is Board-certified in radiology, Decision and Order at 21 n.25, but proceeded under the presumption that Dr. Kendall is dually-qualified based on his experience and membership in the American College of Radiology. *Id.* Notwithstanding the administrative law judge's statement, we note Dr. Kendall's CV specifies he passed the oral and written American Board of Radiology exams. Employer's Exhibit 6.

The administrative law judge correctly found the February 10, 2016 x-ray is negative for pneumoconiosis as all three dually-qualified radiologists who read it interpreted it as negative for the disease and their readings are uncontradicted. Decision and Order at 22. He rationally found the readings of the December 3, 2015, April 20, 2017, and November 6, 2018 x-rays in equipoise because an equal number of dually-qualified radiologists read each x-ray as positive and negative for pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); Decision and Order at 22. Because the record contains one negative and three inconclusive x-rays, we affirm the administrative law judge's finding the x-ray evidence does not establish clinical pneumoconiosis as supported by substantial evidence. 20 C.F.R. §718.202(a)(1).[8]

Legal Pneumoconiosis

"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). In order to establish legal pneumoconiosis, Claimant must prove that he has a "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).

The administrative law judge correctly found Dr. Ajjarapu was the only physician to diagnose legal pneumoconiosis. Decision and Order at 22. She conducted the Department of Labor (DOL)-sponsored pulmonary evaluation of Claimant on February 10, 2016 and issued a medical report based on that evaluation. Director's Exhibit 12. She noted a February 10, 2016 pulmonary function study initially conducted as part of this evaluation produced a severe pulmonary impairment. Director's Exhibit 12. She diagnosed legal pneumoconiosis in the form of chronic bronchitis due to both coal mine dust exposure and cigarette smoking. Director's Exhibit 12. She explained both tobacco smoke and coal mine dust "cause inflammation leading to bronchospasm and cause excessive airways secretions and bronchitis symptoms." *Id.*

The administrative law judge noted the DOL had Dr. Ranavaya review the February 10, 2016 pulmonary function study that Dr. Ajjarapu discussed in her report, and Dr. Ranavaya invalidated the study because its "vents are not acceptable." Decision and Order at 9 n.8, *quoting* Director's Exhibit 12 at 26. As a consequence, the DOL had Claimant

[8] Claimant cannot establish clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) or (4) because there is no biopsy or medical opinion evidence in the record diagnosing clinical pneumoconiosis. 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).

perform a subsequent pulmonary function study on September 12, 2016, with Dr. Ajjarapu. Director's Exhibit 12. This study was valid and produced qualifying values for total disability. *Id*.

As the administrative law judge found, Dr. Ajjarapu did not revisit her diagnosis of legal pneumoconiosis or submit a supplemental report based on the later September 12, 2016 pulmonary function study results. Decision and Order at 14. He also found Dr. Ajjarapu did not cite to any specific objective test results to support her diagnosis. *Id.* at 23. Further, the administrative judged noted Dr. Ajjarapu conceded she did not observe any respiratory abnormalities upon physical examination of the Claimant. *Id*. Thus the administrative law judge concluded her diagnosis of legal pneumoconiosis was based entirely on Claimant's reported symptoms. *Id*. He also concluded Dr. Ajjarapu assumed an inflated coal mine employment history of eleven years underground, "which is more than the stipulated work history of 8.86 years of which about eight were underground." *Id*.

Based on the foregoing findings, we conclude the DOL has not met its duty to provide Claimant with the required complete pulmonary evaluation. Under the Act, "[e]ach miner who files a claim . . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-89-90 (1994). The purpose of a DOL-sponsored evaluation is to "develop the medical evidence necessary to determine each claimant's entitlement to benefits." 20 C.F.R. §718.101(a).

The DOL meets its statutory obligation to provide a "complete pulmonary evaluation" under 30 U.S.C. §923(b) "when it pays for an examining physician who (1) performs all of the [required] medical tests . . . and (2) specifically links each conclusion in his or her medical opinion *to those medical tests*." *See Green v. King James*, 575 F.3d 628, 642 (6th Cir. 2009) (emphasis added) (distinguishing an administrative law judge's permissible rejection of a DOL examiner's opinion on credibility grounds from cases in which the miner was denied a complete pulmonary evaluation because the DOL examiner did not perform required testing or based his opinion on invalid testing). Because Dr. Ajjarapu's opinion was based on an invalid test, the Act requires the case be remanded for Dr. Ajjarapu to provide a supplemental report considering the results of valid testing.[9] *Greene*, 575 F.3d at 642; *Hodges*, 18 BLR at 1-89-90.

[9] Although Claimant's lay representatives did not raise the issue of whether Claimant was provided a complete pulmonary evaluation below, the Director's obligation is statutorily mandated and the Board has held that the failure to apply a statutory provision

Consequently, we vacate the administrative law judge's denial of benefits and remand this case to the district director to obtain a supplemental report from Dr. Ajjarapu. Specifically Dr. Ajjarapu should provide an opinion on whether Claimant has legal pneumoconiosis based on the valid pulmonary function testing.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, vacated in part and the case is remanded to the district director for further development of the evidence consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

constitutes an exception to the waiver rule. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994).