U.S. Department of Labor

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

BRB No. 17-0508 BLA

CURTIS STILWELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
J S & K COAL CORPORATION	)	DATE ISSUED: 07/18/2018
	)	
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 an Initial Claim of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Curtis Stilwell, Cedar Bluff, Virginia.

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 an Initial Claim (2013-BLA-05493) of Administrative Law Judge Clement J. Kennington, rendered on a miner's claim filed on March 19, 2012, 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 11.16 years of coal mine employment and, therefore, could not invoke the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge also found that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer/carrier (employer) responds, urging affirmance.[2] The Director, Office of Workers' Compensation Programs, has not filed a substantive response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact are rational and 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).

[1] 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); 20 C.F.R. §718.305(b)(1).

[2] On May 22, 2018, employer filed a Motion for Leave to File Response Instanter (Motion), stating that it had not yet filed a response brief because it did not receive the Board's acknowledgement of claimant's appeal. We hereby grant employer's Motion and accept its response brief.

[3] Because claimant's last coal mine employment was in Virginia, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 6, 7.

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

Claimant bears the burden of establishing the length of his coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710 (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 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); *Miller v. Director, OWCP*, 7 BLR 1-693, 1-694 (1983); *Maggard v. Director, OWCP*, 6 BLR 1-285, 1-286 (1983).

In addressing this issue, the administrative law judge considered all relevant evidence, which consists of the application for benefits, an employment history form, the Social Security Administration (SSA) earnings record, and claimant's deposition and hearing testimony. Decision and Order at 15-17; Director's Exhibits 2-4, 6, 30; Hearing Transcript at 9-18. The administrative law judge accurately found that there is no evidence in the record specifically identifying the beginning and ending dates of claimant's coal mine employment. Decision and Order at 15. The administrative law judge further permissibly determined that although claimant "tried his best" to remember the dates of his coal mine employment at his 2012 deposition and the 2016 hearing, his recollection was inconsistent and conflicted with the information on his claim form, employment history form and SSA earnings record. Decision and Order at 16; *see Lafferty v. Cannelton Indus.*, 12 BLR 1-190, 1-192 (1989); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc). The administrative law judge also observed, "[c]laimant acknowledged at the 2012 deposition that the earning records were 'probably more accurate' than what he was thinking." Decision and Order at 16, *quoting* Director's Exhibit 30 at 15. "[B]ased on the absence of direct evidence of the specific dates of [c]laimant's coal mine employment and [c]laimant's inconsistent recollections," the administrative law judge rationally determined that the SSA earning record provides "the most accurate basis to determine the length of his coal mine employment." Decision and Order at 16; *see Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204-05 (2016); *Clayton v. Pyro Mining Co.*, 7 BLR 1-551, 1-553-54 (1984).

The administrative law judge then prepared a table listing claimant's coal mine employment and his earnings from each coal mining company, as reflected on his SSA earnings record.[4] Decision and Order at 16-17. For the period from 1968 through 1977,

[4] The administrative law judge explained that the table he prepared included all companies identified on claimant's employment history form that have names indicative of coal mining, with the exception of "Carl Davis" and "Amer Short." Decision and Order at 16 n.12; Director's Exhibits 2, 3. Claimant listed "Carl Davis" on his claim form and

the administrative law judge rationally credited claimant with a full quarter of employment for each quarter in which he earned at least fifty dollars, for sixteen quarters or four years of coal mine employment. *See Muncy*, 25 BLR at 1-27; *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984); Decision and Order at 16-17. For the years of earnings after 1977, which the SSA reports only on an annual basis, the administrative law judge used a version of the formula set forth in 20 C.F.R. §725.101(a)(32)(iii), because he could not determine the beginning or ending dates of claimant's employment.[5] He concluded that claimant had an additional 7.16 years of coal mine employment between 1978-85 and 1988-90, for a total of 11.16 years of coal mine employment. Decision and Order at 17, n.12.

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his employment history form, but it does not appear in his Social Security Administration (SSA) earnings record. Director's Exhibit 2, 3. In addition, claimant did not identify the beginning or ending dates of his tenure with "Carl Davis," or specifically discuss this employment at his 2012 deposition or the 2016 hearing. Concerning "Amer Short," the administrative law judge noted that claimant testified at his 2012 deposition that he worked for them dumping coal when he was fifteen, which the administrative law judge found would have been in 1965. Decision and Order at 16 n.12; Director's Exhibit 30 at 34-35. The administrative law judge observed that the SSA earnings record prior to 1966 was not requested and that claimant did not provide any information permitting him to include this employment in his calculations. Decision and Order at 16 n.12. Further, the administrative law judge explained that although claimant listed employment with Jewell Smokeless on his employment history form, he testified at his 2012 deposition that Bill Branch Coal, an employer listed on his SSA earnings record, was owned by Jewell Smokeless. *Id*.; Director's Exhibit 30 at 19. In light of the administrative law judge's thorough explanation of how he identified coal mining companies on claimant's SSA record, we find no error in his exclusion of Carl Davis and Amer Short from his calculation of the length of claimant's coal mine employment. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998).

[5] The regulation at 20 C.F.R. §725.101(a)(32)(iii) provides, in pertinent part:

> If 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, then the adjudication officer may use the following formula: divide 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 (BLS).

20 C.F.R. §725.101(a)(32)(iii).

We affirm the administrative law judge's finding of less than fifteen years of coal mine employment as supported by substantial evidence because it is based on a complete and accurate review of all relevant testimony and documentation.[6] *See Muncy*, 25 BLR at 1-27; *Vickery*, 8 BLR at 1-432. Thus, we further affirm his determination that claimant did not invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.305(b)(1)(i); Decision and Order at 17, 21 n.19.

II. Existence of Pneumoconiosis

Without the Section 411(c)(4) presumption, or the irrebuttable presumption of total disability due to pneumoconiosis,[7] claimant has the burden to prove: he has pneumoconiosis; his pneumoconiosis arose out of coal mine employment; he has a totally disabling respiratory or pulmonary impairment; and his total disability is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; Decision and Order at 21 & n.19. 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).

A. Clinical Pneumoconiosis

In this case, claimant could establish the existence of clinical pneumoconiosis[8] by x-ray or medical opinion evidence.[9] 20 C.F.R. §718.202(a)(1), (4). Pursuant to 20 C.F.R.

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[6] We do not take a position concerning the way in which the administrative law judge applied the formula at 20 C.F.R. §725.101(a)(32)(iii). However, we note that error, if any, in his method of calculation is harmless because he used an assumption as to the length of a work year that benefited claimant. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984); Decision and Order at 17 n.13.

[7] The administrative law judge accurately determined that there is no evidence of complicated pneumoconiosis and, therefore, claimant could not invoke the presumption at 20 C.F.R. §718.304. Decision and Order at 21 n.19.

[8] 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).

[9] The administrative law judge correctly found that claimant could not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(2), as there is no biopsy evidence in the record. Decision and Order at 21. In addition, claimant could not establish

§718.202(a)(1), the administrative law judge considered four interpretations of three x-rays dated March 29, 2012, October 17, 2012, and September 2, 2015. Decision and Order at 22; Director's Exhibits 14-16; Employer's Exhibit 1. Dr. DePonte, dually-qualified as a Board-certified radiologist and B-reader, found that the March 29, 2012 x-ray showed a profusion of opacities of 0/1,[10] while Dr. Meyer, also dually-qualified, found this x-ray negative for pneumoconiosis.[11] Director's Exhibits 15-16. Dr. Fino, a B-reader, read the October 17, 2012 x-ray as negative for pneumoconiosis. Director's Exhibit 14. Dr. Meyer, a dually-qualified reader, interpreted the September 2, 2015 x-ray as negative for pneumoconiosis. Employer's Exhibit 1. As the record contains no positive x-ray interpretations, the administrative law judge rationally determined that claimant did not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). Decision and Order at 22.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge weighed the medical opinions of Drs. Splan, Fino and McSharry, noting that each is a Board-certified pulmonologist. Decision and Order at 23; Director's Exhibits 14-15; Employer's Exhibit 1. He accurately concluded that because none of these physicians diagnosed claimant with clinical pneumoconiosis, claimant could not prove that he has clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 23-25. In light of the administrative law judge's accurate and rational consideration of the relevant evidence, we affirm his findings that claimant did not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4), or based on a weighing of all relevant evidence together. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); Decision and Order at 26.

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the existence of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(3), based on the administrative law judge's appropriate determination that there is no evidence of complicated pneumoconiosis, and our affirmance of his finding that the Section 411(c)(4) presumption was not invoked. *Id*. at n.19.

[10] The regulation at 20 C.F.R. §718.102(d)(3) provides that a 0/1 x-ray reading does not constitute evidence of pneumoconiosis.

[11] Dr. Barnett, a Board-certified radiologist and B-reader, interpreted the March 29, 2012 x-ray for quality purposes only. Director's Exhibit 15.

B. Legal Pneumoconiosis

To establish the existence of legal pneumoconiosis,[12] claimant must demonstrate that he suffers from a "chronic lung disease or impairment" that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). The administrative law judge considered the opinions of Drs. Splan, Fino, and McSharry, all Board-certified pulmonary specialists. Decision and Order at 22-25; Director's Exhibits 14-15; Employer's Exhibit 1.

Dr. Splan, the only physician that diagnosed legal pneumoconiosis, noted that claimant "began working in the mines in 1968 and came out in 1990 as a result of medical problems." Director's Exhibit 15. He diagnosed claimant with a respiratory impairment due to coal dust inhalation and tobacco smoke exposure. *Id*. Dr. Splan explained that his diagnosis is "based upon confirmed work time, exposure to coal[,] symptoms and findings on physical examination, [and] spirometry and arterial blood gas reports." *Id*.

The administrative law judge permissibly found that Dr. Splan's opinion is entitled to "little probative weight," as he relied on a coal mine employment history of twenty-two years, which is approximately twice the 11.16 years that the administrative law judge found. Decision and Order at 23; *see Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993). Because the administrative law judge permissibly discredited the only medical evidence supportive of claimant's burden, we affirm his finding that claimant did not establish the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a).[13] *See Compton*, 211 F.3d at 207-208, 22 BLR at 2-168; Decision and Order at 25-26.

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[12] 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).

[13] The administrative law judge also considered claimant's hospital and treatment records and rationally determined that they are consistent with his finding that claimant did not establish the existence of clinical pneumoconiosis. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); Decision and Order at 26. With respect to legal pneumoconiosis, the administrative law judge accurately found that claimant's records "do not include [a] specific discussion" regarding the existence of the disease. Decision and Order at 26. In rendering this finding, the administrative law judge permissibly discredited as speculative a physician's statement that "[i]t is conceivable that [claimant] could have low oxygen levels from black lung from being a coal miner for a long time." Decision and Order at 26, *quoting* Director's Exhibit 13; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997.

In light of our affirmance of the administrative law judge's finding that claimant did not establish the existence of either clinical or legal pneumoconiosis, an essential element of entitlement, we must affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits in an Initial Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge