U.S. Department of Labor

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

BRB No. 15-0532 BLA

JAMES E. MOORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STOKER MINING COMPANY	)	DATE ISSUED: 07/29/2016
	)	
and	)	
	)	
OLD REPUBLIC 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 in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

James E. Moore, Printer, 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, the Decision and Order Denying Benefits in a Subsequent Claim[1] (2011-BLA-05029) of Administrative Law Judge Larry S. Merck, issued 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 found that claimant established nine years and seven months of coal mine employment. In addition, the administrative law judge found that the newly submitted evidence was insufficient to establish that claimant suffers from a totally disabling respiratory or pulmonary impairment. Based on these findings, the administrative law judge determined that claimant was not entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4), 30 U.S.C §921(c)(4) (2012).[2] The administrative law judge also found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Because claimant failed to establish the existence of pneumoconiosis or total disability through newly submitted evidence, the administrative law judge concluded that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly benefits were denied.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging the Board to affirm the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the administrative law judge's Decision and Order if the findings of fact

[1] Claimant filed an initial claim for benefits on October 4, 1984, which was denied by Administrative Law Judge W. Ralph Musgrove on February 19, 1991, because the evidence was insufficient to establish that claimant had pneumoconiosis. Director's Exhibit 1. Claimant filed a second claim for benefits on March 12, 2002, which was denied by Administrative Law Judge Rudolf L. Jensen on January 25, 2006, because claimant failed to establish any of the requisite elements of entitlement. Director's Exhibit 2. Claimant filed this subsequent claim on October 5, 2009. Director's Exhibit 4.

[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 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.

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).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). In this case, because claimant's prior claim was denied for failure to establish any element of entitlement, claimant had to establish one element, based on the newly submitted evidence, in order to obtain review of the case on the merits. *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); Director's Exhibit 2.

I. INVOCATION OF SECTION 411(c)(4) PRESUMPTION

Initially, we will address the administrative law judge's finding that claimant is unable to invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), based on his determinations that claimant failed to establish that he worked fifteen or more years in qualifying coal mine employment and also has a totally disabling respiratory or pulmonary impairment.

A. Length of Coal Mine Employment

Claimant bears the burden of establishing the length of coal mine employment. *See Mills v. Director, OWCP*, 348 F.3d 133, 136, 23 BLR 2-12, 2-16 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). Because 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 of calculation 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). In calculating claimant's length of coal mine employment, the administrative law judge considered statements made by claimant on the Employment History Form, CM-911a, and the Description of Coal Mine Work and Other Employment Form CM-913. Decision and Order at 5-6; Director's Exhibits 5, 6. The administrative law judge also considered the answers that claimant gave in response to a questionnaire, Form DO-5, as well as claimant's Social Security Administration (SSA) earnings records,

[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); Director's Exhibit 5.

and letters from claimant and employer. Decision and Order at 5-6; Director's Exhibits 7-10, 13, 48.

As noted by the administrative law judge, claimant contends that he has twenty-four years of coal dust exposure, based on ten years of coal mine work with employer and an alleged fourteen years of employment at a cement plant, where claimant maintains coal was present. Decision and Order at 5; Director's Exhibit 48 at 2. With regard to claimant's alleged work at a cement plant, we conclude that the administrative law judge reasonably determined that it did not constitute coal mine employment. *See Kephart*, 8 BLR at 1-186. The administrative law judge properly found that "the record contains no evidence to support [claimant's] assertion that he worked at a cement plant" as claimant's "employment history and his description of his coal mine work refer only to his work period of employment with Marathon Oil Corporation, from 1959 to 1973." Decision and Order at 5; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Although claimant's SSA records indicate fourteen years of employment at Marathon Oil Corporation, they do not identify whether this work was performed at a cement plant. Decision and Order at 5; Director's Exhibit 13. Furthermore, even if the record showed that claimant was employed at a cement plant, the administrative law judge observed correctly that "the mere presence of coal at the [cement] plant would not be enough to transform that time into coal mine employment." Decision and Order at 5. Rather, claimant's employment must constitute the work of a miner.[4] *See Navistar, Inc. v. Forester*, 767 F.3d 638, 641, 25 BLR 2-659, 2-664 (6th Cir. 2014).

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. 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. *See Forester*, 767 F.3d at 641, 25 BLR at 2-664. Under the situs requirement, the work must take place in or around a coal mine or coal preparation facility. *Director, OWCP v. Consolidation Coal Co.*, [*Petracca*], 884 F.2d 926, 931, 13 BLR 2-38, 2-41-42 (6th Cir.

[4] In his letter to the Board dated September 23, 2015, claimant indicates that he was exposed to coal dust as a child, as he was born in a coal mining camp and lived there for years. Claimant also states that, presently, coal trucks pass his home regularly, and he and his wife are exposed to coal dust as a result. However, coal dust exposure during his childhood and at home does not constitute coal mine employment under the Black Lung Benefits Act. *See Navistar, Inc. v. Forester*, 767 F.3d 638, 641 25 BLR 2-659, 2-664 (6th Cir. 2014).

1989). 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. *Id*. In this case, the administrative law judge properly found that claimant's alleged work at a cement plant would not constitute coal mine employment as the record contains "no evidence that the cement plant was a coal mine or coal preparation facility." Decision and Order at 5; *see 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 next noted that claimant identified coal mine employment with employer, Stoker Mining Company, from 1973 to 1983, as a tipple worker. Director's Exhibits 6, 7. Claimant asserted that this equates to ten years of coal mine employment. Director's Exhibit 7. However, a letter from employer to the district director details that claimant worked for Stoker Mining Company from July 12, 1973 until January 15, 1983. Director's Exhibit 10. Moreover, a letter from Ruth Hall Trucking, Inc. to the district director indicates that claimant worked for that entity from January 16, 1983 until February 15, 1983. Director's Exhibit 9. In addition, claimant stated that he was laid off by employer in February 1983. Director's Exhibit 7. Although the administrative law judge noted claimant's contention that both employer and Ruth Hall were owned by the same parent company, Turner Elkhorn Mining Company, he properly found that claimant's combined employment with those companies does not amount to fifteen years of coal mine employment. Decision and Order at 5. The administrative law judge correctly determined that employment from July 12, 1973 to February 15, 1983 equates to only nine years and seven months of coal mine employment. Decision and Order at 5. Thus, because it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant established nine years and seven months of coal mine employment, and not the fifteen years necessary to invoke the Section 411(c)(4) presumption. *See Muncy*, 25 BLR at 1-27.

B. Total Disability

The regulations provide that a miner shall be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work, and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies showing values equal to or less than those listed in Appendix B to 20 C.F.R Part 718; 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; 3) the miner has pneumoconiosis and is shown by the evidence to suffer from cor pulmonale with right-sided congestive heart failure; or 4) a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

Pursuant to 20 C.F.R. §718.204(b)(2)(i)-(ii), the newly submitted evidence includes a single pulmonary function study and single arterial blood gas study, both taken on March 11, 2010. Director's Exhibit 18. The administrative law judge correctly found that the pulmonary function study and arterial blood gas study are non-qualifying for total disability.[5] Decision and Order at 6 n.8; Director's Exhibit 18. Consequently, we affirm the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (ii). Because there is no evidence of record indicating that claimant suffers from cor pulmonale with right-sided congestive heart failure, claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). In considering the newly submitted medical opinions of Drs. Forehand and Jarboe,[6] the administrative law judge correctly found that "neither Dr. Forehand nor Dr. Jarboe opined that [c]laimant's respiratory or pulmonary condition prevents him from performing his most recent coal mine employment."[7] Decision and Order at 7. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). We further affirm the administrative law judge's overall finding that claimant did not establish a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987).

Thus, because the evidence is insufficient to establish the requisite fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that claimant is unable to

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i). A "qualifying" blood gas study yields values that are equal to or less than the values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[6] The record contains no newly submitted treatment records indicating that claimant is totally disabled by a respiratory or pulmonary impairment.

[7] Dr. Forehand stated that claimant has a respiratory impairment, but that "sufficient residual ventilatory capacity remains to return to last coal mining job." Director's Exhibit 18; *see* Employer's Exhibit 3. Dr. Jarboe opined that the objective testing "does not support the presence of a totally and permanently disabling pulmonary condition." Employer's Exhibit 2.

invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4).

II. EXISTENCE OF PNEUMOCONIOSIS

To be entitled to benefits under the Act, claimant must establish that he has pneumoconiosis arising out of coal mine employment, and that he is totally disabled by 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. *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).

The administrative law judge found that the newly submitted evidence is insufficient to establish the existence of clinical[8] or legal[9] pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Weighing the x-ray evidence under 20 C.F.R. §718.202(a)(1), the administrative law judge noted that the record includes two newly submitted x-ray readings, by Drs. Forehand and Tarver, of a March 11, 2010 x-ray. Decision and Order at 7; Director's Exhibit 18; Employer's Exhibit 1. The administrative law judge correctly found that both physicians interpreted this x-ray as negative for clinical pneumoconiosis. Decision and Order at 7. Because the March 11, 2010 x-ray is negative and there are no newly submitted positive x-rays, we affirm the administrative law judge's finding that

[8] Clinical pneumoconiosis is defined as:

> [T]hose 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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[9] Legal pneumoconiosis includes "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). The regulation also provides that "a disease 'arising out of coal mine employment' includes any 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) (emphasis added).

claimant failed to establish clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Id.* Further, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3), as the record contains no autopsy or lung biopsy evidence and the presumptions at 20 C.F.R. §§718.304 and 718.305 are not applicable.[10] Decision and Order at 7 n.9.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge noted that there were two newly submitted medical opinions by Drs. Forehand and Jarboe, neither of whom diagnosed clinical or legal pneumoconiosis.[11] As the medical opinions do not diagnose either clinical or legal pneumoconiosis,[12] we affirm the administrative law judge's finding that claimant is unable to establish the existence pneumoconiosis at 20 C.F.R. §718.202(a)(4). We further affirm, as supported by substantial evidence, the administrative law judge's finding that all of the evidence of record, when weighed together, did not establish the existence of pneumoconiosis pursuant to 20 C.F.R.

[10] The presumption at 20 C.F.R. §718.304 is not applicable 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 failed to establish at least fifteen years of qualifying coal mine employment.

[11] The administrative law judge correctly noted that Dr. Forehand performed the examination of claimant for the Department of Labor and concluded that there was "no evidence of coal workers' pneumoconiosis,'" and that claimant suffered from an obstructive impairment, but "'cigarette smoker's lung disease is the principle cause of the impairment." Decision and Order at 7, *quoting* Director's Exhibit 18. In addition, the administrative law judge also correctly noted that Dr. Jarboe examined claimant on behalf of employer and "likewise concluded that [c]laimant has neither clinical nor legal pneumoconiosis" and that "coal dust exposure had not significantly contributed to or aggravated any disease or condition[.]" Decision and Order at 8, *citing* Employer's Exhibit 2.

[12] The record contains an August 1, 2002 treatment note from Dr. Abou-Ghazala of Kentucky Cardiovascular Group. Director's Exhibit 23. Claimant was seen for "[o]ne month follow-up of permanent pacemaker." *Id.* Under the heading "Problem List" a notation of "Black Lung" is listed among other notations, including "Pacer pocket infection," "Family history of CAD [coronary artery disease]," "Remote tobacco use," and "Hypertension, controlled." *Id.* Although the administrative law judge did not specifically discuss this treatment note in his Decision and Order, we consider the error to be harmless, as the note does not identify the physician who may have made the diagnosis or the basis for the diagnosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

§718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000).

Because the newly submitted evidence is insufficient to establish either the existence of pneumoconiosis or total disability, each of the elements that claimant failed to prove in his prior claim,[13] we affirm the administrative law judge's finding that claimant failed to establish a change in an applicable condition of entitlement under 20 C.F.R. §725.309, and the denial of benefits. *See White*, 23 BLR at 1-3.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[13] Claimant argues that he is entitled to the rebuttable presumption at 20 C.F.R. §718.203, that his pneumoconiosis arose out of coal mine employment. However, as we have affirmed the administrative law judge's findings that claimant established less than ten years of coal mine employment and that he does not have pneumoconiosis, the presumption is not applicable. 20 C.F.R. §718.203(b), (c).