U.S. Department of Labor

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

BRB No. 17-0347 BLA

BILLY N. LLOYD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 03/29/2018
	)	
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 of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Billy N. Lloyd, Rural Retreat, Virginia.[1]

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

[1] Cindy Viers, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Viers is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (2014-BLA-05413) of Administrative Law Judge Lee J. Romero, Jr. denying benefits 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). This case involves a subsequent claim for benefits filed on May 10, 2013.[2]

Because the administrative law judge initially credited claimant with "just over [twelve] years of coal mine employment,"[3] he found that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2012). Turning to whether claimant could affirmatively establish entitlement under 20 C.F.R. Part 718, the administrative law judge found that the new pulmonary function study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), and therefore that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). However, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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

[2] Claimant's previous claim for benefits, filed on January 27, 1994, was denied by the district director on July 12, 1995 for failure to establish any element of entitlement. Director's Exhibit 1.

[3] The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibit 1. 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).

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with applicable law. 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).

Length of Coal Mine Employment

Because it is relevant to whether claimant can invoke the Section 411(c)(4) presumption, we initially address the administrative law judge's determination that claimant established less than fifteen years of qualifying coal mine employment.

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). As the regulations provide only limited guidance 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 supported by substantial evidence in the record. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (en banc).

The administrative law judge used two methods to calculate the length of claimant's coal mine employment. For the years 1969 through 1977, relying on claimant's Social Security Earning Statement, the administrative law judge credited claimant with coal mine employment for every quarter in which he had earnings from coal mine companies.[5] Using this method of calculation, the administrative law judge credited claimant with six quarters, or 1.50 years of employment.[6] *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984) (For pre-1978 employment, it is reasonable to credit a claimant for each quarter in which at least $50 in earnings from coal mine employment is reflected in the Social Security records.); Decision and Order at 6.

For the years 1978 through 1991, the administrative law judge applied the formula

[5] The administrative law judge noted that claimant indicated on his application for benefits that he was "not sure" how long he worked in or around the coal mines. Decision and Order at 6; Director's Exhibit 3.

[6] The administrative law judge credited claimant with one quarter of coal mine employment in the fourth quarter of 1969 (Olga Coal Company); one quarter of coal mine employment in the first quarter of 1970 (Olga Coal Company); and four quarters of coal mine employment in 1977 (The Pittston Company). Decision and Order at 6; Director's Exhibit 7. Claimant earned at least $700.00 during each of these quarters. *Id.*

at 20 C.F.R. §725.101(a)(32)(iii)[7] and, using Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*, credited the miner with an additional 10.659 years of coal mine employment,[8] for a total of 12.159 years of coal mine employment.[9] Decision and Order at 6-7.

In calculating the length of claimant's coal mine employment history, the administrative law judge reasonably found that claimant's work as a welder in a maintenance shop at S&S Corporation (1974 to 1977) did not constitute coal mine employment, because it was not performed in or around a coal mine or coal preparation facility.[10] *See* 20 C.F.R. §725.101(a)(19); *Director, OWCP v. Ziegler Coal Co. [Wheeler]*, 853 F.2d 529, 535 (7th Cir. 1988) (claimant who worked in a repair shop over a mile and one-half from the coal mine, and never entered the mines, did not work "in or around" an extraction site and therefore did not meet the "situs" requirement); Decision and Order at 6. Moreover, even if claimant's employment with S&S Corporation was fully credited as coal mine employment, it would result in only an additional 2.25 years of additional coal mine employment, for a total of 14.409 years of coal mine

[7] 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 administrative law judge may 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).

[8] The administrative law judge credited claimant with 10.0 years of coal mine employment with The Pittston Company/Clinchfield Coal Company from 1978 to 1987; 0.575 year of coal mine employment with Coalfield Services, Incorporated in 1988; and 0.84 years of coal mine employment with L&L Construction Company in 1991. Decision and Order at 7; Director's Exhibit 7.

[9] We note that the methodology employed by the administrative law judge appears to have overstated the length of claimant's coal mine employment from 1978 to 1991. The administrative law judge calculated the length of employment using the average *annual* earnings by year for miners who spent 125 days at a mine site, rather than the average *daily* earnings by year, as specified at 20 C.F.R. §725.101(a)(32)(iii). Decision and Order at 6-7.

[10] Although claimant testified that he repaired coal mining equipment at an S&S Corporation maintenance shop, he testified that the company did not own any coal mines. Hearing Transcript at 35-36.

employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984) (holding that error which does not affect the disposition of a case is harmless).

Because it is supported by substantial evidence, we affirm the administrative law judge's determination that claimant established less than fifteen years of coal mine employment. Because the administrative law judge credited claimant with less than fifteen years of coal mine employment, he properly found that claimant was not entitled to consideration under Section 411(c)(4). Decision and Order at 16.

The Existence of Pneumoconiosis

Because claimant could not invoke the Section 411(c)(4) presumption, the administrative law judge considered whether claimant could establish entitlement under 20 C.F.R. Part 718. In order to establish entitlement to benefits, 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. Failure to establish any one of these elements precludes an award of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1),[11] or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[12] is sufficient to support a finding of pneumoconiosis. However, in this case, there is no evidence of legal pneumoconiosis.[13]

[11] "Clinical pneumoconiosis" consists of "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).

[12] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[13] Dr. Owens diagnosed chronic obstructive pulmonary disease (COPD). Claimant's Exhibit 7. However, because Dr. Owens did not attribute the COPD to claimant's coal mine dust exposure, this diagnosis does not support a finding of legal pneumoconiosis. Dr. Forehand diagnosed obstructive lung disease due to smoking.

Section 718.202(a)(1)

A chest x-ray may form the basis for a finding of the existence of clinical pneumoconiosis. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered eleven interpretations of five x-rays taken on September 20, 2012, June 3, 2013, January 14, 2014, December 22, 2014, and June 23, 2016. Decision and Order at 16-17. Drs. Alexander and Wolfe, each dually qualified as a B reader and Board-certified radiologist, and Dr. Forehand, a B reader, interpreted the June 3, 2013 x-ray as negative for pneumoconiosis. Director's Exhibit 12; Claimant's Exhibit 4; Employer's Exhibit 1. There were no positive readings of this film. The administrative law judge therefore found that this x-ray was negative for pneumoconiosis. Decision and Order at 17.

Although Dr. Miller, a B reader and Board-certified radiologist, interpreted the x-rays taken on September 20, 2012, January 14, 2014, December 22, 2014, and June 23, 2016 as positive for pneumoconiosis, Claimant's Exhibits 1-3, 8, Dr. Wolfe, an equally qualified physician, interpreted these x-rays as negative for the disease. Employer's Exhibits 3-4, 7-8. Because equally-qualified physicians disagreed as to whether the September 20, 2012, January 14, 2014, December 22, 2014, and June 23, 2016 x-rays established the existence of pneumoconiosis, the administrative law judge permissibly found these x-rays insufficient to support a finding of clinical pneumoconiosis. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984); Decision and Order at 17. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[14]

Director's Exhibit 12. Dr. McSharry diagnosed emphysema unrelated to coal mine dust exposure. Employer's Exhibit 3. Dr. Sargent diagnosed a disabling obstructive ventilatory impairment due to cigarette smoking. Employer's Exhibit 4. The administrative law judge found that the medical opinions of Drs. Forehand, McSharry, and Sargent, irrespective of their probative value, did not support a finding of legal pneumoconiosis. Decision and Order at 19.

[14] Because there is no biopsy evidence of record, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Furthermore, because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge properly found that the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304; Decision and Order at 17. Moreover, because this

Section 718.202(a)(4)

Notwithstanding a negative x-ray, a determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, finds that the miner suffered from pneumoconiosis. 20 C.F.R. §718.202(a)(4). The administrative law judge therefore considered the medical opinion of Dr. Owens who examined claimant on March 18, 2014, and diagnosed coal workers' pneumoconiosis. Claimant's Exhibit 7. The administrative law judge found that Dr. Owens did not explain the basis for her diagnosis of clinical pneumoconiosis or "include any x-rays . . . to support her findings." Decision and Order at 17. The administrative law judge therefore found that Dr. Owens's opinion was not well reasoned. *Id.*

Although Dr. Owens did not provide any explicit explanation for her diagnosis of coal workers' pneumoconiosis, she referenced two positive x-ray interpretations in her report.[15] Claimant's Exhibit 7. In his discussion of Dr. Owens's opinion, the administrative law judge noted that he found that the x-ray evidence was insufficient to establish the existence of clinical pneumoconiosis. Decision and Order at 17. Thus, to the extent that Dr. Owens based her diagnosis of clinical pneumoconiosis on positive x-ray interpretations referenced in her report, the administrative law judge recognized that reliance on this evidence would be inconsistent with his weighing of the x-ray evidence, thereby undermining Dr. Owens's opinion. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983). Because the administrative law judge permissibly discredited Dr. Owens's opinion, the only opinion supportive of a finding of pneumoconiosis, we affirm his finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Because claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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claim is not a survivor's claim, the Section 718.306 presumption is inapplicable. *See* 20 C.F.R. §718.306.

[15] Dr. Owens referenced positive interpretations of x-rays taken on June 25, 2013 and January 14, 2014. Claimant's Exhibit 7. In his consideration of the x-ray evidence, the administrative law judge accurately noted that the January 14, 2014 x-ray was read as both positive and negative by equally qualified physicians. The record does not contain any interpretations of a June 25, 2013 x-ray.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge