U.S. Department of Labor

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

BRB No. 21-0637 BLA

GARY D. SHELTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOFTIS COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 03/22/2023
	)	
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.

Jonathan C. Masters (Masters Law Office PLLC), South Williamson, Kentucky, for Claimant.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Denying Benefits (2018-BLA-06061) rendered on a subsequent claim[1] filed on December 8, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). The ALJ credited Claimant with 9.195 years of coal mine employment and thus found he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant did not establish clinical or legal pneumoconiosis,[3] 20 C.F.R. §718.202(a), and thus could not establish a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). He therefore denied benefits.

[1] Claimant filed three previous claims, all of which were denied. Director's Exhibits 1-3. An ALJ denied Claimant's third claim because he failed to establish pneumoconiosis. Director's Exhibit 3. When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must 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); *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's prior claim was denied for failure to establish pneumoconiosis, he had to submit new evidence establishing that element in order to obtain a review of the merits of his current claim. *See White*, 23 BLR at 1-3; Director's Exhibit 3.

[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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 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 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). A disease "arising out of coal mine employment" 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).

On appeal, Claimant contends the ALJ erred in finding he did not establish pneumoconiosis.[4] Neither Employer nor the Director, Office of Workers' Compensation Programs, filed a response brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Part 718 Entitlement

To be entitled to benefits under the Act, 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. Statutory presumptions may assist claimants if certain conditions are met, but 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 ALJ found the chest x-ray evidence, computed tomography scan evidence, and medical opinion evidence did not establish clinical pneumoconiosis. The ALJ thus found all the evidence weighed together did not establish clinical pneumoconiosis. Decision and Order at 10-13.

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established 9.195 years of coal mine employment and has a 50 pack-year smoking history. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5-8.

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 7.

Claimant argues the ALJ erred in failing to explain why he concluded the x-ray evidence[6] did not support a finding of clinical pneumoconiosis. Claimant's Brief at 3-4. We disagree.

The ALJ considered four readings of three new x-rays dated January 4, 2017, December 13, 2017, and January 16, 2019. Dr. Crum, a Board-certified radiologist and B reader, read the January 4, 2017 x-ray as positive for pneumoconiosis; Dr. Meyer, an equally qualified reader, read the x-ray as negative. Director's Exhibits 22, 29. Dr. Meyer also read the December 13, 2017 and January 16, 2019 x-rays as negative. Employer's Exhibits 1, 2. The ALJ found that since equally qualified readers interpreted the January 4, 2017 x-ray as both positive and negative, it was in equipoise for the existence of pneumoconiosis. As there were no other positive x-ray readings,[7] he found the new x-rays did not establish pneumoconiosis. Decision and Order at 11.

Contrary to Claimant's contention, the ALJ sufficiently explained his analysis in accordance with the Administrative Procedure Act (APA).[8] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 802 (6th Cir. 2012) (APA "imposes on the ALJ a duty accurately and specifically to reference the evidence supporting his decision"). The ALJ based his permissible finding on a quantitative and qualitative analysis of the x-ray evidence, considering each physician's respective readings and qualifications. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993). We therefore reject Claimant's allegation of error and affirm the ALJ's finding

[6] Claimant does not challenge the ALJ's findings that the computed tomography scan evidence and medical opinion evidence do not establish clinical pneumoconiosis. Decision and Order at 11-13. We therefore affirm those findings. *See Skrack*, 6 BLR at 1-711.

[7] The ALJ noted that two additional x-ray readings contained in Claimant's medical treatment records made no mention of pneumoconiosis. Decision and Order at 11; Claimant's Exhibits 2, 8.

[8] The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

that the x-ray evidence did not establish clinical pneumoconiosis.[9] 20 C.F.R. §718.202(a)(1).

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(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.'").

The ALJ considered the medical opinions of Drs. Ammisetty, Fino, and Rosenberg. 20 C.F.R. §718.202(a)(4). Dr. Ammisetty opined that Claimant has chronic bronchitis and chronic obstructive pulmonary disease (COPD) due to both smoking and coal mine dust exposure. Director's Exhibits 22, 31. In contrast, Drs. Fino and Rosenberg opined that Claimant has COPD and hypoxemia due solely to smoking. Director's Exhibit 28; Employer's Exhibits 3, 8, 9. The ALJ discredited Dr. Ammisetty's opinion because it was based on a "significantly inaccurate" history of thirty years of coal mine employment and because it was unclear what smoking history Dr. Ammisetty considered.[10] Decision and Order at 16. The ALJ therefore found the medical opinions did not establish legal pneumoconiosis.

Claimant contends the ALJ erred in discrediting Dr. Ammisetty's opinion as based on an inaccurate smoking history. Claimant's Brief at 5. We need not resolve this issue because Claimant does not challenge the ALJ's first reason for discrediting Dr. Ammisetty's opinion: it was based on a "significantly inaccurate" coal mine employment history. Decision and Order at 16; *see Huscoal, Inc., v. Director, OWCP* [*Clemons*], 48

[9] Claimant bears the burden of proof; consequently, even if the x-ray interpretations were considered as being in equipoise, Claimant would not have established clinical pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994).

[10] Dr. Ammisetty recorded a smoking history of two packs of cigarettes per day starting in 1966, then crossed out "Two pack[s] per day" and wrote "2 cigarettes per day." Director's Exhibit 22 at 3; Decision and Order at 16.

F.4th 480, 491 (6th Cir. 2022) (effect of an inaccurate coal mine dust exposure history on the credibility of a medical opinion is a determination for the ALJ to make).

On appeal, Claimant acknowledges "it may be the case that Dr. Ammisetty relie[d] upon an inaccurate employment history . . . ." Claimant's Brief at 5. Therefore, we affirm the ALJ's unchallenged discrediting of Dr. Ammisetty's opinion for that reason. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). As Claimant does not explain how the ALJ's alleged error regarding Dr. Ammisetty's understanding of his smoking history would affect this case, we decline to address that argument and affirm the ALJ's finding that the medical opinions do not establish legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); *see Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Because it is supported by substantial evidence, we affirm the ALJ's finding that the new evidence did not establish the existence of pneumoconiosis and thus did not demonstrate a change in an applicable condition of entitlement. 20 C.F.R. §§718.202(a), 725.309(c). Therefore, we affirm the denial of benefits. 20 C.F.R. §725.309; *see Trent*, 11 BLR at 1-27.

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge