U.S. Department of Labor

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

BRB No. 19-0313 BLA

ALLEN T. MITCHELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK KENTUCKY MINING Self-Insured by ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 05/29/2020
	)	
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 in a Second Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Allen T. Mitchell, North Tazewell, Virginia.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for employer/carrier.

Before: BUZZARD, GRESH and JONES, Administrative Appeals Judges

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits in a Second Subsequent Claim (2017-BLA-05070) of Administrative Law Judge Larry S. Merck 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 miner's claim filed on December 15, 2014.[2]

The administrative law judge found claimant established 10.33 years of coal mine employment. Thus, he determined claimant 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). Because the record lacks evidence of complicated pneumoconiosis, he also found the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act is inapplicable. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304. Considering 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. The Director, Office of Workers' Compensation Programs, has not filed a response.

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

[2] Claimant filed his initial claim for benefits on October 29, 2003, which the district director denied on September 1, 2014, because he did not establish pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 1. Claimant filed a subsequent claim for benefits on December 7, 2010, which Administrative Law Judge Linda S. Chapman denied on February 25, 2013, because claimant did not establish pneumoconiosis and therefore did not establish his totally disabling respiratory impairment was due to pneumoconiosis or a change in an applicable condition of entitlement. *Id*. Claimant did not take any further action before filing the current claim. Director's Exhibit 3.

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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) (2012); 20 C.F.R. §718.305.

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, supported by substantial evidence, and in accordance with applicable 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

To invoke the Section 411(c)(4) presumption, claimant must prove the miner had at least fifteen years of coal mine employment either underground or on the surface in conditions substantially similar to those underground. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. Claimant has the burden 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 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).

The parties agreed all of claimant's coal mine employment was with employer from 1975 to 1988 but did not agree on the length of his employment. Decision and Order at 6; *see* Hearing Transcript at 9, 12-13, 20, 27-30; Director's Exhibit 7. Because claimant did not work continuously and could not recall some of his start and stop dates, the administrative law judge permissibly relied on employer's statement of claimant's employment as the most accurate account of when claimant actually worked for employer.[5]

[4] 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 Exhibits 1 at 715, 719, 1397; 13.

[5] On cross examination, claimant agreed he began working for employer in 1975 and worked for almost seven years without interruption until March 9, 1982, when he had an occupational injury requiring knee surgery. Hearing Transcript at 27-28. He replied "[i]t's hard to remember" when asked if he went back to work in May 1982 and then worked until September 29, 1982, when he was laid off. *Id*. at 28. He did agree, however, that he was laid off for about ten months until July 28, 1983. *Id*. Claimant was asked about time off from work with employer for additional injuries and illnesses from 1983 to 1988 but was unsure about the specific time periods for each injury. *Id*. at 28-30. Claimant testified he had at most "12.9" years of coal mine employment, which as the administrative

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 6; Director's Exhibit 7. As it is based on a reasonable method of calculation and supported by substantial evidence, we affirm the administrative law judge's finding claimant established 10.33 years of coal mine employment.[6] *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204-05 (2016); *Muncy*, 25 BLR at 1-27; Decision and Order at 6. As claimant did not prove at least fifteen years of coal mine employment, we also affirm the administrative law judge's finding he 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).

Entitlement under 20 C.F.R. Part 718

Because he did not invoke the Section 411(c)(4) presumption, 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 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).

In addition, when a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge 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(d); *see 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(d)(2). Claimant's prior claim was denied for failure to establish pneumoconiosis or that his total disability was due to pneumoconiosis. Director's Exhibit 1 at 302. Thus, he had to submit new evidence establishing one of these elements to warrant a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3.

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law judge noted is less than the fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption. Hearing Transcript at 12; Decision and Order at 6 n.5.

[6] Because claimant established at least ten years of coal mine employment, he is entitled to a rebuttable presumption that his pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(b).

Existence of Pneumoconiosis

Clinical Pneumoconiosis

In considering whether claimant established clinical pneumoconiosis,[7] the administrative law judge considered eleven interpretations of five x-rays dated September 17, 2014, February 9, 2015, April 20, 2016, November 28, 2016, and August 1, 2017. 20 C.F.R. §718.202(a)(1); Decision and Order at 9-10; Director's Exhibits 13, 19-20, 23-24; Claimant's Exhibits 1-3, 6-7; Employer's Exhibits 1 at 32, 20. He accurately noted all of the physicians interpreting the chest x-rays are dually-qualified as Board-certified radiologists and B readers. *Id*.

Dr. Seaman interpreted the September 17, 2014 x-ray as negative for pneumoconiosis and Dr. Adcock interpreted the April 20, 2016 x-ray as negative for pneumoconiosis, while Dr. DePonte interpreted both x-rays as positive for pneumoconiosis. Director's Exhibits 19, 24; Claimant's Exhibits 2, 6. Dr. Miller interpreted the November 28, 2016 x-ray as positive for pneumoconiosis and Dr. Alexander interpreted the August 1, 2017 x-ray as positive for pneumoconiosis, but Dr. Tarver interpreted both x-rays as negative for pneumoconiosis. Claimant's Exhibits 1, 3; Employer's Exhibits 1, 20. The administrative law judge determined all four of these 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 10-11. Concerning the February 9, 2015 x-ray, Drs. DePonte and Miller interpreted it as positive for pneumoconiosis, while Dr. Adcock interpreted it as negative. Director's Exhibits 13, 20; Claimant's Exhibit 7. The administrative law judge found this x-ray positive for pneumoconiosis based on the preponderance of the positive readings by dually-qualified radiologists. Decision and Order at 10. He then noted the positive x-ray was not the most recent and concluded the x-ray evidence as a whole is inconclusive and insufficient to establish clinical pneumoconiosis. *Id.* at 11.

The administrative law judge permissibly found the February 9, 2015 x-ray positive for pneumoconiosis and the rest of the x-rays inconclusive based on his weighing of the dually-qualified physicians' interpretations. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); Decision and Order at 10-11. Given that x-rays in equipoise do not establish the presence or absence of disease, however, the administrative law judge has not

[7] Because there is no evidence of complicated pneumoconiosis in the record, we affirm the administrative law judge's finding claimant cannot 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); *see* 20 C.F.R. §718.304; Decision and Order at 11.

adequately explained, in compliance with the Administrative Procedure Act (APA), his conclusion the x-ray evidence as a whole does not support the existence of pneumoconiosis. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a) (administrative law judge must set forth "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record"); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We thus vacate the administrative law judge's finding the weight of the x-ray evidence is insufficient to establish clinical pneumoconiosis and remand this case for further consideration of this issue.

The administrative law judge next considered Dr. Ajjarapu's opinion, noting she diagnosed clinical pneumoconiosis based on the positive February 9, 2015 x-ray.[8] 20 C.F.R. §718.202(a)(4); Decision and Order at 19-21. Relying on his determination that the x-ray evidence did not establish pneumoconiosis, he found her "diagnosis is not supported by the preponderance of the chest x-ray evidence overall" and therefore concluded the medical opinion evidence did not establish clinical pneumoconiosis. Decision and Order at 20. Because we vacate the administrative law judge's weighing of the x-ray evidence, we also vacate his finding Dr. Ajjarapu's clinical pneumoconiosis diagnosis is not supported by that evidence.

The administrative law judge then weighed claimant's hospitalization records and treatment notes. Decision and Order at 21-25; Claimant's Exhibit 8; Employer's Exhibits 2-5, 6-19. Dr. Jawad saw claimant approximately twelve times between December 22, 2014, and March 3, 2017, and diagnosed him with pneumoconiosis and "black lung," observing claimant had a "significant history of coal dust exposure with a small reticular nodular infiltrate." Claimant's Exhibit 8. The administrative law judge found Dr. Jawad's diagnosis of clinical pneumoconiosis was not supported by the x-ray evidence, in part, because the "preponderance of the chest x-ray evidence overall does not establish the existence of clinical pneumoconiosis." Decision and Order at 25. Because we vacate the administrative law judge's weighing of the x-ray evidence, we also vacate his finding Dr. Jawad's clinical pneumoconiosis diagnosis not supported by that evidence. Consequently,

[8] Drs. McSharry and Sargent opined claimant does not have clinical or legal pneumoconiosis. Director's Exhibit 19; Employer's Exhibits 1, 21. The administrative law judge did not indicate what weight, if any, he assigned their contrary opinions because he found claimant did not meet his burden to establish either disease. Decision and Order at 21.

we vacate the administrative law judge's determination claimant did not establish clinical pneumoconiosis.

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). The administrative law judge considered Dr. Ajjarapu's opinion diagnosing "legal coal worker pneumoconiosis/chronic bronchitis." Director's Exhibit 13 at 8; *see* Decision and Order at 21. She attributed both conditions to claimant's coal dust exposure and tobacco use, stating both exposures "cause airway inflammation leading to bronchospasm and cause excessive airway secretions and bronchitic symptoms." Director's Exhibit 13 at 8. The administrative law judge found Dr. Ajjarapu's opinion entitled to little probative weight because although she explicitly diagnosed legal pneumoconiosis, he found she did "not demonstrate whether her understanding of that term comports with its regulatory definition." Decision and Order at 20. He also found her attributing claimant's impairment "in part" to his coal mine dust exposure "does not demonstrate that the link rises to the level of being 'significantly related to,' or 'substantially aggravated by,' the dust exposure in coal mine employment required by 20 C.F.R. §718.201(a)(2), (b)." *Id*. at 21.

Contrary to the administrative law judge's finding, a physician need not apportion the causes of a miner's lung disease to establish the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006). The physician need only credibly diagnose a chronic respiratory or pulmonary impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Further, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that a claimant can satisfy this burden by showing coal dust exposure contributed "in part" to the miner's respiratory or pulmonary impairment. *See Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311 (4th Cir. 2012). Thus, we vacate the administrative law judge's determination Dr. Ajjarapu's opinion is insufficient to establish legal pneumoconiosis.

For similar reasons, we must vacate the administrative law judge's discrediting of Dr. Jawad's opinion. In evaluating claimant's hospitalization and treatment records, the administrative law judge considered Dr. Jawad's diagnoses of chronic obstructive pulmonary disease (COPD), chronic hypoxic respiratory failure with hypoxia, and chronic

bronchitis.[9] Claimant's Exhibit 8. Dr. Jawad noted claimant suffers from shortness of breath "secondary to severe obstructive airway disease, secondary to COPD, with history of significant exposure to coal dust in the past which could contribute to his severe obstructive dysfunction." *Id.* Based on the administrative law judge's statement that, similar to Dr. Ajjarapu, Dr. Jawad did not specify "a relationship that is 'significantly related to' or 'substantially aggravated by' dust exposure in coal mine employment," it appears he applied a more stringent standard than the "in part" standard. Decision and Order at 25; *see Looney*, 678 F.3d at 311. Thus, we also vacate his finding that claimant's treatment records and Dr. Jawad's diagnoses therein are insufficient to establish legal pneumoconiosis. Consequently, we vacate his determination claimant did not establish pneumoconiosis or a change in an applicable condition of entitlement and further vacate the denial of benefits. *See* 20 C.F.R. §§718.202(a), 725.309(c); Decision and Order at 25-26.

Remand Instructions

On remand, the administrative law judge must reconsider whether the x-ray evidence as a whole establishes pneumoconiosis at 20 C.F.R. §728.202(a)(1). In doing so, he must consider the x-ray interpretations, the readers' qualifications, the dates of the films, and the nature of the readings when resolving the conflicting x-ray interpretations. *See Sea "B" Mining Company v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins*, 958 F.2d at 52. He must also reconsider whether the medical opinion evidence, including claimant's treatment records, establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). He should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Looney*, 678 F.3d at 311; *Hicks*, 138 F.3d at 533. Moreover, on remand, the administrative law judge must weigh all of the relevant evidence together under 20 C.F.R. §718.202(a) to determine whether claimant suffers from clinical or legal pneumoconiosis.[10] *Compton v. Island Creek*

[9] The administrative law judge only evaluated Dr. Jawad's treatment notes on the issue of legal pneumoconiosis because he permissibly found the remaining hospitalization records and treatment notes addressing claimant's pneumoconiosis did not document the basis for that diagnosis, and the references to claimant's COPD did not address its etiology or provide a "reasoned and documented link to his dust exposure from coal mine employment." Decision and Order at 25; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997).

[10] We affirm the administrative law judge's finding that the record contains no biopsy evidence. 20 C.F.R. §718.202(a)(2); Decision and Order at 11.

Coal Co., 211 F.3d 203, 211 (4th Cir. 2000). He must set forth his findings in detail, including the underlying rationales, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

If claimant establishes pneumoconiosis on remand, he will also establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c), in which case the administrative law judge must consider whether claimant established the remaining elements of entitlement. If the administrative law judge finds claimant did not establish pneumoconiosis, claimant will have failed to establish an essential element of entitlement. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order Denying Benefits in a Second Subsequent Claim is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge