U.S. Department of Labor

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

BRB No. 19-0094 BLA

FREDDY DAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	
	)	DATE ISSUED: 12/31/2019
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 William T. Barto, Administrative Law Judge, United States Department of Labor.

Freddy Day, Smilax, Kentucky.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2014-BLA-05015) of Administrative Law Judge William T. Barto rendered on a claim filed on January 16, 2013, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

After crediting claimant with ten years and four months of coal mine employment,[2] the administrative law judge found the record contains no evidence of complicated pneumoconiosis and therefore claimant 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). 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 pursuant to Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). Turning to whether claimant is entitled to benefits under 20 C.F.R. Part 718, the administrative law judge found he did not establish pneumoconiosis and thus denied benefits. 20 C.F.R. §718.202(a).

On appeal, claimant generally challenges the denial of benefits. Employer responds urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs has not filed a response brief.

When a claimant files an appeal without the assistance of counsel, the Board considers whether the Decision and Order Denying Benefits is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C.

[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. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] This case arises within the jurisdiction 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.

[3] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption of total disability due to pneumoconiosis if he establishes 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) (2012); 20 C.F.R. §718.305.

§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).

To be entitled to benefits under the Act, claimant must 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. Statutory presumptions may assist claimants in establishing the elements of entitlement, but 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).

Section 411(c)(4) Presumption – Length of Coal Mine Employment

The administrative law judge's determination of the length of coal mine employment is relevant to whether claimant can invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. Claimant bears the burden of proof to establish the number of years he worked in 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). The Board will uphold an administrative law judge's determination on length of coal mine employment based on a reasonable method of calculation that is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

Claimant testified he worked for one coal mining company between ten and eleven years and alleged eleven years of coal mine employment on his employment history forms. Director's Exhibits 3, 4; Employer's Exhibit 4 at 5. Claimant's Social Security Administration statements show less than fifteen years of earnings in coal mining. Director's Exhibit 6. Based on the claimant's testimony and the documentary evidence, the administrative law judge rationally found claimant had less than fifteen years of coal mine employment. *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 406-07 (6th Cir. 2019); *Muncy*, 25 BLR at 1-27. As claimant did not prove at least fifteen years of coal mine employment, we affirm the administrative law judge's finding that claimant is unable to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b)(1)(i).

Part 718 - Pneumoconiosis

Without the assistance of any statutory presumptions, the administrative law judge addressed whether claimant met his burden to establish pneumoconiosis. 20 C.F.R. §718.202(a).

The administrative law judge first considered eleven interpretations of five x-rays taken on December 13, 2012, February 15, 2013, May 23, 2013, October 17, 2013, and November 19, 2013. 20 C.F.R. §718.202(a)(1); Decision and Order at 6-10. Dr. Alexander, a dually-qualified Board certified radiologist and B reader, interpreted the December 13, 2012 x-ray as positive for pneumoconiosis, but Dr. Seaman, also dually-qualified, interpreted it as negative. Director's Exhibit 12; Employer's Exhibit 5. Dr. Baker, a B reader, and Dr. Miller, a dually-qualified radiologist, interpreted the February 15, 2013 x-ray as positive for pneumoconiosis, but Dr. Meyer, also dually-qualified, interpreted it as negative. Director's Exhibits 4, 9, 11. Dr. DePonte, a dually-qualified radiologist, interpreted the May 23, 2013 x-ray as positive for pneumoconiosis, but Dr. Kendall, also dually-qualified, interpreted it as negative. Director's Exhibit 10; Claimant's Exhibit 2. Dr. Miller interpreted the October 17, 2013 x-ray as positive for pneumoconiosis, but Dr. Seaman interpreted it as negative. Claimant's Exhibit 3; Employer's Exhibit 1. Dr. Alexander interpreted the November 19, 2013 x-ray as positive for pneumoconiosis, but Dr. Adcock, a dually-qualified radiologist, interpreted it as negative. Claimant's Exhibit 1; Employer's Exhibit 6.

The administrative law judge noted he may consider the radiological qualifications of the physicians who render x-ray interpretations and permissibly assigned greater weight to those physicians that are dually-qualified as B readers and Board-certified radiologists. *Staton v. Norfolk & W. Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); Decision and Order at 6, 22-24. He found all these x-rays are inconclusive because an equal number of dually-qualified radiologists read the respective films as positive and negative for pneumoconiosis. Decision and Order at 22-24. He also found that claimant's treating physician, Dr. Wicker, read seven x-rays taken between January 24, 2005 and September 27, 2011 as negative for pneumoconiosis. *Id.* at 9-10, 24; Claimant's Exhibit 10. Because, as the administrative law judge found, the record contains seven negative and five inconclusive x-rays, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1); Decision and Order at 24.

We also affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis based on the biopsy evidence, as the record contains no such evidence. Decision and Order at 24; 20 C.F.R. §718.202(a)(2). Further, the presumptions at 20 C.F.R. §§718.304 and 718.305 are not applicable.[4] 20 C.F.R. §718.202(a)(3).

[4] The administrative law judge correctly found claimant cannot establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis under Section

The administrative law judge then weighed the medical opinions. 20 C.F.R. §718.202(a)(4); Decision and Order at 24-26. He noted Drs. Baker and Habre diagnosed clinical pneumoconiosis, but found their opinions "are effectively restatements of the [respective] x-rays they relied upon."[5] Decision and Order at 24; Director's Exhibit 9; Claimant's Exhibit 1. He also noted neither physician addressed the other x-rays of record. *Id*. He permissibly assigned their opinions diminished weighed because he found they are not well-reasoned or supported by the objective evidence. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 24.

The administrative law judge correctly noted the only diagnosis of pneumoconiosis contained in the treatment records, as opposed to the reports created by doctors examining claimant in conjunction with his claim for benefits, was by a Ms. Dean, an individual who is not a physician. Decision and Order at 24; Claimant's Exhibit 10. Thus, based upon substantial evidence in the record, we affirm his finding that the treatment records do not establish clinical pneumoconiosis. Decision and Order at 24.

With respect to the issue of legal pneumoconiosis, the administrative law judge noted Dr. Baker diagnosed chronic obstructive pulmonary disease, severe resting arterial hypoxemia, and chronic bronchitis. Decision and Order at 25; Director's Exhibit 9. Dr. Baker opined all these conditions arose out of claimant's coal mine employment because they can be caused by coal mine dust exposure and claimant stated that he never smoked. *Id*. The administrative law judge found Dr. Baker's opinion is based "solely on [claimant's] occupational exposure" and "that without further explanation, a history of exposure to coal mine dust, even in the absence of a smoking history, is not sufficient to justify a diagnosis of [legal] pneumoconiosis." Decision and Order at 25-26, *citing Sahara Coal Co. v. Fitts*, 39 F.3d 781, 783 (7th Cir. 1994).

The administrative law judge also noted Dr. Habre diagnosed chronic bronchitis and a blood gas exchange impairment and opined both conditions also arose out of coal mine employment. Decision and Order at 26; Claimant's Exhibit 1. He found Dr. Habre made "a general statement about the connection between coal mine dust and declines seen on

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411(c)(3) of the Act because there is no evidence of complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 21, 24.

[5] Dr. Baker opined the February 15, 2013 x-ray is positive for pneumoconiosis and Dr. Habre opined the November 19, 2013 x-ray is positive. Director's Exhibit 9; Claimant's Exhibit 1.

claimant's pulmonary function studies and blood gas studies, [but Dr. Haber] does not connect the general statements to [c]laimant's particular circumstances and [c]laimant's specific test results." *Id*. The administrative law judge permissibly found the opinions of Drs. Baker and Habre not well-reasoned on the issue of legal pneumoconiosis. *Napier*, 301 F.3d at 713-14 (explaining that the determination as to whether a physician's opinion is sufficiently documented and reasoned is essentially a credibility matter for the factfinder to decide); *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 25-26. Thus we affirm the administrative law judge's finding that the medical opinions do not establish pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 26. Because claimant failed to establish pneumoconiosis, an essential element of entitlement, we further affirm the denial of benefits. 20 C.F.R. §718.202(a); *Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge