U.S. Department of Labor

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

BRB No. 18-0009 BLA

JAMES LIVELY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
A & M COAL COMPANY, INCORPORATED	)	DATE ISSUED: 11/15/2018
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	
	)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Dan F. Partin, Harlan, Kentucky, for claimant.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2016-BLA-05170) of Administrative Law Judge Adele Higgins Odegard, rendered on a claim filed on May 2, 2014, 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 credited claimant with 11.28 years of coal mine employment and determined that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis.[1] 30 U.S.C. §921(c)(4) (2012). She also found that claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis by establishing the presence of complicated pneumoconiosis. 30 U.S.C. §921(c)(3). Considering whether claimant could establish entitlement without the aid of those presumptions, the administrative law judge found that claimant did not establish the existence of pneumoconiosis and denied benefits accordingly.

On appeal, claimant contends that the administrative law judge erred in finding that he established less than fifteen years of coal mine employment. Claimant also contends that the administrative law judge erred in finding that he did not establish the existence of pneumoconiosis, based on the medical opinion evidence.[2] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

---

[1] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if the evidence establishes that he has at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those of an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant did not invoke the Section 411(c)(3) presumption and that he did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11-12.

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

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Length of Coal Mine Employment

Claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. *Mills v. Director, OWCP*, 348 F.3d 133, 136 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (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 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, 1-432 (1986).

The administrative law judge was unable to determine the beginning and ending dates of claimant's coal mine employment. Decision and Order at 9. She found that claimant's Social Security Administration (SSA) earnings records showed coal mine employment for the years 1998 – 2012. *Id*. Relying on the SSA records, she applied the formula at 20 C.F.R. §725.101(a)(32)(iii)[4] and, using Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*, credited claimant with a total of 11.28 years of coal mine employment. *Id*. at 10.

Claimant generally asserts that he has established a total of sixteen years of coal mine employment based on his testimony and SSA records. Claimant's Brief at 6. The administrative law judge determined, however, that claimant's testimony regarding the

[4] The regulation states:

> (iii) If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mining 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). A copy of the BLS table must be made a part of the record if the adjudication officer uses this method to establish the length of the miner's work history.

20 C.F.R. §725.101(a)(32)(iii).

dates he was employed were "inconsistent" and insufficient to establish the length of his coal mine employment.[5] Decision and Order at 8.

The Board is not empowered to reweigh the evidence and must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Assessing witness credibility is within the administrative law judge's discretion as fact-finder, and the Board will not disturb her findings unless they are inherently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc). Claimant's brief recites the evidence favorable to claimant, but does not raise specific error with regard to the administrative law judge's finding that claimant's testimony was not reliable, nor does it explain why the administrative law judge's method of calculating claimant's coal mine employment is not reasonable. *See Cox*, 791 F.2d at 446; *Muncy*, 25 BLR at 1-27. We therefore affirm the administrative law judge's finding that claimant established 11.28 years of coal mine employment and unable to invoke the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).

Existence of Pneumoconiosis – Medical Opinion Evidence

Where no statutory presumptions apply, 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. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Claimant argues that the administrative law judge erred in finding that he did not establish the existence of legal pneumoconiosis, based on Dr. Baker's opinion and his

[5] The administrative law judge found that "numerous times throughout his testimony, [c]laimant qualified his recollection in ways that indicate his general uncertainty about the beginning and ending dates of his coal mine employment." Decision and Order at 8. She noted as an example that claimant testified in his deposition to working for Profit Coal Company for "six to eight months . . . but testified at [the] hearing to working there for on a 'few weeks.'" *Id.*, *quoting* Director's Exhibit 15 at 13 and Hearing Transcript at 8-10. The administrative law judge found that the Social Security Administration's earnings records "lack the credibility concerns of the other evidence of record" with regard to the years claimant worked in coal mine employment. Decision and Order at 8.

treatment records.[6] We disagree. Dr. Baker conducted the Department of Labor evaluation on June 21, 2014. Director's Exhibit 11. He noted that claimant had twenty-four years of coal mine employment and a thirty-five pack-year smoking history, and he obtained a negative x-ray for clinical pneumoconiosis. *Id*. He diagnosed "[l]egal pneumoconiosis: based on signs or symptoms that can be due to coal dust exposure; [chronic obstructive pulmonary disease (COPD)] and chronic bronchitis." *Id*. Dr. Baker opined that claimant's COPD and chronic bronchitis were due to a combination of his smoking history and coal dust exposure." *Id*.

In a supplemental report dated December 29, 2014, Dr. Baker addressed the district director's question whether his opinion would change if claimant had only eleven years of coal mine employment.[7] Director's Exhibit 13. Dr. Baker opined that eleven years of coal dust exposure "would be of borderline significance in causing [claimant's] COPD and bronchitis in association with his smoking habit." *Id*. Dr. Baker stated that smoking is the "most likely" cause of claimant's COPD and bronchitis, while also noting the possibility that claimant's coal dust exposure "may have contributed to some extent" to his respiratory condition. *Id*.

We see no error in the administrative law judge's finding that Dr. Baker's opinion was "equivocal" and not sufficiently persuasive to establish that claimant has legal pneumoconiosis, based on Dr. Baker's qualified statements regarding whether coal dust exposure contributed to claimant's COPD and chronic bronchitis. *See Griffith v. Director, OWCP*, 49 F.3d 184, 186 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 19. When considering an eleven-year coal mine dust exposure (essentially the length of coal mine employment credited by the administrative law judge), Dr. Baker opined that it was "possible" that claimant's respiratory condition was significantly contributed to or aggravated by that exposure; however, he did not opine that it was probable. Director's Exhibit 13. Thus, his opinion, even when considered alone,

---

[6] Claimant notes that Dr. Baker diagnosed clinical pneumoconiosis but claimant does not raise any specific error with the administrative law judge's finding that the evidence did not establish existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).

[7] The district director determined that claimant had eleven years of coal mine employment. Director's Exhibit 12.

was insufficient to meet claimant's burden.[8] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994) (Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if the evidence submitted in support of his case is found insufficient to establish a crucial element of entitlement.).

Additionally, we reject claimant's assertion that the treatment records support a finding of legal pneumoconiosis. The administrative law judge correctly noted that while claimant's treatment records include diagnoses of COPD, the treating physicians did not specifically state that claimant has legal pneumoconiosis or address whether his respiratory or pulmonary symptoms were related to his coal dust exposure.[9] Decision and Order at 19-20; Claimant's Exhibit 1; Employer's Exhibit 12.

As the trier-of-fact, the administrative law judge has authority to assess the credibility of the medical opinions based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002). The Board considers claimant's arguments on appeal to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the administrative law judge's determination that claimant did not establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[10] As claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded. *Id*. at 1-112.

---

[8] The opinions of Drs. Rosenberg and Fino, which the administrative law judge found merited some weight, do not support finding legal pneumoconiosis. *Id.*

[9] Because the administrative law judge rationally found that Drs. Pullamaraju and Tiu did not discuss the etiology of claimant's respiratory condition in their treatment records, claimant's arguments that their opinions are entitled to controlling weight as those of treating physicians pursuant to 20 C.F.R. §718.104(d) is moot. Claimant's Exhibit 1; Employer's Exhibit 12. Furthermore, while the treatment records contain notations that the claimant had a medical history of "black lung," none of the records provide the basis for that diagnosis. Claimant's Exhibit 1; Employer's Exhibit 12.

[10] Since the administrative law judge gave permissible reasons for the weight accorded Dr. Baker's opinion, we need not address claimant's arguments regarding the administrative law judge's crediting of Drs. Rosenberg's and Fino's opinions that claimant does not have legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Exhibits 7, 11.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge