U.S. Department of Labor

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

BRB No. 21-0380 BLA

LARRY G. JUSTUS	)	
Claimant-Petitioner	)	
v.	)	
ROYALTY SMOKELESS COAL COMPANY, INCORPORATED	)	
and	)	
ALPHA NATURAL RESOURCES	)	DATE ISSUED: 9/27/2022
Employer/Carrier	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Carrie Bland, Administrative Law Judge, United States Department of Labor.

Larry G. Justus, Panther, West Virginia.

Steven Winkelman (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without representation, Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Denying Benefits (2016-BLA-05648) rendered on a subsequent claim filed on March 10, 2015,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 7.03 years of coal mine employment and therefore found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] She also found Claimant did not establish complicated pneumoconiosis and thus 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); 20 C.F.R. §718.304. Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant failed to establish total disability or the existence of pneumoconiosis. 20 C.F.R. §§718.202, 718.204(b)(2). Thus, she found Claimant failed to establish a change in an applicable condition of entitlement,[3] 20 C.F.R. §725.309, and denied benefits.

[1] Claimant filed three previous claims for benefits. Director's Exhibits 1-3. The district director denied his most recent prior claim, filed on February 12, 2003, for failure to establish any element of entitlement. Director's Exhibit 3. In the current claim, ALJ Paul Almanza held a hearing on December 14, 2016. On July 24, 2019, the parties were sent a Notice and Order informing them of their right to have the case reassigned to a new and properly appointed ALJ in light of the Supreme Court's decision in [Lucia v. SEC…add full citation] that certain federal ALJs were not constitutionally appointed, entitling litigants who timely raised the issue to a new hearing before a different ALJ. July 24, 2019 Notice and Order. The order also stated that if any party failed to respond, the case would be reassigned. Because Claimant did not respond, the case was reassigned to ALJ Bland on August 17, 2020. She notified the parties that she intended to issue a Decision and Order based on the existing record. Aug. 17, 2020 Notice of Reassignment. There is no indication in the record that any party objected to her proceeding in that fashion.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he had 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.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim, the ALJ must also deny the subsequent claim unless she 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)(1); *White v. New*

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer has not filed a response brief. The Director, Office of Workers' Compensation Programs, filed a response urging affirmance of the denial.[4]

In an appeal filed by an unrepresented Claimant, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is 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).

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

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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). Because Claimant did not establish any element of entitlement his prior claim, he had to submit evidence establishing at least one element to obtain review of his current claim on the merits. *See id.*; *White*, 23 BLR at 1-3.

[4] Before ALJ Almanza, Employer's counsel filed a Motion to Withdraw as Counsel on July 6, 2016, due to Employer's Chapter 11 Bankruptcy. July 6, 2010 Motion to Withdraw as Counsel. ALJ Almanza granted the motion but ordered the parties to show cause why the matter should not be remanded to the district director. Sept. 15, 2016 Order. In response, the Director requested that ALJ Almanza dismiss Employer as the responsible operator and designate the Trust Fund as liable for any benefits, if awarded. Sept. 26, 2016 Director's Response. Though ALJ Almanza did not issue a subsequent order on the matter, he again granted Employer's counsel's motion to withdraw during the hearing on December 14, 2016. Hearing Transcript at 4-5. There is no evidence Employer continued to participate in this case.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia and West Virginia. *See Shupe v. Director*, *OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 28.

calculation that is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The ALJ considered Claimant's employment history form, Social Security Administration (SSA) earnings records, pay stubs, W-2 forms, and Claimant's hearing testimony. Decision and Order at 4. Although Claimant alleged ten years of coal mine employment in his application for benefits, Director's Exhibit 5, he stated during the hearing that he may have worked in coal mines from 1972 to 1992. Hearing Tr. at 19, 21-27. Given the discrepancy, the ALJ rationally relied on Claimant's pay stubs and SSA earnings records to make a ruling on Claimant's length of coal mine employment. Furthermore, in the absence of evidence regarding the specific beginning and ending dates of Claimant's coal mine employment, the ALJ permissibly referenced Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine Procedure Manual*[6] and applied the formula at 20 C.F.R. §725.101(a)(32)(iii) to determine the number of days Claimant worked in coal mine employment each year. 20 C.F.R. §725.101(a)(32)(iii);[7] *see Daniels Co., Inc. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984); Decision and Order at 4-7. Then, dividing the number of days worked by 125, the ALJ found the record established a total of 7.03 years of coal mine employment. Decision and Order at 6-7. Because the ALJ permissibly found Claimant established less than 15 years of coal mine employment, we affirm his finding Claimant did not invoke the Section 411(c)(4) presumption.[8] *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i); *Muncy*, 25 BLR at 1-27.

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[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).

[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] We note that the method used by the ALJ in determining length of coal mine employment followed the precedent of the United States Court of Appeals for the Sixth Circuit, whereas this case arises within the Fourth Circuit. However, any error in this regard is harmless as it resulted in crediting Claimant with more coal mine employment rather than less, and, in any event, her conclusion that Claimant established less than fifteen

Entitlement Under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3)[9] 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, 718.204. 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).

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 considered one x-ray dated April 8, 2015. Decision and Order at 8. Because Dr. Forehand, the only physician to provide an interpretation of an x-ray in this case,[10] read it as negative for clinical pneumoconiosis, the ALJ found the x-ray evidence does not establish clinical pneumoconiosis. Decision and Order at 8; Director's Exhibit 15 at 5, 7; 20 C.F.R. §718.202(a)(1). We affirm the ALJ's determination as substantial evidence supports her finding. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); Decision and Order at 8. As the record contains no biopsy or autopsy evidence, no evidence of complicated pneumoconiosis, and no medical opinions diagnosing clinical pneumoconiosis for consideration at 20 C.F.R. §718.202(a)(2)-(4), we affirm the ALJ's

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years of coal mine employment is affirmable. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[9] The ALJ correctly found the record contains no evidence of complicated pneumoconiosis. Decision and Order at 8. We therefore affirm the ALJ's finding that Claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 14.

[10] Dr. Gaziano reviewed the April 8, 2015 x-ray for quality purposes only. Director's Exhibit 15 at 17.

finding that Claimant did not establish clinical pneumoconiosis at 20 C.F.R. §718.202(a). Decision and Order at 14-16.

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). 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(b). In assessing whether Claimant established legal pneumoconiosis, the ALJ considered Dr. Forehand's opinion, which is the sole medical opinion in the record. Decision and Order at 8. Because Dr. Forehand opined that Claimant does not have any lung disease or respiratory impairment, we affirm the ALJ's finding that Claimant would not establish legal pneumoconiosis on the basis of the medical opinion evidence. Decision and Order at 8; Director's Exhibit 15 at 5.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must consider all relevant evidence and weigh the evidence supporting total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ correctly observed that the pulmonary function studies and arterial blood gas studies[11] each produced non-qualifying values.[12] Decision and Order at 10; Director's Exhibit 15 at 7, 15. She therefore determined Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(ii). Decision and Order at 10. She also correctly observed the record contains no evidence of cor pulmonale with right-sided congestive heart failure and thus determined Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iii). *Id.* She further permissibly found Claimant did not establish total

[11] The record contains one pulmonary function study and one blood gas study, both dated April 8, 2015. Director's Exhibit 15 at 7, 14.

[12] A "qualifying" pulmonary function study or blood gas study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204((b)(2)(i),(ii).

disability at 20 C.F.R. §718.204(b)(2)(iv) because Dr. Forehand, the only physician to provide an opinion in this case, opined Claimant has no active lung disease or respiratory impairment. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-73 (4th Cir. 1997) ("[A]n ALJ may rely on a physician's report that does not discuss the exertional requirements of the miner's work if the physician concludes that the miner suffers from no impairment at all."); Decision and Order at 11; Director's Exhibit 15 at 5.

Because these findings are supported by substantial evidence, we affirm the ALJ's determination that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2). Decision and Order at 11. Because Claimant did not establish total disability or the existence of pneumoconiosis, we affirm the ALJ's finding that Claimant did not establish a change in an applicable condition of entitlement, 20 C.F.R. §725.309, or entitlement to benefits. *See Anderson*, 12 BLR at 1-112.

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