U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0151 BLA

DONALD RAY SANDERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
T C BELL MINING, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 01/13/2016
	)	
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 Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Donald Ray Sanders, Arjay, Kentucky, *pro se*.

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

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 (2012-BLA-5883) of Administrative Law Judge Lystra A. Harris (the administrative law judge) rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge determined that employer was the properly designated responsible operator and adjudicated this claim, filed on August 10, 2011, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge credited claimant with 8.06 years in underground coal mine employment, and found, therefore, that claimant failed to establish the fifteen years of qualifying coal mine employment necessary to invoke the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge further found that while the evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this case.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent 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 Associates, Inc.*, 380 U.S. 359 (1965).

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[1] Claimant was represented by counsel at the hearing before Administrative Law Judge Lystra A. Harris (the administrative law judge). Hearing Transcript at 4.

[2] Congress enacted amendments to the Act, applicable to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this miner's claim, the amendments reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Decision and Order at 7.

Initially, we will address the administrative law judge's finding that claimant is unable to invoke the rebuttable presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), based on her determination that claimant failed to establish that he worked fifteen or more years in qualifying coal mine employment.

Claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Since the Act fails to provide any specific guidelines for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method or methods and is supported by substantial evidence in the record considered as a whole. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1983); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983).

In addressing the issue of whether claimant established at least fifteen years of qualifying coal mine employment, the administrative law judge reviewed claimant's employment history form, his testimony at deposition and at the hearing, his W-2 forms, and his Social Security Administration (SSA) earnings records. Decision and Order at 3-6, 7-10; Director's Exhibits 3, 8, 9, 10, 19; Hearing Transcript at 9-23. The administrative law judge noted that claimant estimated that he worked in the coal mining industry for twenty-one years,[4] working as an underground miner from 1979 through 1995 and as a diesel mechanic for two trucking companies from 1995 through 2000. Decision and Order at 8. The administrative law judge separately addressed the length and nature of claimant's work at the trucking companies and the length of his underground coal mine employment. Decision and Order at 6-10.

[4] The administrative law judge determined that:

> Claimant's form CM-911(a) lists that he worked in underground coal mining from 1979 through 1994, at Warren Coal (1979), TC Bell Coal (1980), King Coal (1981-1982), Amy Joe [Coal] (1983), V&W Coal (1984), Shane Dale Coal (1985), Crib Coal (1986-1994), S&L Coal (1994). He worked as a mechanic for S&B Truck[ing] and D&D Truck[ing] (1995-1997), and S&B Trucking (1995-2000).

Decision and Order at 8; Director's Exhibit 3.

With respect to claimant's work as a mechanic from 1995 through 2000, the administrative law judge did not credit claimant with any years of coal mine employment, finding that claimant failed to prove that his work constituted coal mine employment. The administrative law judge found that claimant's work as a diesel mechanic for S&B Trucking and D&D Trucking from 1995 through 2000 was not qualifying coal mine employment, as claimant's duties did not constitute the work of a miner. Decision and Order at 6-8.

A miner is defined as any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. 30 U.S.C. §902(d); 20 C.F.R. §§725.101(a)(19), 725.202. There is a "rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." 20 C.F.R. §725.202(a). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this cases arises, has held that duties that meet situs and function requirements constitute the work of a miner as defined in the Act. *Navistar, Inc. v. Forester*, 767 F.3d 638, 25 BLR 2-659 (6th Cir. 2014); *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 13 BLR 2-38 (6th Cir. 1989). Under the situs requirement, the work must take place in or around a coal mine or coal preparation facility. The function requirement mandates that the duties performed be integral to the extraction or preparation of coal or, to the extent the individual's duties were incidental to the extraction or preparation of coal, those duties were an integral or necessary part of the coal mining process. *Forester*, 767 F.3d at 641, 25 BLR at 2-664; *Petracca*, 884 F.2d at 931, 13 BLR at 2-42.

The administrative law judge found that claimant failed to establish the situs prong of the test, because the "the vast majority of his regular work took place in a garage offsite, not owned by a mine operator." Decision and Order at 8. Specifically, the administrative law judge noted claimant's testimony that he worked almost entirely in the garage; that he would occasionally leave to service a broken down truck located anywhere from the mine to the tipple; that 75% of the time was spent in the garage; that he only worked on trucks and did not haul coal himself; that he did not know the type of coal hauled, just that "it came from the mines and went to the load-out tipple where it was loaded into trains . . . ." Decision and Order at 7-8; Director's Exhibit 19 at 30-32. As substantial evidence supports the administrative law judge's determination that claimant's work did not satisfy the situs test, we affirm her finding that employer has rebutted the presumption that claimant's work as a mechanic from 1995 through 2000 was that of a miner.

Considering claimant's underground employment, the administrative law judge noted that claimant was "unable to recount the specific beginning and ending timeframes of his employment with various companies, and often could only recall a general year

date of employment." Decision and Order at 8. The administrative law judge found the evidence of record to be "unclear as to when claimant's employment started and ended with each company," and that there were "many periods in which claimant worked for less than one year with a specific employer." *Id*. Finding claimant's SSA earnings statement and his corresponding W-2 Forms to be "the only specific and credible evidence of record[]," the administrative law judge accorded them great weight. Decision and Order at 8-9. The administrative law judge noted that, "where the evidence is 'insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year,' it is permissible to use the formula provided by [20 C.F.R.] §725.101(a)(32)(iii)." Decision and Order at 9; *see* 20 C.F.R. §725.101(a)(32)(iii). The administrative law judge listed claimant's employers from 1979 through 1995, totaled claimant's yearly income, and then divided the yearly income by the coal mine industry's yearly average for 125 days set forth in Exhibit 610 to the *Office of Workers' Compensation Programs Coal Mine* (*BLBA*) *Procedure Manual*, to credit claimant with 8.06 years in underground coal mine employment.[5] Decision and Order at 8-10.

Section 725.101(a)(32) provides that to be credited with a year of coal mine employment, claimant must prove that the miner worked in or around a coal mine over a period of one calendar year (365 days), or partial periods totaling one year, during which he worked for at least 125 working days. 20 C.F.R. §725.101(a)(32). 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 finder-of-fact may, in her discretion, determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics. 20 C.F.R. §725.101(a)(32)(iii).

In this case, the administrative law judge used the average *annual* earnings by year for miners who spent an actual 125 days at a mine site, rather than the *daily* average earnings by year, to credit claimant with 365 days of employment if his income exceeded the industry standard for just 125 days of work. *See Croucher v. Director, OWCP*, 20 BLR 1-67, 1-72-3 (1996)(en banc)(McGranery, J., concurring and dissenting)(a mere showing of 125 working days does not establish one year of coal mine employment). Nevertheless, because the evidence of record is insufficient to establish the requisite fifteen years of qualifying coal mine employment, we affirm the administrative law

[5] Exhibit 610, titled *Average Earnings of Employees in Coal Mining*, contains the average annual earnings by year for miners who spent an actual 125 days at a mine site, and also contains the daily average earnings by year. *See* Department of Labor website at https://www.dol.gov/owcp/dcmwc/exh610.htm.

judge's finding that claimant is unable to benefit from the rebuttable presumption at Section 411(c)(4), 30 U.S.C. §921(c)(4).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, unassisted by the Section 411(c)(4) presumption, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *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).

Addressing the merits of the case, the administrative law judge found the evidence insufficient to establish the existence of clinical or legal pneumoconiosis pursuant to Section 718.202(a)(1)-(4).[6] Pursuant to Section 718.202(a)(1), the administrative law judge accurately determined that the August 27, 2011 x-ray was interpreted as positive for pneumoconiosis by Dr. Baker, a B reader, and as negative by Drs. Meyer and Tarver, who are dually qualified as Board-certified radiologists and B readers. Director's Exhibits 14, 16; Employer's Exhibit 2. Considering the quality and quantity of the x-ray evidence as a whole, the administrative law judge permissibly concluded that the x-ray evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), based on a numerical preponderance of negative interpretations by dually-qualified physicians, and we affirm her findings as supported by substantial evidence. Decision and Order at 12; 20 C.F.R. §718.202(a)(1); *see Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Chaffin v. Peter Cave Coal Co*., 22 BLR 1-294, 1-300 (2003).

Further, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(2), (3), as the record

[6] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconiosis, *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 is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

contains no autopsy or lung biopsy evidence and the presumptions at 20 C.F.R. §§718.304 and 718.305 are not applicable.[7]

At Section 718.202(a)(4), the administrative law judge accurately summarized the medical opinions of Drs. Baker,[8] Rosenberg,[9] and Vuskovich,[10] and determined that Dr. Baker was the only physician who diagnosed clinical pneumoconiosis, based on his positive x-ray interpretation. Decision and Order at 12-17, 19; Director's Exhibits 14, 15; Employer's Exhibit 1. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of clinical pneumoconiosis at Section 718.202(a)(4). *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). We also affirm her finding that the totality of the x-ray[11] and medical opinion evidence failed to establish the existence of clinical pneumoconiosis. Decision and Order at 20.

[7] The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he did establish at least fifteen years of qualifying coal mine employment.

[8] Dr. Baker performed the Department of Labor examination on August 27, 2011. He diagnosed clinical pneumoconiosis based on his x-ray reading and claimant's exposure to coal dust. He also diagnosed legal pneumoconiosis based on claimant's chronic obstructive pulmonary disease (COPD), hypoxemia and chronic bronchitis from coal dust exposure and cigarette smoking. He opined that claimant's total pulmonary impairment is due significantly to his coal dust exposure as well as his cigarette smoking. Director's Exhibit 14.

[9] Dr. Rosenberg examined claimant on March 23, 2012, and reviewed Dr. Baker's report, claimant's deposition, and other evidence of record. He diagnosed claimant as totally disabled from a pulmonary perspective, but found no evidence of clinical or legal pneumoconiosis. Director's Exhibit 15.

[10] Dr. Vuskovich provided a consulting opinion dated October 18, 2013, and opined that claimant did not have the ventilatory capacity to perform coal mine work or similar work in a dust free environment. He diagnosed asthma and chronic bronchitis due to cigarette smoke, and opined that claimant did not have clinical or legal pneumoconiosis. Employer's Exhibit 1.

[11] Pursuant to 20 C.F.R. §718.107, claimant may establish the existence of pneumoconiosis based on other evidence not specifically provided for in Section 718.202(a). Noting that the sole interpretation of the March 23, 2012 digital x-ray was read as negative by Dr. Meyer, who is dually qualified, the administrative law judge permissibly found that the digital x-ray evidence did not aid claimant in establishing

With regard to the existence of legal pneumoconiosis pursuant to Section 718.204(a)(4), the administrative law judge found that the opinions of all three physicians were entitled to diminished weight. Decision and Order at 21-22. Within a reasonable exercise of her discretion, the administrative law judge found that the opinion of Dr. Baker, the only opinion supportive of claimant's burden, was insufficient to establish the existence of legal pneumoconiosis. The administrative law judge found that Dr. Baker's opinion, attributing claimant's chronic obstructive pulmonary disease, chronic bronchitis, and hypoxemia to both smoking and coal dust exposure, was "not well reasoned," as the doctor failed to address why coal dust is a contributing factor to claimant's respiratory impairment, other than stating that coal dust and cigarette smoke are synergistic in the damage that they cause. Decision and Order at 21; *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) *citing Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). The administrative law judge further found Dr. Baker's opinion to be conclusory, as he stated that cigarette smoking could be the stronger agent in causing claimant's impairment, without explaining why coal mine dust contributes at all to the condition. *See* Decision and Order at 21; *Rowe*, 710 F.2d at 254, 5 BLR at 2-103; *Clark*, 12 BLR at 1-55; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Because the administrative law judge provided a valid basis for according less weight to Dr. Baker's opinion, the only opinion supportive of claimant's burden, we need not address the administrative law judge's weighing of the contrary opinions of Drs. Rosenberg and Vuskovich. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983). Thus, the administrative law judge permissibly concluded that the weight of the medical opinions of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4).

As substantial evidence supports the administrative law judge's finding that the weight of all probative evidence was insufficient to establish the existence of pneumoconiosis at Sections 718.202(a)(1)-(4) and 718.107, it is affirmed. Because claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, we affirm the administrative law judge's denial of benefits. *See Anderson*, 12 BLR at 1-112.

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pneumoconiosis. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc)(McGranery & Hall, JJ., concurring and dissenting); Decision and Order at 18; Director's Exhibit 15. We affirm the administrative law judge's finding that the digital x-ray evidence of record was insufficient to establish the existence of pneumoconiosis.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge