U.S. Department of Labor

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

BRB No. 19-0525 BLA

HENRY N. MADDEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ICG HAZARD, LLC,	)	
Self-Insured by ARCH COAL,	)	
INCORPORATED	)	DATE ISSUED: 11/30/2020
	)	
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 of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Henry N. Madden, Wooten, Kentucky.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for Employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] Administrative Law Judge Larry A. Temin's Decision and Order Denying Benefits (2018-BLA-05041) rendered on a claim filed on October 29, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge found Claimant established 12.98 years of underground coal mine employment and thus could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). Considering Claimant's entitlement under 20 C.F.R. Part 718, the administrative law judge found he established legal (but not clinical pneumoconiosis[3]) and a totally disabling respiratory impairment. However, the administrative law judge also found Claimant did not establish his total disability is due to legal pneumoconiosis and denied benefits. 20 C.F.R. §718.204(c).

On appeal, Claimant generally challenges the administrative law judge's denial of benefits. Employer responds, arguing the administrative law judge erred in finding Claimant established legal pneumoconiosis but urging affirmance of his findings on disability causation and the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

[1] Diane Jenkins, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on Claimant's behalf that the Benefits Review Board review the administrative law judge's decision, but Ms. Jenkins is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that he 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) (2012); 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).

In an appeal a claimant files without the assistance of counsel, the Benefits Review Board considers whether substantial evidence supports the decision and order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). 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 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

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. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The administrative law judge noted Claimant alleged fifteen years of underground coal mine employment. Decision and Order at 4; Director's Exhibits 2, 22, 52. The record includes his work history form, his Social Security Administration (SSA) earnings record, and his hearing testimony. Director's Exhibits, 3, 5. Claimant testified all of his coal mine employment was underground or occurred in underground mines. Hearing Transcript at 16, 19.

Claimant testified about the coal companies he worked for but was unable to remember the exact beginning and ending dates for each of them. Decision and Order at 5. He stated he last worked for Employer on December 2, 2011. *Id*. Because the administrative law judge was unable to determine the beginning and ending dates, he found the SSA earnings records most probative for determining Claimant's length of coal mine employment. *Id.*; Director's Exhibit 5. He found Claimant had earnings with Simpson Mining, Incorporated from 1997 to 2003, Motivation Enterprise from 2004 to 2006, Blue Diamond Coal Company from 2006 to 2009 and Employer/ICG Hazard from 2010 to 2011.[5] Decision and Order at 5. The administrative law judge found Claimant worked for

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 22 at 10; Hearing Transcript at 16.

[5] Although Claimant earned wages from Employer from 2010 to 2012, his SSA earnings record identifies Pine Branch Mining Resources, LLC as the employer in 2012

a single employer each year from 1998-2002, 2005, 2007 and 2008, and therefore he inferred that Claimant was employed for a full calendar year and entitled to the presumption he had 125 working days in each of those years for a total of eight years of coal mine employment.[6] 20 C.F.R. § 725.101(a)(32)(ii); *see Shepherd v. Incoal, Inc*., 915 F.3d 392, 401-02 (6th Cir. 2019); Decision and Order at 5. For 2011, the administrative law judge credited Claimant with an additional year of coal mine employment, noting that while Claimant testified he last worked for Employer on December 2, 2011, he earned $85,514.56 for that year, which is sufficient to indicate that he had more than 125 working days. *Id.* at 5-6.

For the remaining years (1996, 1997, 2003, 2004, 2006, 2009, 2010), the administrative law judge found Claimant's wages reflect he was either employed for part of a calendar year or worked for multiple employers within a calendar year. Decision and Order at 6. Because the beginning and ending dates of Claimant's employment could not be determined, he applied the formula at 20 C.F.R. §725.101(a)(32)(iii)[7] and credited Claimant with additional 3.98 years of coal mine employment.[8] *See Shepherd*, 915 F.3d at

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because Pine Branch acquired ICG after Claimant's employment ended. Decision and Order at 5 n.13; Director's Exhibit 5; Hearing Transcript at 41-42.

[6] The administrative law judge considered Claimant's testimony that Simpson Mining sometimes paid him in cash and that he was occasionally laid off, but found his testimony too vague to rebut the presumption that he was employed for 125 days. Decision and Order at 5.

[7] The regulation provides that if the beginning and ending dates of the miner's employment cannot be ascertained, or the miner's employment lasted less than a calendar year, the administrative law judge may determine the length of the miner's work history by dividing his yearly income by the average daily earnings of employees in the coal mining industry, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS wage information is published in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, entitled "Average Wage Base."

[8] The administrative law judge divided Claimant's earnings for each year by the average daily earnings reported in Exhibit 610 of the *BLBA Procedure Manual*. Decision and Order at 6. Where Claimant's wages exceeded the 125-day average, the administrative law judge credited him with a full year of employment; where Claimant's wages were less, the administrative law judge credited him with a fraction of the year based on the ratio of days worked to 125. *Id.*; *see* 20 C.F.R. §725.101(a)(32)(i).

401-02; Decision and Order at 6. Thus, the administrative law judge found Claimant established a total of 12.98 years of underground coal mine employment from 1996 through 2011.[9] Decision and Order at 6. As the administrative law judge's method of calculating Claimant's length of coal mine employment was reasonable and his finding of 12.98 years is supported by substantial evidence, we affirm it. *See Shepherd*, 915 F.3d at 401-02; *Muncy*, 25 BLR at 1-27; Decision and Order at 6. Because Claimant did not establish fifteen years of coal mine employment, we further affirm the administrative law judge's determination he did not invoke the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4)(2012); 20 C.F.R. §718.305; Decision and Order at 12.

Entitlement under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3)[10] 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.[11] *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).

Clinical Pneumoconiosis

The administrative law judge considered six interpretations of two x-rays. Each of the physicians interpreting the x-rays are dually-qualified as Board-certified radiologists and B readers. Decision and Order at 8. Drs. DePonte and Miller read the December 9,

[9] The administrative law judge did not include Claimant's 2012 income in his calculation. Claimant's SSA record reveals income of $200 from ICG Hazard in 2012 that, even if credited, would not result in Claimant having at least fifteen years of coal mine employment. Director's Exhibit 5. Based on the average daily wage reported in Exhibit 610 of the *BLA Procedure Manual*, this constitutes approximately one day of work. Director's Exhibit 5.

[10] Claimant cannot invoke 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.

[11] We affirm, as unchallenged on appeal, the administrative law judge's finding Claimant established total disability. 20 C.F.R. §718.204(b)(2); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

2015 x-ray as positive for pneumoconiosis, while Dr. Shipley read it as negative. Director's Exhibits 9, 12, 15. The administrative law judge permissibly found the December 9, 2015 x-ray positive for clinical pneumoconiosis based on a preponderance of positive readings by dually qualified radiologists. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); *See* Decision and Order at 14.

Drs. Tarver and Seaman read the October 20, 2016 x-ray as negative for pneumoconiosis, while Dr. DePonte read it as positive. Director's Exhibit 16, 19; Employer's Exhibit 1. The administrative law judge permissibly found the October 20, 2016 x-ray negative for clinical pneumoconiosis based on a preponderance of negative interpretations by the dually qualified radiologists. *See Woodward*, 991 F.2d at 321; Decision and Order at 14.

Because one x-ray was positive for pneumoconiosis and the other negative for the disease, the administrative law judge permissibly found the weight of the x-ray evidence inconclusive. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward*, 991 F.2d at 321; 20 C.F.R. §718.202(a)(1); Decision and Order at 15. The administrative law judge further noted the x-rays in the treatment records are silent regarding the presence or absence of pneumoconiosis. Decision and Order at 14-15; Director's Exhibit 17; Claimant's Exhibits 3, 4. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence does not establish Claimant has clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 272-76 (1994).

The administrative law judge also considered three medical opinions. Decision and Order at 15. Dr. Ajjarapu diagnosed clinical pneumoconiosis, while Drs. Jarboe and Dahhan did not. Decision and Order at 15; Director's Exhibits 9, 18; Employer's Exhibits 2, 3. The administrative law judge permissibly found Dr. Ajjarapu's opinion unpersuasive because she relied on Dr. DePonte's positive reading of the December 9, 2015 x-ray to diagnose clinical pneumoconiosis when he found the weight of the x-ray evidence inconclusive. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 15; Director's Exhibit 9. We therefore affirm the administrative law judge's finding that the medical opinion evidence does not establish clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 15. We further affirm his overall finding that Claimant did not satisfy his burden to establish he has clinical pneumoconiosis.[12] Decision and Order at 15.

[12] There is no biopsy evidence in the record. 20 C.F.R. §718.202(a)(2).

Disability Causation

To establish he is totally disabled due to pneumoconiosis, Claimant must establish pneumoconiosis was a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1).

Dr. Ajjarapu diagnosed legal pneumoconiosis in the form of chronic bronchitis due in part to coal mine dust exposure and smoking. Director's Exhibit 9. She also opined Claimant's pulmonary function study revealed a disabling respiratory impairment. *Id*. Regarding the cause of Claimant's respiratory disability, she stated:

> He does have extensive coronary artery disease, with low EF (per patient). He has extensive tobacco use history (approximately 44 years) and he has moderate obesity. Given all the coexisting diseases and risk factors, even though he has work history in the mines and was exposed to coal dust, *his underlying pulmonary impairment is more a result of other factors mentioned and less to do with his occupational exposure*.

Id. (emphasis added).

The administrative law judge interpreted Dr. Ajjarapu's "statement to mean that she does not feel that the Claimant's pneumoconiosis or occupational exposure to coal mine dust was a substantially contributing cause and that it did not have a material adverse effect on or materially worsen the miner's respiratory or pulmonary condition." Decision and Order at 23. He noted that Dr. Ajjarapu diagnosed legal pneumoconiosis in the form of chronic bronchitis due to smoking and coal mine dust exposure, but did not attribute the legal pneumoconiosis/chronic bronchitis "to the Claimant's disability in any way," and "did not assert that [simple clinical pneumoconiosis] played any role in causing the abnormal [pulmonary function study] results or his disability." *Id.; see* 20 C.F.R. §718.204(c).

The administrative law judge has discretion to weigh the evidence, draw appropriate inferences, and determine credibility. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002). Because the administrative law judge drew a permissible inference from Dr. Ajjarapu's statements and acted within his discretion in finding her opinion inadequate to satisfy Claimant's burden of proof, we affirm his finding that Claimant did not establish total disability due to pneumoconiosis.[13] *See* 20 C.F.R. §718.204(c); *Napier*, 301 F.3d at

[13] Neither Dr. Dahhan nor Dr. Jarboe opined Claimant is totally disabled due to pneumoconiosis. Director's Exhibit 18; Employer's Exhibits 2, 3. Because Employer

713-714; *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); Decision and Order at 24-25. As Claimant did not establish disability causation, a necessary element of entitlement, benefits are precluded. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

asserts the administrative law judge's finding Claimant did not establish disability causation renders his alleged errors on legal pneumoconiosis harmless, we need not address Employer's arguments on legal pneumoconiosis. *See Larioni v. v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 10 n.2.