U.S. Department of Labor

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

BRB No. 17-0345 BLA

JAMES L. GRAHAM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KENTUCKY HARLAN COAL, INCORPORATED	)	DATE ISSUED: 04/26/2018
	)	
Employer-Respondent	)	
	)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

James L. Graham, DayHoit, Kentucky.

Walter E. Harding (Boehl Stopher & Graves, LLP), Louisville, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2015-BLA-05468) of Administrative Law Judge Adele Higgins Odegard, rendered on a miner's subsequent claim, filed on March 27, 2014, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[2] The administrative law judge credited claimant with 5.42 years of coal mine employment and accepted employer's stipulation that claimant has a totally disabling respiratory or pulmonary impairment. She therefore determined that claimant established a change in an applicable condition of entitlement, but could not invoke the rebuttable presumption of total disability due to pneumoconiosis, as claimant has less than fifteen years of coal mine employment.[3] The administrative law judge further found that claimant established the existence of both clinical and legal pneumoconiosis. However, the administrative law judge determined that claimant failed to prove that he is totally disabled due to pneumoconiosis and denied benefits accordingly.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[4]

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[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the 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] Claimant filed his initial claim on June 7, 1996, which was denied by the district director on October 4, 1996, because claimant did not establish the existence of pneumoconiosis or that he was totally disabled. Director's Exhibit 1.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[4] We affirm the administrative law judge's findings that claimant established total disability and a change in an applicable condition of entitlement, as they are not adverse to claimant and are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are rational 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 Associates, Inc.*, 380 U.S. 359 (1965).

I. Invocation of the Section 411(c)(4) Presumption - Length of Coal Mine Employment

Because there is evidence in the record which, if credited, could establish at least fifteen years of coal mine employment, we first review the administrative law judge's determination that claimant had only 5.42 years of such employment. Claimant bears the burden of establishing the length of his 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); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). In the absence of specific statutory guidelines for calculating length of coal mine employment, the administrative law judge is granted broad discretion in deciding this issue, and his or her determination will be upheld if it is based on a reasonable method of computation and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986); *Maggard v. Director, OWCP*, 6 BLR 1-285, 1-286 (1983).

In this case, the administrative law judge initially acknowledged that claimant alleged up to eighteen years of coal mine employment and reviewed claimant's hearing testimony, employment history forms, medical reports, Social Security Administration (SSA) earnings record, and responses to interrogatories. Decision and Order at 5-8; Hearing Transcript at 18-22; Director's Exhibits 1-5, 11. In addressing whether this evidence established that claimant's employment from 1969 to 1978 as a machinist repairing mine motors constituted coal mine employment, the administrative law judge applied the situs-function test adopted by the United States Court of Appeals for the Sixth Circuit.[6] Decision and Order at 9, *citing Director, OWCP v. Consolidation Coal Co.*

[5] Because the record reflects that claimant's last coal mine employment was in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[6] The Social Security Administration (SSA) earnings record shows that claimant worked for Harco Electric and Hydraulic from the fourth quarter of 1969 to 1978. Director's Exhibit 5. Claimant indicated in testimony and on his employment history forms

[*Petracca*], 884 F.2d 926, 929-30, 13 BLR 2-38, 2-41-42 (6th Cir. 1989) (to satisfy the situs-function test, a miner must have worked in or around a coal mine or coal preparation facility, and done work necessary to the extraction or preparation of coal). She permissibly determined that claimant's employment failed the situs requirement because claimant did not put forth evidence establishing "that the machine shop at which he worked was located in physical proximity to the mine site." Decision and Order at 9; *see Navistar, Inc. v. Forester*, 767 F.3d 638, 641, 25 BLR 2-659, 2-663-64 (6th Cir. 2014).

Similarly, the administrative law judge reasonably found that claimant's 1.0 to 1.5 years of employment as a mine security guard between 1991 and 1992[7] did not meet the situs or function tests, as she could not conclude from the evidence provided by claimant that his work occurred at a mine site or was integral to the extraction or preparation of coal.[8] *See Petracca*, 884 F.2d at 929-30, 13 BLR at 2-41-42; Decision and Order at 10-11.

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that he worked between 1969 and 1977 or 1978 in a machine shop repairing mine motors. Director's Exhibit 1.

[7] Claimant reported on the employment history form submitted with his subsequent claim that he worked as a mine security guard, but he did not provide any dates for this employment. Director's Exhibit 2. Claimant told Dr. Baker that he was a mine security guard for 1.0 to 1.5 years. Director's Exhibit 1. His SSA records show employment with Martins Fork Security in 1991 and 1992. Director's Exhibit 5.

[8] The administrative law judge stated:

> Here, the [c]laimant reported that his duties as a security guard entailed watching and guarding the mines, sweeping and cleaning mobile homes, and pulling out main power to all machines if needed for workers in mines. Again, [c]laimant has the burden of proving that his work constitutes coal mine employment. I do not find the information provided by the [c]laimant sufficient to establish that his work as security guard meets the function requirement. The job duty of sweeping and cleaning mobile homes appears to fall[] outside the realm of keeping the mine operational. The purpose of the mobile homes, even if they satisfied the situs requirement, is not established; keeping them swept and cleaned would, at most, fall into the category of being convenient or helpful. Pulling out main power to all machines if needed for workers in mines, would be a duty that would appear to fall within the realm of ensuring the safe operation of the mine. However, the frequency of the [c]laimant doing so, whether it was a rare occurrence or

We therefore affirm the administrative law judge's findings that claimant's jobs at the machine shop and as a mine security guard did not constitute the work of a miner. Even if the administrative law judge credited claimant with a full year for each year he worked as a miner between 1978 and 1984,[9] without receiving credit for his approximately 10.5 years of non-coal mine employment as a machinist and security guard, claimant cannot establish at least fifteen years of coal mine employment. Accordingly, we further affirm the administrative law judge's determination that claimant did not establish the fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(i); *see Muncy*, 25 BLR at 1-27; Decision and Order at 14 n.9.

II. Entitlement Under 20 C.F.R. Part 718 – Disability Causation

Without the benefit of the Section 411(c)(4) presumption, claimant has the burden to establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 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. *See 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).

Having found that claimant established the existence of both clinical and legal pneumoconiosis arising out of coal mine employment,[10] and a totally disabling respiratory

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> whether it was a part of his routine job duties, is not established. Finally, [c]laimant's description of his job to watch and guard the mine is vague.

Decision and Order at 10; Director's Exhibit 1.

[9] In his hearing testimony, claimant estimated that he worked in underground coal mining as a roof bolter and beltman between 1977 and 1981. Hearing Transcript at 19. On the employment history form claimant filed in his initial claim, he reported that he worked underground from 1976 to 1981. Director's Exhibit 1. Claimant reported on the employment history form submitted in his subsequent claim that he worked underground from 1977 to 1981 and part of 1982. Director's Exhibit 2.

[10] Because the administrative law judge credited claimant with only 5.42 years of coal mine employment, he could not invoke the ten-year presumption that his pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(b). She found, however, that claimant affirmatively established this element of entitlement with respect to clinical pneumoconiosis. Decision and Order at 32. In addition, the administrative law

or pulmonary impairment, the relevant inquiry before the administrative law judge was whether claimant is totally disabled due to pneumoconiosis. Citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 25 BLR 2-615 (6th Cir. 2014), the administrative law judge articulated the proper standard under the regulations for establishing disability causation, i.e., claimant must establish that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment.[11] 20 C.F.R. §718.204(c); Decision and Order at 33. The administrative law judge then considered the medical opinions of Drs. Baker, Jarboe, Tuteur and Ajjarapu, and determined that claimant could only establish total disability causation through Dr. Ajjarapu's opinion.[12] Decision and Order at 33; Director's Exhibit 8; Employer's Exhibit 2.

Dr. Ajjarapu diagnosed simple clinical pneumoconiosis based on a chest x-ray reading and "chronic bronchitis/legal pneumoconiosis" based on the results of a pulmonary function study and a blood gas study she administered. Director's Exhibit 8. She

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judge accurately determined that her finding of legal pneumoconiosis subsumed the inquiry into whether the legal pneumoconiosis arose out of coal mine employment. *See* 20 C.F.R. §718.201(a)(2), (b); *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); Decision and Order at 32.

[11] Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially 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).

[12] Dr. Baker stated in his 1996 medical report that claimant's impairment is "primarily due to cigarette smoking and only minimally, if at all, contributed to" by claimant's dust exposure. Director's Exhibit 1. Drs. Jarboe and Tuteur indicated that cigarette smoking was the sole cause of claimant's disabling impairment. Director's Exhibit 15; Employer's Exhibit 1 at 7-11. The administrative law judge discredited the opinions of Drs. Jarboe and Tuteur at 20 C.F.R. §718.204(c) because their failure to diagnose clinical and legal pneumoconiosis conflicted with her findings at 20 C.F.R. §718.202(a). Decision and Order at 24.

determined that claimant's "chronic bronchitis/legal pneumoconiosis" caused a totally disabling pulmonary impairment and attributed it to coal dust exposure and a lengthy cigarette smoking history. *Id*. At her subsequent deposition, Dr. Ajjarapu testified that "most of" claimant's chronic bronchitis is due to smoking and acknowledged the comment in her written report that coal mine dust exposure had a "minimal" effect on claimant's lungs. Employer's Exhibit 2 at 19, 21. When weighing Dr. Ajjarapu's opinion, the administrative law judge stated:

> Based on Dr. Ajjarapu's characterization of the underlying role of the coal mine dust exposure as "minimal," I find that such opinion is insufficient for me to conclude that the role of the [c]laimant's pneumoconiosis was "substantial." To the contrary, I find that a characterization of the contributory effect of coal mine dust exposure as "minimal" negates a finding that the claimant's clinical or legal pneumoconiosis was a substantially contributing cause of his disabling pulmonary impairment.

Decision and Order at 33-34.

Because the administrative law judge did not apply the proper analysis in finding that Dr. Ajjarapu's opinion was insufficient to establish disability causation, her finding cannot be affirmed. When determining that claimant established legal pneumoconiosis based on Dr. Ajjarapu's diagnosis of chronic bronchitis caused, at least in part, by coal dust exposure,[13] the administrative law judge essentially determined that claimant's chronic

[13] The administrative law judge credited Dr. Ajjarapu's opinion as sufficient to establish legal pneumoconiosis, stating:

> Her diagnosis of legal pneumoconiosis is supported by an essentially accurate account of the length of the [c]laimant's coal mine employment, his respiratory symptoms, and documented pulmonary impairment. Dr. Ajjarapu's rationale that coal mine dust exposure and smoking have a compounding effect is supported by the preamble to the regulations that recognizes that the risks of smoking and coal mine dust exposure are additive. I further note that Dr. Ajjarapu's opinion that the [c]laimant's coal mine dust exposure makes a minimal contribution to his respiratory or pulmonary disease or impairment satisfies the burden of arising out of coal mine employment as it contributes – in part.

Decision and Order at 28, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 599, 25 BLR 2-615, 2-624 (6th Cir. 2014) (a claimant can satisfy his or her burden of proof on

bronchitis *is* legal pneumoconiosis.[14] 20 C.F.R. §718.201(a)(2), (b); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). Rather than determining whether legal pneumoconiosis is a substantially contributing cause of claimant's totally disabling pulmonary impairment as required, the administrative law judge revisited the extent to which coal dust exposure was a factor in claimant's chronic bronchitis. 20 C.F.R. §718.204(c)(1); *see Groves*, 761 F.3d at 598, 25 BLR at 624; *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 490, 25 BLR 2-135, 2-154-55 (6th Cir. 2012). The administrative law judge instead should have determined whether claimant's chronic bronchitis substantially contributed to his disability. 20 C.F.R. §718.204(c)(1) (explaining that a miner will be considered disabled due to pneumoconiosis if *pneumoconiosis* – not coal dust – substantially contributes to the disability). Having determined that coal dust exposure caused claimant's chronic bronchitis, the sole question is the role *the disease* played in causing the disability; coal dust exposure is not relevant to that inquiry. *Id.*

In light of this error, we must vacate the administrative law judge's finding that claimant failed to establish total disability due to pneumoconiosis. We therefore remand this case to the administrative law judge to reconsider whether the relevant evidence is sufficient to establish that legal pneumoconiosis is a substantially contributing cause of claimant's total respiratory or pulmonary disability under 20 C.F.R. §718.204(c).

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legal pneumoconiosis by proving that his or her respiratory or pulmonary impairment is due, at least in part, to coal dust exposure).

[14] "Chronic bronchitis/legal pneumoconiosis" is the disease that Dr. Ajjarapu identified as the cause of claimant's total pulmonary disability. Director's Exhibit 8. Although Dr. Ajjarapu answered "yes" when asked at her deposition whether she diagnosed chronic obstructive pulmonary disease, her written report does not reflect this diagnosis. *Id.*; Employer's Exhibit 2 at 17.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge