U.S. Department of Labor

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

BRB No. 22-0223 BLA

BEDFORD D. TURNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JERICOL MINING COMPANY	)	
	)	
and	)	DATE ISSUED: 9/22/2023
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
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 Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Bedford D. Turner, Rose Hill, Virginia.

Jason A. Mullins (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Denying Benefits (2020-BLA-05593) rendered on a claim filed on November 2, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant has 12.28 years of surface coal mine employment, and therefore found he cannot 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) (2018). Considering entitlement under 20 C.F.R. Part 718, she found Claimant established he has a totally disabling pulmonary or respiratory impairment but did not establish he has pneumoconiosis. Accordingly, she denied benefits.

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 (the Director), responds, urging the Board to vacate the denial of benefits and remand the case for the ALJ to reconsider whether Claimant has legal pneumoconiosis.

In an appeal filed without representation, 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,

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

[2] 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); *see* 20 C.F.R. §718.305.

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

Without the benefit of the Section 411(c)(3)[4] and (c)(4)[5] 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.[6] 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). The ALJ found the evidence does not establish clinical[7] or legal pneumoconiosis.[8] Decision and Order at 7.

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[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 11.

[4] Because there is no evidence of complicated pneumoconiosis, Claimant cannot 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.

[5] Claimant cannot invoke the Section 411(c)(4) presumption because he stipulated to having only twelve years of coal mine employment. Hearing Transcript at 6; *see Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013) (voluntary stipulations are binding); *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996) (same).

[6] We affirm, as unchallenged by Employer, the ALJ's finding that Claimant has a totally disabling respiratory impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-9.

[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).

[8] "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

Clinical Pneumoconiosis

The ALJ considered six interpretations of three chest x-rays dated February 4, 2019, November 25, 2019, and July 13, 2021. Decision and Order at 4-5, 7. She accurately noted that the interpreting physicians are all dually qualified as Board-certified radiologists and B readers. *Id*. at 4-5.

Dr. Miller interpreted the February 4, 2019 x-ray as positive for pneumoconiosis, while Drs. DePonte and Seaman interpreted the film as negative for the disease. Director's Exhibits 12, 17; Claimant's Exhibit 3. Dr. Adcock interpreted the November 25, 2019 x-ray as negative for pneumoconiosis. Employer's Exhibit 1. Dr. Tarver interpreted the July 13, 2021 x-ray as negative for pneumoconiosis. Employer's Exhibit 2.

The ALJ found the February 4, 2019 x-ray negative for pneumoconiosis as two of the three equally qualified physicians read the x-ray as negative. Decision and Order at 7. She also found the remaining two x-rays negative for pneumoconiosis based on the uncontradicted interpretations of the films by Drs. Adcock and Tarver. *Id*. Consequently, she found Claimant did not establish pneumoconiosis at 20 C.F.R. §718.202(a)(1). *Id*.

The ALJ properly conducted both a qualitative and quantitative review of the conflicting x-ray evidence, taking into consideration the number of interpretations and the readers' qualifications when resolving the conflict in the x-ray readings. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); Decision and Order at 7. Because it is supported by substantial evidence, we affirm her determination that the February 4, 2019, November 25, 2019, and July 13, 2021 x-rays are negative for clinical pneumoconiosis and the x-ray evidence as a whole does not establish the disease. *Addison*, 831 F.3d at 256-57; *Adkins*, 958 F.2d at 52-53; Decision and Order at 7.

In determining Claimant does not have clinical pneumoconiosis, the ALJ failed to consider the medical opinion evidence and Claimant's treatment records.[9] 20 C.F.R. §718.202(a)(4); Director's Exhibit 12; Claimant's Exhibit 6; Employer's Exhibits 1-4. However, as Drs. Forehand, Sargent, and McSharry did not diagnose clinical pneumoconiosis, any error in not considering their opinions is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Moreover, while the treatment records

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significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[9] As there is no biopsy or autopsy report in the record, Claimant cannot establish clinical pneumoconiosis at 20 C.F.R. §718.202(a)(2).

contain diagnoses of coal workers' pneumoconiosis by Dr. Yeary on June 14, 2020 and December 29, 2020, there is no indication of the basis for this diagnosis. Claimant's Exhibit 6 at 8; Employer's Exhibit 7 at 2, 4. Consequently, any error in failing to address these records is also harmless. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192 (4th Cir. 2000); *Larioni*, 6 BLR 1-1278. We therefore affirm the ALJ's determination that Claimant did not establish clinical pneumoconiosis. 20 C.F.R. §§718.201(a)(1), 718.202(a); Decision and Order at 7.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has 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(b).

The ALJ considered the medical opinions of Drs. Forehand, McSharry, and Sargent. Decision and Order at 7-8. Dr. Forehand diagnosed Claimant with legal pneumoconiosis in the form of obstructive lung disease due to cigarette smoking and coal mine dust exposure. Director's Exhibit 12 at 5. Conversely, Dr. McSharry opined Claimant does not have legal pneumoconiosis, but has chronic bronchitis and emphysema due solely to smoking. Employer's Exhibit 1 at 2. Similarly, Dr. Sargent opined Claimant does not have legal pneumoconiosis, but has an obstructive impairment due to cigarette smoking. Employer's Exhibit 2 at 2. The ALJ "afford[ed] all medical opinions some weight" and subsequently found Claimant did not establish legal pneumoconiosis. Decision and Order at 8.

The Administrative Procedure Act (APA) requires the ALJ to consider all relevant evidence in the record, and to set forth her "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). While the ALJ summarized the opinions of Drs. Forehand, McSharry, and Sargent, she did not make any findings regarding the credibility of each opinion as to the role coal mine dust played in Claimant's obstructive disease, which all the physicians agreed is present. *See Addison*, 831 F.3d at 252-53 (ALJ must still conduct an appropriate analysis of the evidence to support his or her conclusion and render necessary credibility findings); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998) (ALJ erred by failing to adequately explain why she credited certain evidence and discredited other evidence); Decision and Order 7-8. Because the ALJ provided no analysis of the physicians' opinions and failed to resolve the conflict in the evidence, her findings are not in compliance with the APA. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at

1-165; Director's Response Brief at 2 (unpaginated). The ALJ also did not consider Claimant's treatment records, which contain diagnosis of coal workers' pneumoconiosis, chronic obstructive pulmonary disease, and other information that may be relevant to the existence of legal pneumoconiosis. Claimant's Exhibits 6, 7; Employer's Exhibits 3-7.

We therefore vacate the ALJ's determination that Claimant did not establish legal pneumoconiosis and the denial of benefits. Decision and Order at 8.

Remand Instructions

On remand, the ALJ must reconsider whether the medical opinion evidence and Claimant's treatment records establish the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a)(4). In rendering her credibility findings, she must consider the comparative credentials of the physicians, the explanations for their conclusions, and the documentation underlying their medical judgments.[10] *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). She must then weigh all the relevant evidence together to determine whether Claimant suffers from legal pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-09 (4th Cir. 2000). The ALJ must set forth her findings in detail, including the underlying rationales, in accordance with the APA. 5 U.S.C. §557(c)(3)(A); *see Wojtowicz*, 12 BLR at 1-165.

If Claimant establishes legal pneumoconiosis on remand, the ALJ must consider whether it substantially contributed to his totally disabling respiratory or pulmonary impairment.[11] 20 C.F.R. §718.204(b)(2)(iv). If the ALJ finds legal pneumoconiosis is not established, Claimant will have failed to establish an essential element of entitlement, and the ALJ must deny benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

[10] On remand, the ALJ should consider the Director's argument that the opinions of Drs. McSharry and Sargent, that Claimant does not have legal pneumoconiosis based on the lack of x-ray evidence of pneumoconiosis, are inconsistent with the regulatory definition of legal pneumoconiosis. Director's Response Brief at 2.

[11] If Claimant establishes legal pneumoconiosis on remand, then he will have established that his legal pneumoconiosis arose out of his coal mine employment. *See Kiser v. L & J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); 20 C.F.R. §718.203.

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part, vacated in part, and we remand the case for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge