U.S. Department of Labor

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

BRB No. 16-0313 BLA

CARL L. CRUSENBERRY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
P&P COAL COMPANY, INCORPORATED	)	DATE ISSUED: 03/31/2017
	)	
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 of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Carl L. Crusenberry, St. Charles, Virginia.

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

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2012-BLA-05817) of Administrative Law Judge Morris D. Davis, rendered on a subsequent claim, filed on January 26, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited claimant with 10.883 years of coal mine employment and adjudicated this claim pursuant to the regulatory provisions of 20 C.F.R. Parts 718 and 725. The administrative law judge determined that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. 921(c)(4) (2012), because he had less than the required fifteen years of underground coal mine employment or coal mine employment in substantially similar conditions. The administrative law judge further found that, although claimant established the existence of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(1), he did not establish the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). The administrative law judge then determined that claimant's clinical pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), and that claimant is totally disabled at 20 C.F.R. §718.204(b)(2)(iv). Thus, the administrative law judge found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[2] The administrative law judge further found, however, that claimant failed to prove that his total disability is due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers'

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

[2] Claimant filed his initial claim on August 12, 1986. Director's Exhibit 1. In a Decision and Order dated May 30, 1995, Administrative Law Judge Lawrence E. Gray denied benefits, finding that claimant did not establish the existence of pneumoconiosis or total disability. *Id*. Claimant timely filed a request for modification. *Id*. On June 23, 1999, Administrative Law Judge Pamela Lakes Wood issued a Decision and Order - Denying Benefits, finding that the evidence submitted on modification was insufficient to establish the existence of pneumoconiosis or total disability. *Id*. No further action was taken until claimant filed the present subsequent claim.

Compensation Programs, has indicated that he will not file a substantive response to claimant's appeal.[3]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

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, 1-710-11 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984). 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 (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 this case, the administrative law judge considered claimant's employment history summaries, hearing testimony, and Social Security Administration (SSA) earnings records. Decision and Order at 5-8; Director's Exhibits 1, 6; Hearing Transcript

[3] We affirm as unchallenged on appeal, and not adverse to claimant, the administrative law judge's findings that claimant established total disability at 20 C.F.R. §718.204(b), a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and the existence of clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), 718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The record indicates that claimant's last coal mine employment was in Virginia. Decision and Order at 8; Director's Exhibit 1; Hearing Transcript at 12. Accordingly, the Board 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).

at 12-20. The administrative law judge determined that the miner's SSA earnings records showed that from 1970 through 1977, claimant had nineteen quarters of coal mine employment in which he earned over $50.00. Decision and Order at 5. Based on this data, the administrative law judge credited the miner with 4.75 years of coal mine employment. *Id*. The administrative law judge determined that in 1978 and 1979, the evidence was insufficient to establish the beginning and ending dates of claimant's employment, and that his yearly earnings were below the yearly wage base in Exhibit 609 to the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*. *Id*. at 6-7. The administrative law judge cited the formula set forth in 20 C.F.R. §725.101(a)(32)(iii)[5] and divided the miner's earnings from coal employment in each year by the wage base for each year, as reported in Exhibit 609. *Id*. Based on his calculations, the administrative law judge credited claimant with .813 of a year of coal mine employment in 1978, and .153 of a year of coal mine employment in 1979, resulting in a total of .966 of a year of coal mine employment for 1978 and 1979. *Id*. at 7.

For 1980 through 1986, the administrative law judge considered claimant's underground coal mine work while self-employed with Fox Branch Coal Company, which operated as Cox Creek Coal Company (Cox Creek). Decision and Order at 7. The administrative law judge declined to credit the SSA records regarding claimant's work at Cox Creek[6] because "the information reflected on the [SSA records] for [c]laimant's period of self-employment is not a reliable indication of the amount of time he spent working as a coal miner during that period." *Id*. The administrative law judge relied on claimant's testimony, and the partnership agreement which purported to make claimant an owner of Cox Creek, to credit him with .833 of a year of coal mine employment in

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

> 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).

[6] The Social Security Administration (SSA) earnings record reflects self-employment earnings of $9,917.00 in 1980, $20,216.00 in 1981, $30,637.00 in 1982, $11,092.00 in 1983 and $12,439.00 in 1984. Director's Exhibit 6. No earnings are reported for 1985. *Id*. The SSA earnings record reflects earnings of $3,697.00 in 1986 with Sherbett Energies Inc. *Id*.

1980, full years of coal mine employment in 1981, 1982, 1983 and 1984, and .167 of a year in 1985, for a total of 5 years of coal mine employment from 1980 through 1985. *Id*. Finally, the administrative law judge credited claimant with two months of coal mine employment in 1986, based on his Form CM-911 (History of Coal Mine Employment) and his hearing testimony in 1994 and 1998. *Id*. at 8 n.14.

Adding the 4.75 years credited for 1970 to 1977, the .966 of a year credited for 1978 and 1979, the five years credited for 1980 to 1985, and the .167 of a year credited for 1986, the administrative law judge found that claimant had a total of 10.883 years of coal mine employment. Decision and Order at 8. The administrative law judge concluded, therefore, that claimant had the ten years of coal mine employment necessary to invoke the presumption that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), but not the fifteen years necessary to invoke the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. *Id*. at 8, 19.

We hold that the administrative law judge permissibly credited the miner with 4.75 years of coal mine employment for the period prior to 1978, when the SSA reported earnings by quarter, because he earned over $50.00 per quarter in nineteen quarters. *See Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003); Decision and Order at 5; Director's Exhibit 6. We also affirm the administrative law judge's determination to credit claimant with five years of coal mine employment from 1980 to 1985 and .167 of a year in 1986, as supported by substantial evidence in the form of claimant's extensive testimony regarding his self-employment with Cox Creek. *See Muncy*, 25 BLR at 1-27; *Vickery*, 8 BLR at 1-432.

When applying the formula set forth in 20 C.F.R. §725.101(a)(32)(iii) to calculate claimant's partial years of coal mine employment in 1978 and 1979, however, the administrative law judge erred in using Exhibit 609 to the *Office of Workers' Compensation Programs Coal Mine* (*BLBA*) *Procedure Manual*, rather than Exhibit 610 to calculate the fractional years of coal mine employment.[7] *Osborne v. Eagle Coal Co.*, BLR , BRB No. 15-0275 BLA, slip op. at 8-9 (Oct. 5, 2016). Notwithstanding this error, remand is not required because, even if the administrative law judge credited claimant with a full year of coal mine employment for the periods that he worked in 1978 and 1979, claimant would have, at most, twelve years of such employment, which is

[7] Exhibit 610 to the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, entitled "*Average Wage Base*," contains the coal mine industry daily earnings data referenced in 20 C.F.R. §725.101(a)(32)(iii). Exhibit 609 sets out the annual limit on income subject to Social Security tax. The Social Security earnings records may underreport a miner's actual wages because the earnings records do not typically show income that exceeds the wage base amount.

insufficient for invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(b)(1)(i); *see Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984). Accordingly, we affirm the administrative law judge's finding that claimant could not invoke the presumption at Section 411(c)(4) because he did not have the requisite length of coal mine employment. 20 C.F.R. §718.305(b).

II. Legal Pneumoconiosis – 20 C.F.R. §718.202(a)(4)

To establish entitlement to benefits when, as in this case, the administrative law judge has determined that the Sections 411(c)(3)[8] and 411(c)(4) presumptions do not apply, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he or she has 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. 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Because the administrative law judge relied on his legal pneumoconiosis findings when considering whether claimant established that he is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c), we will address the administrative law judge's determination that the medical opinion evidence was insufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).[9] The record contains the medical opinions of Drs. Baker, Rosenberg, and Fino. Dr. Baker performed the Department of Labor-sponsored examination of claimant on March 18, 2011, and diagnosed both clinical[10] and legal pneumoconiosis. In an addendum to Form CM-988

[8] The administrative law judge determined correctly that claimant cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis, set forth in 20 C.F.R. §718.304, because there is no evidence of complicated pneumoconiosis. Decision and Order at 19.

[9] 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).

[10] 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

(Medical History and Examination for Coal Mine Workers' Pneumoconiosis), Dr. Baker stated:

> [Claimant] has a severe degree of resting arterial hypoxemia and associated chronic bronchitis. These can be caused by coal dust exposure. He also has a long history of smoking of about [forty-seven] years at the rate of one-half to one pack per day. This can likewise cause similar symptoms. The medical literature suggest[s] that when the patient has exposure to both tobacco smoke and coal dust, [his] condition would be worse than if he had either one exposure or the other instead of both exposures. On this basis, I feel his condition has been significantly contributed to and substantially aggravated by coal dust exposure from his coal mine employment and represents legal pneumoconiosis.

Director's Exhibit 11. Drs. Fino and Rosenberg, who examined claimant on June 15, 2011 and December 13, 2012 respectively, determined that he does not have clinical or legal pneumoconiosis, but suffers from chronic obstructive pulmonary disease (COPD) related solely to cigarette smoking. Director's Exhibit 15; Employer's Exhibit 1.

The administrative law judge weighed each medical opinion and concluded that they were all unreasoned on the issue of the existence of legal pneumoconiosis, as the physicians did not provide conclusions that were either definitive or adequately explained. Decision and Order at 20. Because Dr. Baker is the only physician who diagnosed legal pneumoconiosis, we will limit our review to the administrative law judge's consideration of his opinion. We hold that the administrative law judge permissibly discredited Dr. Baker's diagnosis based on his statement that claimant's hypoxemia and chronic bronchitis "can" be caused by coal dust, which implied that these conditions "can" also be caused by factors that Dr. Baker did not address. Decision and Order at 19, *quoting* Director's Exhibit 11; *see Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). The administrative law judge also rationally determined that Dr. Baker's opinion was entitled to little weight because Dr. Baker provided a "conclusory statement[]" that he alleged was supported by medical literature, which he did not "identify or attempt to explain or apply." Decision and Order at 20, *quoting* Director's Exhibit 11; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-235 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Because the administrative law judge provided valid rationales for finding that Dr. Baker's opinion

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reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

was insufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), we affirm this finding.

III. Disability Causation - 20 C.F.R. §718.204(c)

To establish that total respiratory or pulmonary disability is due to pneumoconiosis, claimant was required to establish that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge again considered the medical opinions of Drs. Baker, Rosenberg, and Fino. He correctly determined that Dr. Baker's opinion constituted "[t]he sole evidence that pneumoconiosis is a substantially contributing cause of [c]laimant's total disability."[11] Decision and Order at 23; Director's Exhibit 11. The administrative law judge found that Dr. Baker's opinion as to whether clinical pneumoconiosis contributed to claimant's totally disabling respiratory or pulmonary impairment did not satisfy the "substantially contributing cause" standard, because Dr. Baker did not clearly state that clinical pneumoconiosis had a material adverse effect on claimant's respiratory or pulmonary condition, or materially worsened claimant's totally disabling respiratory or pulmonary impairment. Decision and Order at 25. The administrative law judge also determined that Dr. Baker's opinion did not constitute probative evidence that legal pneumoconiosis was a substantially contributing cause of claimant's total respiratory or pulmonary disability, stating:

> First, I found that the evidence did not establish legal pneumoconiosis; therefore, I give no weight to the part of Dr. Baker's opinion dedicated solely to legal pneumoconiosis. Second, the only part of Dr. Baker's opinion that has any probative value on the question of disability causation is the final sentence: "His Coal Workers Pneumoconiosis 1/0, clinical and legal pneumoconiosis, severe resting arterial hypoxemia and chronic bronchitis all have an adverse effect on his respiratory system and

[11] Drs. Rosenberg and Fino indicated that cigarette smoking was the sole cause of claimant's disabling impairment. Director's Exhibit 15; Employer's Exhibit 1 at 7-11. The administrative law judge discredited these opinions at 20 C.F.R. §718.204(c) because their failure to diagnose clinical pneumoconiosis conflicted with his finding at 20 C.F.R. §718.202(a). Decision and Order at 24.

> contribute[] to his total pulmonary disability due, at least in part, to his coal dust exposure." Legal pneumoconiosis factored into Dr. Baker's analysis and it would be pure speculation for me to guess what he might have said without it.

Decision and Order at 25-26, *quoting* Director's Exhibit 11. The administrative law judge concluded, therefore, that claimant failed to establish that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 26.

Determining the credibility of the medical opinion evidence is committed to the discretion of the administrative law judge in his or her role as fact-finder. *See Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). In the present case, the administrative law judge acted within his discretion in finding that Dr. Baker's opinion was insufficient to satisfy claimant's burden as to clinical pneumoconiosis, because Dr. Baker did not explicitly opine that clinical pneumoconiosis met the standard set forth in 20 C.F.R. §718.204(c). *See Consolidation Coal Co. v. Held*, 314 F.3d 184, 187-8, 22 BLR 2-564, 2-571 (4th Cir. 2002); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 21, 23-26. In addition, the administrative law judge rationally discredited Dr. Baker's opinion that legal pneumoconiosis, in the form of hypoxemia and chronic bronchitis, was a substantially contributing cause of claimant's total respiratory or pulmonary disability on the ground that Dr. Baker's diagnosis of legal pneumoconiosis was contrary to the administrative law judge's finding at 20 C.F.R. §718.202(a)(4). *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-720-21 (4th Cir. 2015); *Hicks*, 138 F.3d at 535, 21 BLR at 2-340.

Because the administrative law judge provided valid reasons for discrediting the opinion of Dr. Baker, the only physician to opine that pneumoconiosis played a significant role in claimant's disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that Dr. Baker's opinion is insufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). In light of our affirmance of the administrative law judge's determination that claimant failed to establish total disability due to pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718, we must further affirm the denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge