U.S. Department of Labor

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

BRB No. 22-0493 BLA

JIMMY R. HENSLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ANDALEX RESOURCES INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN RESOURCES INSURANCE COMPANY	)	DATE ISSUED: 5/17/2023
	)	
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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Jimmy R. Hensley, Manchester, Kentucky.

Thomas L. Ferreri and Matthew J. Zanetti (Ferreri Partners, PLLC), Louisville, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Denying Benefits (2020-BLA-05292) rendered on a subsequent claim[2] filed on March 6, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found no evidence of complicated pneumoconiosis; therefore, he found 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) (2018). He credited Claimant with 13.16 years of coal mine employment and thus found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant failed to establish pneumoconiosis at 20 C.F.R. §718.202 and therefore a change in an applicable condition of entitlement at 20 C.F.R. §725.309.[4] Accordingly, he denied benefits.

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[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested that the Benefits Review Board review the ALJ's decision on Claimant's behalf, but she does not represent Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] This is Claimant's fourth claim. Decision and Order at 2; Director's Exhibits 1-4. His prior claim filed on January 10, 2013, was denied on January 31, 2017, by ALJ John P. Sellers, III, because Claimant failed to establish the existence of pneumoconiosis. *Hensley v. Andalex Res., Inc.*, OALJ Case No. 2014-BLA-05416, slip op. at 2, 31 (Jan. 31, 2017).

[3] Section 411(c)(4) 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.

[4] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "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).

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

In an appeal filed by an unrepresented claimant, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are 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).

Invocation of the Irrebuttable Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.

The ALJ accurately observed the record contains no evidence of complicated pneumoconiosis – none of the x-rays was read as positive for complicated pneumoconiosis, there is no biopsy evidence, and none of the physicians diagnosed the disease. Decision and Order at 3. Thus, we affirm the ALJ's finding that Claimant is unable to 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's prior claim was denied for failure to establish the existence of pneumoconiosis, Claimant was required to submit new evidence establishing pneumoconiosis to warrant a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 2.

[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); Decision and Order at 4; Hearing Transcript at 8; Director's Exhibit 5.

Section 411(c)(4) Presumption—Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines, or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). The Board will uphold an ALJ's determination on length of coal mine employment if it is 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).

Claimant alleged nineteen years of coal mine employment in his application for benefits. Director's Exhibit 4 at 1. The ALJ found 13.16 years of coal mine employment established considering Claimant's work history form (CM-911a), his Social Security Administration (SSA) earnings records, and a statement from Geraldine Wells, the bookkeeper for Hi Flame Coals, Incorporated (Hi Flame Coals) and New Big Creek Mining Company (New Big Creek Mining) (the bookkeeper) regarding Claimant's coal mine employment with those companies. Decision and Order at 6-7; Director's Exhibits 5, 7, 8.

The ALJ credited the bookkeeper's statement that Claimant worked from September 24, 1972, to the first week of 1982 for Hi Flame Coals and from 1987 to 1988 for New Big Creek Mining. Decision and Order at 6; Director's Exhibit 7. For 1972, assuming a five-day work week, the ALJ found Claimant worked for Hi Flame Coals for fourteen weeks or seventy days (5 x 14), amounting to 0.56 year of coal mine employment (70/125). Decision and Order at 6. From 1973 to 1981, the ALJ credited Claimant with one full year of coal mine employment for each calendar year (nine years in all) for a combined total of 9.56 years of coal mine employment with Hi Flame Coals. *Id.* For 1987, again assuming a five-day work week, the ALJ credited the bookkeeper's statement that Claimant worked for New Big Creek Mining for twelve weeks, and found Claimant worked for New Big Creek Mining for sixty days (5 x 12) or 0.48 year (60/125) of coal mine employment. *Id.*

For 1982 and 1988 to 1991, the ALJ found Claimant established 3.12 years of coal mine employment based on his SSA earnings records. *Id*. at 7. Based on the absence of evidence regarding the specific beginning and ending dates for 1982 and 1988to 1991, the ALJ relied on Claimant's SSA earnings records and Exhibit 610[6] of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual* and applied the formula

[6] Exhibit 610 to the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, entitled "Average Wage Base," contains the average daily earnings of employees in coal mining and the earnings for those who worked 125 days during a year, and is referenced in 20 C.F.R. §725.101(a)(32)(iii).

at 20 C.F.R. §725.101(a)(32)(iii)[7] to determine the number of days Claimant worked in coal mine employment for each of those years. 20 C.F.R. §725.101(a)(32)(iii); Decision and Order at 6-7; Director's Exhibit 8.

The ALJ divided Claimant's annual earnings for each of the above years from Claimant's SSA earnings records by the daily average earnings from Exhibit 610, and he arrived at a number of working days for each year. Decision and Order at 7 (table) and at n.40. Then, dividing the number of working days by 125, he calculated the fractional year of coal mine employment for each year. *Id*. and at n.41. If the fractional year of coal mine employment totaled 125 days or more, he credited Claimant with one year of coal mine employment. *Id*. Using this method, the ALJ credited Claimant with 3.12 years of coal mine employment for the remaining years of 1982 and 1988 to 1991. *Id*.

Adding the 9.56 years with Hi Flame Coals, 0.48 year with New Big Creek Mining, and 3.12 years for the remaining years of 1982 and 1988 to 1991, the ALJ calculated a total of 13.16 years of qualifying coal mine employment. Decision and Order at 6-7. As the ALJ's method of calculating Claimant's length of coal mine employment is reasonable and in accordance with the law of the Sixth Circuit, we affirm his finding that Claimant established 13.16 years of coal mine employment.[8] *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 400-05 (6th Cir. 2019); *Muncy*, 25 BLR at 1-27; Decision and Order at 6-7; Director's Exhibits 7, 8. Because the ALJ permissibly found Claimant established less than fifteen years of coal mine employment, we affirm his finding Claimant did not invoke the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i).

[7] 20 C.F.R. §725.101(a)(32)(iii) provides that, if the beginning and ending dates of a miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the ALJ 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.

[8] Any error in the ALJ's failure to include the year of 1992 in his calculation is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Even if the ALJ had included 1992 in his calculation, Claimant's earnings of $92.80 in coal mine employment for that year with Ikerd Bandy Company, Incorporated, would only add 0.01 year of coal mine employment to the ALJ's calculation for a total of 13.17 years. *See* Director's Exhibit 8; Employer's Closing Argument at 10 (unpaginated).

Entitlement under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions, 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).

Clinical Pneumoconiosis

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).

In considering whether Claimant established clinical pneumoconiosis, the ALJ noted the record contains seven readings of three x-rays dated January 26, 2018, April 17, 2018, and October 1, 2019. Decision and Order at 9.

Dr. DePonte, a dually-qualified Board-certified radiologist and B reader, interpreted the January 26, 2018 x-ray as positive for pneumoconiosis, while Dr. Meyer, also a Board-certified radiologist and B reader, read it as negative. Director's Exhibit 27 at 3; Employer's Exhibit 1. Dr. DePonte read the April 17, 2018 x-ray as negative for pneumoconiosis whereas Dr. Ramakrishnan, also dually-qualified, read it as positive.[9] Director's Exhibits 15 at 13; 28. The ALJ permissibly found both of these two x-rays were inconclusive given the equal number of positive and negative readings by the dually-qualified radiologists. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *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); Decision and Order at 20; Director's Exhibits 15 at 13; 27 at 3; 28; Employer's Exhibit 1.

Drs. Meyer and Tarver, both dually-qualified radiologists, read the October 1, 2019 x-ray as negative for pneumoconiosis. Employer's Exhibits 3, 4. As there are no positive

[9] Dr. Lundberg, a Board-certified radiologist and B reader, assessed the April 17, 2018 x-ray for film quality only. Director's Exhibit 18.

readings of the x-ray, we affirm the ALJ's finding that it is negative for clinical pneumoconiosis. Decision and Order at 20; Employer's Exhibits 3, 4.

Because the ALJ conducted a proper quantitative and qualitative evaluation of the x-ray evidence, and having found the x-rays are either inconclusive or negative, we affirm his finding that Claimant did not establish pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Staton*, 65 F.3d at 58-60; *Woodward*, 991 F.2d at 321; Decision and Order at 20. As the record contains no biopsy or autopsy evidence, and no medical opinions[10] diagnosing clinical pneumoconiosis for consideration at 20 C.F.R. §718.202(a)(2) or (a)(4), the ALJ permissibly found Claimant did not establish clinical pneumoconiosis at 20 C.F.R. §718.202(a). Decision and Order at 20-21; Claimant Exhibits 1; 2 at 122, 125, 127; 3 at 83, 85-86, 88-89, 91-96, 98-99, 101, 103, 105; 4 at 72, 75, 78.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must demonstrate 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). Claimant can establish legal pneumoconiosis by showing coal dust exposure contributed "in part" to his respiratory or pulmonary impairment. *See Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (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.").

The ALJ considered three medical opinions. Dr. Ajjarapu diagnosed legal pneumoconiosis while Drs. Rosenberg and Broudy did not. Director's Exhibits 15, 22, 25, 29; Employer's Exhibit 2. We see no error in the ALJ's finding that Dr. Ajjarapu's opinion is not adequately reasoned to support Claimant's burden of proof.

Dr. Ajjarapu performed the Department of Labor's complete pulmonary evaluation of Claimant and diagnosed chronic obstructive pulmonary disease (COPD) based on Claimant's reported symptoms of dyspnea and wheezing on exertion. Director's Exhibit 15 at 6. She noted the most common causes of recurrent wheezing are asthma and COPD

[10] Drs. Ajjarapu, Rosenberg, and Broudy did not diagnose clinical pneumoconiosis. Decision and Order at 13-16; Director's Exhibits 15 at 7, 13; 22; 25; 29 at 3-10; Employer's Exhibit 2 at 3. The ALJ correctly noted the Claimant's treatment records include a history of coal workers' pneumoconiosis, but he permissibly found they are not credible because there is no explanation as to the basis for that history. *Clark v. Karst-Robins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 22; Claimant's Exhibits 2-4.

which cause narrowing and bronchospasms in the large and small airways of the lungs. *Id.* She attributed Claimant's COPD to coal mine dust and tobacco smoke exposure. *Id.* In her first of two supplemental opinions, Dr. Ajjarapu stated Claimant's reported symptoms of wheezing and dyspnea "can exist in COPD conditions in advanced stages, and therefore, he has legal pneumoconiosis and this arose out of 12 year[s] proven coal mine employment." Director's Exhibit 22; *see also* Director's Exhibit 25 (her second supplemental opinion attributing Claimant's pulmonary disability to his coal mine employment).

The ALJ permissibly found that, while Dr. Ajjarupu noted Claimant's smoking and coal mine dust exposure occurred around the same time and it was difficult to quantify the contribution of either exposure to his COPD, she did not adequately explain why she believed Claimant's coal mine dust exposure materially and adversely affected his respiratory condition. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 21; Director's Exhibits 15, 22, 25. Because the ALJ acted within his discretion in finding Dr. Ajjarapu's opinion "conclusory" and therefore not sufficiently reasoned, we affirm the ALJ's determination. *See Grundy Mining Co. v. Flynn*, 353 F.3d 467, 483 (6th Cir. 2003) (conclusory statements do not reflect reasoned medical judgment); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark*, 12 BLR at 1-155; Decision and Order at 21; Director's Exhibits 15 at 6-7; 22; 25. As the Sixth Circuit has held, we "may not reweigh [that] evidence, substitute [our] judgment for that of the administrative law judge, or reverse the administrative law judge's decision simply because 'we would have taken a different view of the evidence were we the trier of facts.'" *Shepherd*, 915 F.3d at 398 (quoting *Ramey v. Kentland Elkhorn Coal Corp*., 755 F.2d 485, 486 (6th Cir. 1985)).

The ALJ also accurately observed the opinions of Drs. Rosenberg and Broudy cannot assist Claimant in establishing legal pneumoconiosis as neither physician diagnosed the disease. Decision and Order at 21; Director's Exhibit 29 at 3-10; Employer's Exhibit 2 at 3-4. Although Claimant's treatment records note a history or diagnoses of chronic bronchitis, coal workers' pneumoconiosis, asthma, and COPD, the ALJ permissibly gave them little weight as they do not provide a basis for the diagnoses. *Clark*, 12 BLR at 1-155; Decision and Order at 21-22; Claimant's Exhibits 2 at 122, 125, 127; 3 at 82-86, 88-96, 98, 99, 101, 103-114; 4 at 67, 69, 72, 75, 78.

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if the evidence is found insufficient to establish a required element of entitlement. *See Ondecko*, 512 U.S. at 281; *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because it is supported by substantial evidence, we affirm the ALJ's determination that Claimant did

not establish legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Rowe*, 710 F.2d at 255; Decision and Order at 20-21.

As Claimant failed to establish pneumoconiosis under any of the subsections of 20 C.F.R. §718.202(a), we affirm the ALJ's finding that Claimant did not therefore establish a change in an applicable condition of entitlement or entitlement under 20 C.F.R. Part 718. 20 C.F.R §§718.202, 725.309; *see Anderson*, 12 BLR at 1-112; *Trent,* 11 BLR at 1-27; Decision and Order at 22.

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

JONATHAN ROLFE
Administrative Appeals Judge