U.S. Department of Labor

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

BRB No. 19-0526 BLA

GEORGE D. HALL Claimant-Petitioner v. HARLAN CUMBERLAND COAL COMPANY, LLC and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/29/2020 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

George D. Hall, Totz, Kentucky.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Kathleen H. Kim (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] Administrative Law Judge Jonathan C. Calianos's Decision and Order Denying Benefits (2018-BLA-05149) rendered on a claim filed on October 11, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with ten years of underground coal mine employment. Because Claimant did not have at least fifteen years of coal mine employment, the administrative law judge found he could not invoke the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He also found the record lacks evidence of complicated pneumoconiosis and thus 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.

Turning to whether Claimant is entitled to benefits under 20 C.F.R. Part 718, the administrative law judge "[a]ssum[ed], for the purposes of this decision, that [Claimant] has . . . established that he has pneumoconiosis related to coal dust exposure" and accepted the parties' stipulation that Claimant is totally disabled. Decision and Order at 5-6; 20 C.F.R. §§718.201, 718.202(a), 718.203(b), 718.204(b)(2). The administrative law judge further found, however, that Claimant did not establish that his total disability is due to pneumoconiosis because the physician who examined him on behalf of the Department of Labor (DOL) did not opine on the extent to which pneumoconiosis contributes to his total disability. 20 C.F.R. §718.204(c). He therefore denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, (the Director) has filed a limited response conceding that she failed to provide Claimant with a complete pulmonary evaluation and requesting a remand to the district director for the DOL physician to complete her opinion. Employer has filed a reply

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

[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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

contending that the Director waived the complete pulmonary evaluation issue and arguing that Claimant received a complete pulmonary evaluation.

As Claimant filed this appeal without the assistance of counsel, the Benefits Review Board considers whether substantial evidence supports the Decision and Order Denying Benefits. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

The Section 411(c)(3) Presumption – Complicated Pneumoconiosis

The record contains no evidence that Claimant has complicated pneumoconiosis. We therefore affirm the administrative law judge's finding that Claimant failed to invoke the irrebuttable presumption of total disability due to pneumoconiosis. *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 6 n.4.

The 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 surface coal mines in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4) (2018); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). Claimant bears the burden to establish the number of years he worked in coal mine employment. *Mills v. Director, OWCP*, 348 F.3d 133, 136 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). The Board will uphold an administrative law judge's determination based on a reasonable method of calculation that is supported by substantial evidence. *Muncy*, 25 BLR at 1-27.

The administrative law judge noted the parties stipulated Claimant has at least ten years of underground coal mine employment, but disagreed as to whether he has more than ten years. Decision and Order at 4. The record reflects that Claimant alleged approximately fourteen to fifteen years of coal mine employment between 1975 or 1976 and 1990[4] with Benham Coal Company, U.S. Steel Coal Company, and Harlan

[3] The Board will apply the law 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 3.

[4] Claimant indicated on his Employment History Form that he began his coal mine employment with Benham Coal Company during the summer of 1976, but later testified at

Cumberland Coal Company. Director's Exhibits 3, 4. The administrative law judge considered Claimant's descriptions of his coal mine employment history, his deposition testimony regarding his coal mine employment, and his Social Security earnings records. Decision and Order at 4; Director's Exhibits 3, 4; Employer's Exhibit 10. The administrative law judge found that Claimant did not establish at least fifteen years of coal mine employment and thus could not benefit from the Section 411(c)(4) presumption. Decision and Order at 4-6.

Substantial evidence supports this finding. The administrative law judge accurately noted Claimant's deposition testimony that he did not work in coal mine employment from 1982 to 1984 because he was laid off during that period. Decision and Order at 4; Employer's Exhibit 10 at 9. Additionally, the administrative law judge accurately noted that Claimant's earnings records showed he was employed by Marathon Oil Corporation in 1980 and part of 1981, and he reasonably found Claimant did not establish this work was coal mine employment.[5] *See Mills*, 348 F.3d at 136; *Kephart*, 8 BLR at 1-186; Director's Exhibit 5; Employer's Exhibit 10 at 7. Deducting these periods from Claimant's alleged years of coal mine employment results in less than fifteen years. We therefore affirm the administrative law judge's finding Claimant did not invoke the Section 411(c)(4) presumption. Decision and Order at 4-5; *Muncy*, 25 BLR at 1-29.

Part 718 Entitlement

Without the benefit of the statutory 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 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).

After "[a]ssuming . . . that [Claimant] has . . . pneumoconiosis related to coal dust exposure" and accepting the parties' stipulation that he is totally disabled, the administrative law judge considered disability causation. To establish his total disability is due to pneumoconiosis, Claimant must prove that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20

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a deposition that he began his coal mine employment in either 1975 or 1976. Employer's Exhibit 10 at 6.

[5] Claimant testified he could not recall working for Marathon Oil Corporation in 1980 and 1981 and stated it may have been a gas station. Employer's Exhibit 10 at 7.

C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); *see Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 599-601 (6th Cir. 2014). The "cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical opinion." 20 C.F.R. §718.204(c)(2).

The administrative law judge reviewed the opinion of Dr. Ajjarapu, who stated only that Claimant's disabling "impairment is due in part to his work in the coal mines."[6] Director's Exhibit 9 at 7. The administrative law judge found that "[b]ecause Dr. Ajjarapu [did not] opine[] on the extent that [Claimant's] pneumoconiosis played a role in his disability," her opinion was insufficient to establish that pneumoconiosis is a substantially contributing cause of Claimant's total disability. Decision and Order at 10. The record reflects that Dr. Ajjarapu diagnosed both clinical and legal pneumoconiosis,[7] but did not specifically address the extent to which either disease contributes to Claimant's total disability. Director's Exhibit 9 at 7. We must, however, vacate the administrative law judge's denial of benefits. Dr. Ajjarapu failed to address the issue of disability causation; therefore, Claimant did not receive a complete pulmonary evaluation.

Complete Pulmonary Evaluation

The Act requires that "[e]ach miner who files a claim . . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges*, 18 BLR at 1-89-90. To fulfill its obligations under the Act, the DOL must

[6] The administrative law judge also considered Dr. Vuskovich's and Dr. Rosenberg's opinions that Claimant's total disability is unrelated to pneumoconiosis. Employer's Exhibits 8, 9, 11, 12. He discredited their opinions because they did not diagnose pneumoconiosis. Decision and Order at 9.

[7] "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). The definition 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).

"provid[e] 'a medical opinion that addresses all of the essential elements of entitlement.'" *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 640 (6th Cir. 2009), *quoting Smith v. Martin Cnty. Coal Corp.*, 233 F. App'x 507, 512 (6th Cir. 2007).

The Director concedes the DOL failed to satisfy its obligation because, as the administrative law judge found, Dr. Ajjarapu, who conducted the DOL-sponsored pulmonary evaluation, failed to address the extent to which pneumoconiosis contributes to Claimant's disabling pulmonary impairment. Director's Brief at 2-3. Because Dr. Ajjarapu's opinion does not address an essential element of entitlement, i.e., whether Claimant is totally disabled due to pneumoconiosis, the Director requests the case be remanded for Dr. Ajjarapu to provide a supplemental report addressing the issue.[8] *Id.* Based on these facts, and given the Director's concession that the DOL failed to provide Claimant with a complete pulmonary evaluation that the Act requires, we grant the Director's request to remand this case. 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406; *Greene*, 575 F.3d at 641-42; *R.G.B.* [*Blackburn*] *v. S. Ohio Coal Co.*, 24 BLR 1-129, 1-137-140 (2009) (en banc). Consequently, we vacate the administrative law judge's denial of benefits.

[8] We reject Employer's contention that the Director waived whether Claimant received a complete pulmonary evaluation by failing to raise it below. The Director is statutorily mandated to provide a complete pulmonary evaluation upon a miner's request, and the Board has held that the failure to apply a statutory provision constitutes an exception to the waiver rule. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994); Employer's Reply Brief at 1-3.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, vacated in part, and the case is remanded to the district director for further development of the evidence. After the case is returned to the administrative law judge, he must determine whether the evidence establishes that Claimant has pneumoconiosis[9] and whether his total disability is due to pneumoconiosis.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[9] The administrative law judge stated he would "[a]ssum[e], for the purposes of this decision, that [Claimant] has also established that he has pneumoconiosis . . . ." Decision and Order at 6. He did not, however, render a finding on the issue.