U.S. Department of Labor

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

BRB No. 19-0186 BLA

JOEL B. HAMILTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PRESLEY TRUCKING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 03/23/2020
GRANITE STATE INSURANCE/CHARTIS	)	
	)	
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 in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joel B. Hamilton, Wise, Virginia.

Sarah Y. M. Himmel (Two Rivers Law Group P.C.), Christiansburg, Virginia, 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 in an Initial Claim (2016-BLA-05851) of Administrative Law Judge Larry S. Merck on a claim filed on July 22, 2014, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

After crediting claimant with 12.14 years of coal mine employment,[2] the administrative law judge found the record contains no evidence of complicated pneumoconiosis and therefore claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). Because claimant did not have at least fifteen years of coal mine employment, the administrative law judge found he could not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to 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 urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

When a claimant files an appeal without the assistance of counsel, the Board considers whether the underlying decision and order is supported by substantial evidence. *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,

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the 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 case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[3] Under Section 411(c)(4) of the Act, claimant is entitled to a presumption he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

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 the existence of pneumoconiosis, pneumoconiosis arising out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 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, 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) Presumption – 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 first calculated claimant's employment with employer. Decision and Order at 5. He permissibly found claimant's testimony credibly establishes he started working for employer on March 7, 2005, and stopped on December 23, 2006, for a total of 1.79 years of coal mine employment. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); 20 C.F.R. §725.101(a)(32)(ii); Decision and Order at 5; Hearing Transcript at 15.

He then calculated claimant's employment with Paramount Limited, Horne Brothers Mining, BBC Coal Corporation, A & G Coal Company, Nally & Hamilton Enterprises, True Energy, Wilder Coal Corporation, and Hardrock Contractors and Natural Resource Services. Decision and Order at 6-8. For these companies, he permissibly found claimant's Social Security Administration (SSA) earnings records are the "most probative" evidence.[4] Decision and Order at 6; *see Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841

[4] Although claimant listed the months and years he worked for various coal mine operators on his employment history forms, the administrative law judge concluded these

(1984); Director's Exhibit 5. He further found the evidence does not establish the exact beginning and ending dates of claimant's employment with these companies. Decision and Order at 6. Thus he applied the formula at 20 C.F.R. §725.101(a)(32)(iii).[5] *Id*. Specifically, he divided claimant's yearly income found in the SSA earnings records by the coal mine industry's average daily earnings[6] for that year as set forth in Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual* to determine the number of days worked. Decision and Order at 6-10. Where claimant worked for an individual operator for three consecutive years and had 125-working days in the second year, he credited claimant with a whole year for that second year. *Id*. For all other years, he divided the number of days claimant worked by an estimated 250-day work year divisor. *Id*.

Applying this framework, he found claimant established 9.85 years of coal mine employment with Paramount Limited, Horne Brothers Mining, BBC Coal Corporation, A & G Coal Company, Nally & Hamilton Enterprises, Presley Trucking Company, and True Energy from 1987-2011. Decision and Order at 7-8. When added to his work for employer, claimant established 11.64 years of coal mine employment. 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.[7] *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-203-05 (2016); *Muncy*,

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histories do not accurately reflect claimant's actual work. Decision and Order at 5-6. He explained the histories do not "necessarily represent" full vs. part-time coal mine employment "when compared to [c]laimant's yearly earnings reported" on the SSA earnings records. *Id*.

[5] 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 (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS data is reported in Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*.

[6] For coal mine employment from 2004 onward, however, he found claimant's average daily wage was $161.50 based on claimant's statements on his description of coal mine work forms. Decision and Order at 7; Director's Exhibit 4.

[7] The administrative law judge found claimant worked for Wilder Coal Corporation (Wilder) for 0.42 years and Hardrock Contractors and Natural Resource Services (Hardrock) for 1.59 years based on his SSA earnings records. Decision and Order at 7-10.

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.[8] 20 C.F.R. §718.202(a).[9]

He first considered eight interpretations of four x-rays taken on June 24, 2014, August 27, 2014, June 18, 2015, and March 15, 2016. 20 C.F.R. §718.202(a)(1); Decision and Order at 12-13. He noted he may consider the radiological qualifications of the physicians who render x-ray interpretations and permissibly assigned greater weight to those physicians who are dually-qualified as B-readers and Board-certified radiologists. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); Decision and Order at 12-13.

He credited claimant with no time with Wilder because claimant "could not approximate the amount of time that his job was coal mine related beyond acknowledging that it was not coal mine employment most of the time." *Id*. He credited claimant with only 0.5 years with Hardrock based on claimant's testimony that he engaged in "coal stripping" for only six months with the remainder of time constructing roads for inactive strip mine sites. *Id*. If claimant had established all of his work for both companies was coal mine employment, he would be entitled to an additional 1.51 years. Because an additional 1.51 years of coal mine employment would not aid claimant in establishing fifteen years of coal mine employment, we need not address whether the administrative law judge erred in making these findings. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[8] 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).

[9] The administrative law judge found claimant established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2); Decision and Order at 10-11.

Dually-qualified physicians read all of the x-rays. Director's Exhibit 7; Claimant's Exhibits 1-3; Employer's Exhibits 1-4. Dr. DePonte interpreted the June 24, 2014 x-ray as negative for pneumoconiosis. Claimant's Exhibit 1. Based on Dr. DePonte's uncontradicted reading, the administrative law judge found this x-ray negative for the disease. Decision and Order at 13. Dr. DePonte interpreted the August 27, 2014 x-ray as positive for pneumoconiosis, but Drs. Adcock and Tarver interpreted it as negative. Director's Exhibit 7; Employer's Exhibits 2, 4. The administrative law judge found this x-ray negative for pneumoconiosis because a greater number of dually-qualified radiologists read it as negative. Decision and Order at 13. Dr. Alexander read the June 18, 2015 x-ray as positive for pneumoconiosis and Dr. DePonte read the March 15, 2016 x-ray as positive for pneumoconiosis, but Dr. Adcock interpreted both x-rays as negative for pneumoconiosis. Claimant's Exhibits 2, 3; Employer's Exhibits 1, 3. The administrative law judge found both x-rays are inconclusive because an equal number of dually-qualified radiologists read the respective films as positive and negative for pneumoconiosis. Decision and Order at 13. Because, as the administrative law judge found, the record contains two negative and two inconclusive x-rays, we affirm his finding that the x-ray evidence is insufficient to establish clinical pneumoconiosis. *See Adkins*, 958 F.2d at 51-52; 20 C.F.R. §718.202(a)(1); Decision and Order at 12-13.

We also affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis based on the biopsy evidence, as the record contains no such evidence. 20 C.F.R. §718.202(a)(2); Decision and Order at 13-14. Further, the presumptions at 20 C.F.R. §§718.304 and 718.305 are not applicable.[10] 20 C.F.R. §718.202(a)(3).

The administrative law judge then weighed the medical opinions. 20 C.F.R. §718.202(a)(4); Decision and Order at 14-26. He noted Dr. Ajjarapu diagnosed clinical pneumoconiosis,[11] but found her opinion was based on her assumption that the August 27, 2014 x-ray was positive for the disease. Decision and Order at 14-15, 20; Director's Exhibit 7. He reiterated, however, that the August 27, 2014 x-ray is negative for

[10] The administrative law judge correctly found 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. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 14.

[11] Drs. Fino and Rosenberg opined claimant does not have clinical or legal pneumoconiosis. Employer's Exhibits 6-8, 11. The administrative law judge did not indicate what weight, if any, he was assigning their contrary opinions because he found claimant did not meet his burden.

pneumoconiosis because a greater number of dually-qualified radiologists read it as negative. Decision and Order at 20. He permissibly assigned Dr. Ajjarapu's opinion diminished weighed because he found it is not well-reasoned or supported by the objective evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12 (4th Cir. 2000); *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 21.

The administrative law judge correctly noted the only diagnosis of clinical pneumoconiosis contained in the treatment records, as opposed to the reports created by physicians examining claimant in conjunction with his claim for benefits, was by a Ms. Dean, an individual who is not a physician. Decision and Order at 25-26; Claimant's Exhibit 8. The administrative law judge rationally rejected these treatment records because Ms. Dean "did not specifically discuss the basis or rationale for her pneumoconiosis diagnosis." Decision and Order at 25; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. Thus, based upon substantial evidence in the record, we affirm his finding that the medical opinions and treatment records do not establish clinical pneumoconiosis. Decision and Order at 26.

With respect to the issue of legal pneumoconiosis, Dr. Ajjarapu diagnosed chronic bronchitis and a moderate respiratory impairment. Director's Exhibit 7. She attributed both conditions to claimant's "work in the mines and his tobacco abuse." *Id*. at 22. The administrative law judge permissibly rejected this opinion because he found Dr. Ajjarapu did not set forth the length of claimant's coal mine employment she relied on to diagnose legal pneumoconiosis. *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). Further, although claimant's treatment records contain diagnoses of chronic obstructive pulmonary disease (COPD) and chronic bronchitis, Claimant's Exhibit 8, the administrative law judge correctly noted no physician in these records opined claimant has a chronic lung disease or impairment significantly related to, or substantially aggravated by, coal mine dust exposure. 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 25-26. 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 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.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge