U.S. Department of Labor

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

BRB No. 21-0188 BLA

THOMAS L. KRUISE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TANOMA MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 11/15/2022
OLD REPUBLIC GENERAL INSURANCE CORPORATION	)	
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Deanna L. Istik (Sutter Williams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Denying Benefits (2019-BLA-05742) rendered on a claim filed on April 23, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with fourteen years and eight months of underground coal mine employment, thus finding he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Considering entitlement to benefits under 20 C.F.R. Part 718, the ALJ found Claimant established a totally disabling respiratory or pulmonary impairment but did not establish clinical or legal pneumoconiosis.[2] 20 C.F.R. §§718.202(a), 718.204(b)(2). She therefore denied benefits.

On appeal, Claimant argues the ALJ erred in finding less than fifteen years of qualifying coal mine employment and no legal pneumoconiosis.[3] Employer and its Carrier (Employer) respond, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

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

[1] 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) (2018); *see* 20 C.F.R. §718.305.

[2] "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). "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).

[3] We affirm, as unchallenged on appeal, the ALJ's determination that the evidence does not establish clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710, 1-711 (1983); Decision and Order at 17, 19.

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 Assocs., Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption — 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 surface coal mines in conditions "substantially similar" to underground mines. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing the length of his coal mine employment. *See 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 the ALJ's determination if it is based on a reasonable method of calculation and supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

In evaluating Claimant's length of coal mine employment, the ALJ considered his deposition testimony, CM-911a and CM-913 forms, United Mine Workers of America (UMWA) pension documents, and Social Security Administration (SSA) earnings record.[5] Decision and Order at 5-6; Claimant's Exhibit 4; Director's Exhibits 3-8. Claimant testified that he worked as a miner from April 1975 to December 1991 with a one-year break from April 1982 until being rehired in April 1983.[6] Claimant's Exhibit 4 at 4-5. The ALJ found this period of employment totals fifteen years and eight months (a period of sixteen years and eight months, minus one intervening year of unemployment).

The ALJ found Claimant's testimony consistent with the employment history he reported on his CM-911a and CM-913 forms. Decision and Order at 5; Director's Exhibits 3-4. The ALJ noted, however, the UMWA pension records credited Claimant with fifteen years but identified no employment after December 1990. Decision and Order at 5;

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[5] There was no hearing testimony as the ALJ granted the parties' request for a decision on the record. Decision and Order at 3.

[6] Claimant explained that his employment "gap" between April 1982 until April 1983 occurred while he was waiting to be called to Tanoma Mining Company after Barnes and Tucker Mining Company shut down the mine where he worked. Claimant's Exhibit 4 at 15.

Director's Exhibits 5-6. Claimant's SSA earnings record was largely consistent with his testimony, but it too reflected no coal mine employment in 1991. Decision and Order at 5-6; Director's Exhibits 7-8. While the ALJ found Claimant's testimony credible, he concluded Claimant must have "mis-remembered" his last year of coal mine employment as 1991 because there was no documentation to indicate he was paid for coal mine work that year. Decision and Order at 6. Thus, the ALJ did not credit Claimant with any coal mine employment in 1991 but found his coal mining career spanned fifteen years and eight months from April 1975 to December 1990. Subtracting from this period the one year Claimant testified he was unemployed beginning in April 1982 until his rehiring in April 1983, the ALJ determined Claimant established fourteen years and eight months of underground coal mine employment.[7] Decision and Order at 6.

On appeal, Claimant challenges the ALJ's determination of his employment in 1982. He argues the ALJ failed to explain or analyze the evidence regarding his employment in 1982 in accordance with the Administrative Procedure Act (APA).[8] Claimant's Brief at 4. He contends it is unclear how long he worked in April 1982 before the break in his coal mine employment began, and thus the ALJ erred by not applying the formula at 20 C.F.R. §725.101(a)(32)(iii)[9] to calculate the partial year of coal mine employment in 1982. Claimant's Brief at 4, 5. We disagree.

[7] We note the period beginning in April 1975 and ending in December 1990 covers fifteen years and *nine* months. Claimant does not, however, allege any error with the ALJ's overall finding that his coal mining career spanned fifteen years and eight months. Regardless, any error in the ALJ's conclusion in this regard would be harmless because, as explained below, the ALJ permissibly found Claimant was unemployed for one year during this period, leaving Claimant with less than the fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption.

[8] The Administrative Procedure Act, 5 U.S.C. §§500-591, requires that every adjudicatory decision 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[9] Section 725.101(a)(32)(iii) provides, in pertinent part:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following

Contrary to Claimant's argument, based on his testimony, CM-911a and CM-913 forms, and SSA earnings record, the ALJ permissibly determined Claimant worked as a coal miner from April 1975 until December 1990, except for a one-year period of unemployment from April 1982 until he was rehired in April 1983. Decision and Order at 6; Director's Exhibits 3-4; Claimant's Exhibit 4 at 5, 15. The ALJ further permissibly determined Claimant's testimony that he worked through December 1991 was unreliable because it was inconsistent with his SSA earnings record and UMWA records, which did not identify any coal mining work in 1991. Decision and Order at 6; Director's Exhibits 5-8; *see Clark v. Barnwell Coal Co*., 22 BLR 1-277, 1-280 (2003); *Henderson v. Director, OWCP*, 7 BLR 1-866, 1-869-1-870 (1985); *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984). In accordance with the APA, the ALJ rationally explained her finding that Claimant established less than fifteen years of coal mine employment. Decision and Order at 6; 5 U.S.C. §557(c)(3)(A); *see Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989); *see also Vickery*, 8 BLR at 1-432.

Claimant asserts application of 20 C.F.R. §725.101(a)(32)(iii) would have resulted in 0.83 of a year of qualifying coal mine employment for 1982 and therefore would have established he had 15.83 years of coal mine employment.[10] Claimant's Brief at 6. However, the ALJ was not required to use the formula at 20 C.F.R. §725.101(a)(32)(iii); the regulation provides an ALJ "may" use the formula when the beginning and ending dates of employment are unknown. The ALJ need only use a reasonable method to calculate a miner's length of coal mine employment, *see Muncy*, 25 BLR at 1-21, and the regulations instruct the ALJ to determine the beginning and ending dates of coal mine employment where possible. 20 C.F.R. §725.101(a)(32)(ii) ("To the extent the evidence permits," the fact-finder must first ascertain the "beginning and ending dates of all periods of coal mine employment . . . ."). We therefore see no error in the ALJ's finding that Claimant worked as a coal miner for less than fifteen years, i.e., a total work history from

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> formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

20 C.F.R. §725.101(a)(32)(iii).

[10] It is unclear how Claimant calculates this amount. With the exception of 1982, Claimant concedes the ALJ's findings are "in accord with applicable law." Claimant's Brief at 6. Including Claimant's proposed calculation of 0.83 of a year for 1982 would appear to result in greater than fifteen years of employment, but not the 15.83 he alleges; moreover, as discussed below, Claimant's calculation seeks credit for at least one additional month not supported by his testimony that he was unemployed for one year.

April 1975 to December 1990, minus one year of unemployment beginning in April 1982 and ending upon his rehiring in April 1983.[11]

The ALJ reasonably utilized the beginning and ending dates of employment and excluded from her calculation the one year period Claimant was unemployed, with such unemployment beginning in April 1982 and ending with his rehiring in April 1983, consistent with Claimant's testimony that he was not engaged in coal mine employment during that time.[12] *See Muncy*, 25 BLR at 1-21*; Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204-05 (2016) (noting that direct evidence of periods of employment includes sworn testimony). Therefore, we affirm the ALJ's determination that Claimant established less than fifteen years of coal mine employment as based on a reasonable method of computation and supported by substantial evidence. Decision and Order at 6; *see Muncy*, 25 BLR at 1-21. Consequently, we also affirm her finding that Claimant did not invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.305; Decision and Order at 7.

20 C.F.R. Part 718 — Pneumoconiosis

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, 1-2 (1986) (en banc).

[11] Claimant's credited testimony establishes that he worked for Barnes and Tucker "until" April 1982 and was out of work for "one year" when he started working for Tanoma Mining "in April 1983." Claimant's Exhibit 4 at 5, 15. It is thus clear from the ALJ's findings that Claimant was not credited with employment for the month of April 1982, but *was* credited for the month of April 1983, as that is when Claimant testified he started working again after one year of unemployment. *Id*. at 15. Requiring the ALJ to credit Claimant with an additional month of coal mine employment in April 1982 would result in a period of only eleven months during which Claimant was unemployed, contrary to Claimant's own testimony, and the ALJ's crediting thereof, that he was out of work for one year until being rehired in April 1983.

[12] In other words, because Claimant was rehired in April 1983, his first month of unemployment was April 1982 and his last month of unemployment was March 1983, a period of twelve months, or one year, as found by the ALJ.

To establish legal pneumoconiosis, Claimant must prove he had a "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(a)(2), (b).

The ALJ considered the medical opinions of Drs. Zlupko, Rosenberg, and Basheda. Decision and Order at 18; Director's Exhibit 13; Employer's Exhibits 2-4, 7-8. Dr. Zlupko diagnosed legal pneumoconiosis based on Claimant's work history of more than fifteen years and abnormal arterial blood gas results, while Drs. Rosenberg and Basheda opined Claimant's blood gas abnormalities are unrelated to his coal mine dust exposure. Director's Exhibit 13; Employer's Exhibits 2, 4, 8. The ALJ found Dr. Zlupko's opinion inadequately explained and accorded greater weight to the opinions of Drs. Rosenberg and Basheda because their opinions are well-reasoned and supported by the objective evidence. Decision and Order at 19. She therefore concluded the medical opinion evidence was insufficient to support a finding of legal pneumoconiosis. *Id*.

Claimant argues the ALJ erred in finding he did not establish legal pneumoconiosis. Claimant's Brief at 7, 12. We disagree.

Contrary to Claimant's argument, the ALJ adequately explained why she discredited Dr. Zlupko's opinion. *Id.* at 8. The ALJ permissibly found Dr. Zlupko's opinion poorly reasoned because he did not "provide adequate explanation" as to why he attributed Claimant's abnormal arterial blood gas results to his coal mine dust exposure.[13] *See Lango v. Director, OWCP*, 104 F.3d 573, 578 (3d Cir. 1997) (assertion which does not explain how the doctor reached the opinion expressed or contain his reasoning does not qualify as a reasoned medical opinion); Decision and Order at 18. The ALJ also accurately found that Dr. Rosenberg's and Dr. Basheda's opinions do not support Claimant's burden to establish legal pneumoconiosis. Decision and Order at 18.

As the trier-of-fact, the ALJ has broad discretion to assess the credibility of the medical opinions and assign them appropriate weight. *See Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986); *see also Compton v. Island Creek Coal Co.*, 211 F.3d 203, 211 (4th Cir. 2000). Claimant's contention amounts to a request to reweigh the evidence, which the Board is not empowered to do. *Anderson*, 12 BLR at 1-113.

[13] Dr. Zlupko indicated: "[Patient] has presumption of [coal workers' pneumoconiosis] based on a work history [greater than fifteen years] and abnormal [arterial blood gases]." Director's Exhibit 13 at 5.

As Dr. Zlupko's opinion is the only evidence that supports a finding of legal pneumoconiosis, we affirm the ALJ's finding that Claimant failed to establish pneumoconiosis.[14] 20 C.F.R. §718.202(a); Decision and Order at 19. Claimant's failure to establish pneumoconiosis, an essential element of entitlement, precludes an award of benefits. *Anderson*, 12 BLR at 1-112; *Trent,* 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[14] Because the ALJ permissibly found Dr. Zlupko's opinion poorly reasoned, we need not address Claimant's allegations of error regarding the ALJ's crediting of Drs. Rosenberg's and Basheda's opinions. Claimant's Brief at 8-12. As the ALJ indicated, their opinions do not support Claimant's burden of proof. Decision and Order at 18; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).