U.S. Department of Labor

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

BRB No. 18-0277 BLA

EUGENE PRESCOTT Claimant-Petitioner v. CLIFTY MINING COMPANY, INCORPORATED and CAPITAL FIRE & MARINE INSURANCE CORPORATION, C/O OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/12/2019 DECISION and ORDER

Appeal of the Decision and Order of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Eugene Prescott, Winfield, Alabama.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (2010-BLA-05820) of Administrative Law Judge Scott R. Morris, rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves claimant's request for modification of the previous denial of a claim filed on September 21, 2009, and is before the Board for the third time.

In a Decision and Order issued on February 9, 2012, Administrative Law Judge Adele Higgins Odegard credited claimant with 11.38 years of coal mine employment.[1] Because claimant did not have at least fifteen years of coal mine employment, she found that he could not invoke the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). Considering whether claimant could establish entitlement to benefits without the aid of the Section 411(c)(4) presumption, Judge Odegard found claimant failed to establish the existence of pneumoconiosis pursuant 20 C.F.R. §718.202(a), or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and denied benefits.

Upon review of claimant's appeal filed without the assistance of counsel, the Board affirmed Judge Odegard's finding of 11.38 years of coal mine employment. *Prescott v. Clifty Mining Co.*, BRB No. 12-0345 BLA, slip op. at 4-5 (Feb. 13, 2013) (unpub.). The Board vacated the denial of benefits, however, based on the concession of the Director, Office of Workers' Compensation Programs (the Director), that claimant did not receive a complete pulmonary evaluation pursuant to 20 C.F.R. §725.406. *Id*. at 3-4. The Board

[1] Claimant's coal mine employment was in Alabama. Director's Exhibits 3, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

remanded the case to the district director to allow for a complete pulmonary evaluation, and for reconsideration of the merits of the claim in light of the new evidence. *Id*.

After further evidentiary development, the case was returned to Judge Odegard. In a Decision and Order on remand issued on February 25, 2014, Judge Odegard again found that claimant failed to establish the existence of pneumoconiosis pursuant 20 C.F.R. §718.202(a), or total disability pursuant 20 C.F.R. §718.204(b)(2), and denied benefits. Upon review of claimant's second appeal, the Board affirmed that denial of benefits. *Prescott v. Clifty Mining Co.*, BRB No. 14-0196 BLA (Jan. 30, 2015) (unpub.).

Claimant subsequently requested modification. Director's Exhibit 107. In a Decision and Order issued on February 28, 2018, which is the subject of this appeal, Administrative Law Judge Scott R. Morris (the administrative law judge) credited claimant with 13.63 years of coal mine employment, insufficient to invoke the Section 411(c)(4) presumption. He also found that because the record lacks evidence of complicated pneumoconiosis, 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. Considering whether claimant could establish entitlement to benefits without the aid of these presumptions, the administrative law judge found claimant failed to establish the existence of pneumoconiosis pursuant 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied claimant's request for modification.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the denial of benefits. The Director declined to file a substantive response brief to claimant's appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers 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 administrative law judge's findings if they are rational, supported by substantial evidence, and in accordance with applicable law. 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).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310 (2000), authorizes modification of an award or denial of benefits in a miner's claim based on a change in conditions or a mistake in a determination of fact, *USX Corp. v. Director, OWCP* [*Bridges*], 978 F.2d 656, 658 (11th Cir. 1992), "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence

initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

I. 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 20 n.19.

II. The Section 411(c)(4) presumption - Length of Coal Mine Employment

Claimant bears the burden of proof to establish the length of his 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). As the regulations provide only limited guidance, the Board will uphold an administrative law judge's determination based on a reasonable method and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The administrative law judge first evaluated whether Judge Odegard's length of coal mine employment finding contained a mistake in a determination of fact. Decision and Order at 8-9. In calculating the length of claimant's coal mine employment, Judge Odegard considered claimant's Social Security Administration (SSA) earnings records, hearing and deposition testimony, responses to interrogatories, and training certifications. Director's Exhibit 72 at 4-10. She also considered affidavits from claimant's coworkers. *Id*.

Judge Odegard found the evidence insufficient to establish the beginning and ending dates of claimant's coal mine employment. Director's Exhibit 72 at 4-10. Applying the formula set forth at 20 C.F.R. §725.101(a)(32)(iii),[3] she found claimant's SSA earnings records and testimony established 10.38 years of coal mine employment from 1974 to 1984. *Id*. 72 at 8-9. She found claimant's training certifications established one additional year of coal mine employment in 1985. *Id*. Although claimant alleged additional coal

[3] Section 725.101(a)(32)(iii) provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the administrative law judge 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 (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS data is reported in Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*.

mine employment from 1953 to 1960, and from 1986 to 1990, Judge Odegard found the evidence did not establish any coal mine employment during these periods. *Id*. She explained that claimant's SSA earnings records and pay stubs do not reflect any coal mine related earnings before 1974 or after 1984, and none of the affidavits he submitted specified employment before 1974 or after 1985. *Id*. Thus she found claimant had 11.38 years of coal mine employment from 1974 to 1985. *Id*. at 8-10.

The administrative law judge found no mistake in Judge Odegard's calculation. Decision and Order at 8-9. He noted, however, that claimant submitted an affidavit from his former coworker, James Tunes on modification stating that claimant "worked for the May Coal Co. from 1953 to 1960" and that he "worked with and saw [claimant] at a regular basis at the mine." Director's Exhibit 107.

Although the administrative law judge considered the affidavit, he recognized that claimant's SSA earnings records reflect income from several non-coal mine employers during this same time period. Decision and Order at 8-9; Director's Exhibit 8. Further, he noted that claimant testified that he worked for non-coal mine companies from 1953 to 1960.[4] Decision and Order at 8-9; Director's Exhibit 5 at 7; Hearing Transcript at 28-30. Thus he found claimant was not employed continually in coal mine employment from 1953 to 1960. Decision and Order at 8-9.

In resolving the conflict in the evidence, the administrative law judge rationally credited claimant with coal mine employment for every quarter of a year from 1953 to 1960 in which he did not receive income from non-coal mine employers. *See Aberry Coal, Inc. v. Fleming*, 843 F.3d 219 (6th Cir. 2016), *amended on reh'g,* 847 F.3d 310, 315-16 (6th Cir. 2017); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc); Decision and Order at 8-9. Based on this method, he found an additional 2.25 years of coal mine employment from 1953 to 1960, for a total of 13.63 years of coal mine employment. *Id*.

We affirm the administrative law judge's finding that claimant established 13.63 years of coal mine employment as based on a reasonable method of calculation and supported by substantial evidence. *Muncy*, 25 BLR at 1-27. As claimant established less

[4] Claimant received income from Harbert Construction Corporation in 1953 and from 1955 to 1957, from Sam Renfroe Jr., in 1958, from Dan River, Inc., in 1958 and 1959, and from Winfield Cotton Mill, Inc., from 1959 to 1970. Director's Exhibit 8. Claimant testified that he did non-coal mine construction for Harbert Construction, carpentry work for Sam Renfroe, and non-coal mine day labor for Dan River, Inc., and Winfield Cotton Mill. Director's Exhibit 5 at 4-9; Hearing Transcript at 29-30.

than fifteen years of coal mine employment, we affirm the administrative law judge's finding that he cannot invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b)(1)(i); Decision and Order at 8-9.

III. Entitlement Under 20 C.F.R. Part 718

Where the presumptions at Sections 411(c)(3) and 411(c)(4) do not apply, claimant must establish disease, disease causation, disability, and disability causation. 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. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

The administrative law judge did not err in finding that the evidence does not establish clinical or legal pneumoconiosis.[5] Because all of the x-rays of record were interpreted as negative for the disease, he correctly found that the x-ray evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 20-21. As there is no biopsy or autopsy evidence, the administrative law judge also correctly found that claimant is unable establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). *Id*. at 24. Further, because claimant did not invoke the Section 411(c)(3) or Section 411(c)(4) presumptions, he cannot establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Connolly, Hawkins, Goldstein, Tuteur, and Rosenberg.[6] Decision and Order at 21-24. None of the physicians diagnosed clinical pneumoconiosis; Drs. Connolly and Hawkins diagnosed legal pneumoconiosis. *Id*.

Dr. Connolly opined that claimant has chronic obstructive lung disease arising out of coal mine dust exposure, based on thirty years of coal mine employment. Decision and

[5] "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).

[6] The administrative law judge also considered claimant's medical treatment notes and correctly found that they do not include any diagnosis of clinical or legal pneumoconiosis. Decision and Order at 24; Claimant's Exhibits 2-5; Employer's Exhibit 7.

Order at 23; Claimant's Exhibit 4. As the administrative law judge found that claimant only has 13.63 years of coal mine employment, however, he permissibly found Dr. Connolly's opinion entitled to little weight. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); Decision and Order at 23.

Dr. Hawkins diagnosed obstructive and restrictive lung impairments arising out of coal mine dust exposure based on an April 29, 2015 pulmonary function study. Claimant's Exhibit 2. The administrative law judge permissibly found the study invalid, however, because it does not include three flow-volume loops, and thus is not in substantial compliance with the quality standards set forth in 20 C.F.R. §718.103. Decision and Order at 12; *Director, OWCP v. Siwiec*, 894 F.2d 635 (3d Cir. 1990); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (en banc); 20 C.F.R. §718.103(c).

The administrative law judge further noted that both Drs. Rosenberg and Goldstein opined that the November 11, 2016 pulmonary function study was completely normal and revealed no obstructive and restrictive lung impairments. Decision and Order at 23; Employer's Exhibits 4, 8. Because Dr. Hawkins "did not have the benefit of reviewing medical records generated after his examination," the administrative law judge permissibly found his opinion entitled to diminished weight. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989); Decision and Order at 23. Conversely, he found Drs. Goldstein, Rosenberg and Tuteur reviewed all the objective testing of record and permissibly determined their opinions thus were entitled to greater weight. *Jones*, 386 F.3d at 992; *Jordan*, 876 F.2d at 1460; Decision and Order at 23.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinions do not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and his finding that the evidence as a whole does not establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 23-24. As claimant did not establish pneumoconiosis, we affirm the administrative law judge's determination that claimant did not establish entitlement under 20 C.F.R. Part 718 and, thus, did not establish a change in conditions or a mistake in a determination of fact at 20 C.F.R. §725.310. *See* 30 U.S.C. §921(c)(4); *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Decision and Order at 23-24.

Accordingly, we affirm the administrative law judge's Decision and Order denying benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge