U.S. Department of Labor

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

BRB No. 17-0020 BLA

CARL STEPP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STURGEON MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 10/30/2017
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Carl Stepp, Winchester, Kentucky.

Lee Jones (Jones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2012-BLA-05986) of Administrative Law Judge Joseph E. Kane, rendered 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 miner's claim filed on June 8, 2011.

Based on his determination that claimant worked for only three years in coal mine employment, the administrative law judge initially found that claimant could not 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) (2012).[1] Considering whether claimant could establish entitlement to benefits without the aid of the Section 411(c)(4) presumption, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[2] Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation, did not file a 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years in underground coal mine employment, or in surface 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.

[2] Because claimant did not establish the existence of pneumoconiosis, an essential element of entitlement, the administrative law judge denied benefits without determining whether claimant established total disability at 20 C.F.R. §718.204(b).

[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 (1989) (en banc); Director's Exhibit 3.

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

Invocation of the Section 411(c)(4) Presumption

Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, claimant must initially establish that he had at least fifteen years of employment "in one or more underground coal mines," or "in a coal mine other than an underground mine" in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). Claimant bears the burden of establishing the length of his coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). 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).

The administrative law judge initially noted, correctly, that a determination of length of coal mine employment "may be established by any credible evidence, including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony." Decision and Order at 4-5, *quoting* 20 C.F.R. §725.101(a)(32)(ii). The administrative law judge observed that claimant alleged nineteen years of aboveground coal mine employment, while the district director determined, and employer stipulated, that claimant had three years of coal mine employment. Decision and Order at 5; Director's Exhibit 33-4; Hearing Transcript at 14. The administrative law judge also considered claimant's hearing testimony that he started hauling coal around 1975, worked for Bob Hoskins between 1974 and 1978, and worked for employer between 1985 and 1990, after which he left coal mine employment. *Id.* Additionally, the administrative law judge noted that the record includes claimant's Department of Labor Employment History Form, on which claimant listed coal mine employment with four employers between 1976 and 1997. Decision and Order at 5; Director's Exhibit 3. The administrative law judge then summarily concluded:

> The hearing testimony contradicts the form, and the [c]laimant's social security records contradict the hearing testimony. The [c]laimant could not testify to specific starting and ending dates. I find that the evidence supports a finding of three years of coal mine employment.

Id.

We are unable to affirm the administrative law judge's finding, as he failed to comply with the requirements of the Administrative Procedure Act (APA) to consider all relevant evidence in the record, and to set forth his "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). In finding that the evidence is contradictory, the administrative law judge did not address the information contained on claimant's Employment History Form, or specify how many years of coal mine employment are supported by claimant's Social Security records. Nor did the administrative law judge explain the weight accorded to the conflicting evidence, or otherwise explain how he arrived at a finding of three years of coal mine employment. Further, the record contains additional relevant evidence regarding claimant's coal mine employment history which the administrative law judge did not address and which, if credited, could establish fifteen years of coal mine employment.[4] *See* 20 C.F.R. §725.101(a)(32)(ii). As the administrative law judge's evaluation of the coal mine employment evidence does not comply with the APA, we must vacate the administrative law judge's finding that the evidence establishes three years of coal mine employment and remand the case for further consideration. *Wojtowicz*, 12 BLR at1-165.

[4] For example, claimant's Employment History Form states that he was engaged in coal mine employment from 1976 to 1985 while working for John Gault Energy and Rifle Coal Company, a period of up to ten years, worked for Ace Coal Company from 1982 to 1983, an overlapping period of up to two years, and worked for employer from 1985 to 1997, a period of up to thirteen years. Director's Exhibit 3. If the work history reported in the Employment History Form was credited it could establish up to twenty-two years of coal mine employment. Additionally, the record contains an affidavit from claimant identifying individuals with whom he worked in the late 1970s and early 1980s, mid 1980s, and late 1980s and 1990s. Director's Exhibit 15. The record also contains supporting affidavits from five of the coworkers claimant identified, including at least one from each time period, four of whom stated that they worked in coal mine employment with claimant for eight years. Director's Exhibits 10-14. If the affidavits were credited, they could establish over fifteen years of coal mine employment. In addition, the record includes: the transcript of claimant's May 7, 2012 deposition, which contains testimony regarding his coal mine employment history, including testimony regarding the time periods that he worked with the individuals who supplied affidavits; documents from employer regarding claimant's dates of employment and earnings; several Coal Truck Driver Questionnaires completed by claimant regarding his employment history; and a Federal Insurance Contributions Act earnings statement. Director's Exhibits 5, 7-9, 23. This evidence, if credited, could support other evidence of record in establishing fifteen years or more of coal mine employment.

On remand, the administrative law judge may use any reasonable method of computation in determining the length of claimant's coal mine employment.[5] *See Muncy*, 25 BLR at 1-27; *Kephart*, 8 BLR at 1-186; *Hunt*, 7 BLR at 1-710-11, *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). The administrative law judge must consider all relevant evidence, however, and explain his findings in accordance with the APA.

Because we have vacated the administrative law judge's finding that claimant did not establish fifteen years of qualifying coal mine employment, we must vacate his finding that claimant did not invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis.

Entitlement Under 20 C.F.R. Part 718

In the interest of judicial economy, we will address the administrative law judge's finding that claimant failed to meet his burden to establish entitlement under 20 C.F.R. Part 718, in the event that the administrative law judge again finds that the Section 411(c)(4) presumption is not invoked.

[5] The administrative law judge may determine the dates and length of claimant's coal mine employment "by any credible evidence." 20 C.F.R. §725.101(a)(32)(ii). As the administrative law judge noted, if the beginning and ending dates of claimant's employment cannot be determined, the administrative law judge may use, but is not required to use, the income-based formula set forth in 20 C.F.R. §725.101(a)(32)(iii). *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); Decision and Order at 5. The administrative law judge further noted that the formula required him to divide claimant's yearly income from coal mine employment by "the coal mine industry's average daily earnings," for that year, as set forth in Exhibit 609 of the *Office of Workers' Compensation Programs Coal Mine* (*BLBA*) *Procedure Manual.* Decision and Order at 5. Subsequent to the issuance of the administrative law judge's Decision and Order, however, the Board observed in a published decision that Exhibit 609 of the *BLBA Procedure Manual*, entitled "Average Wage Base," does not contain "the coal mine industry's average daily earnings," as specified in 20 C.F.R. §725.101(a)(32)(iii). *Osborne v. Eagle Coal Co.*, BRB No. 15-0275 BLA, slip op. at 8-9 (Oct. 5, 2016) (pub.). Rather, the table at Exhibit 610 of the *BLBA Procedure Manual*, entitled "Average Earnings of Employees in Coal Mining," contains the information specified in 20 C.F.R. §725.101(a)(32)(iii). *Id.* Thus, if the administrative law judge, on remand, applies the formula at 20 C.F.R. §725.101(a)(32)(iii) to determine the length of claimant's coal mine employment, he should use the information supplied in Exhibit 610, not Exhibit 609. *Id.*

Without the benefit of the presumption, claimant has the burden to 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 BLER 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). The administrative law judge denied benefits based on his determination that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a).[6]

Relevant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered four interpretations of three x-rays dated August 4, 2011, September 1, 2011,[7] and April 13, 2015. Decision and Order at 8. The administrative law judge properly found that all three interpretations of the August 4, 2011 and September 1, 2011 x-rays are negative for pneumoconiosis. *Id.*; Director's Exhibits 19, 20; Employer's Exhibit 1. The administrative law judge permissibly determined that Dr. Bond's interpretation of the April 13, 2015 x-ray as showing chronic obstructive pulmonary disease (COPD) does not support a finding of pneumoconiosis, because Dr. Bond did not diagnose clinical pneumoconiosis or state the cause of the COPD.[8] *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 9; Claimant's Exhibit 2. Because there are no positive x-ray interpretations for clinical

[6] The existence of pneumoconiosis may be established by evidence that claimant suffers from either legal or clinical pneumoconiosis. 20 C.F.R. §718.201(a). "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). "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).

[7] Dr. Barrett interpreted the September 1, 2011 x-ray film for quality purposes only. Director's Exhibit 19.

[8] Dr. Bond diagnosed "[p]ostsurgical changes and chronic changes with [chronic obstructive pulmonary disease] and prominence of the bronchovascular markings consistent with bronchitis." Claimant's Exhibit 2.

pneumoconiosis, we affirm the administrative law judge's finding that the x-ray evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[9] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); Decision and Order at 8-9.

We further affirm the administrative law judge's determination that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), as the record contains no biopsy or autopsy evidence. In addition, the administrative law judge correctly determined that because there is no evidence of complicated pneumoconiosis in the record, the 20 C.F.R. §718.304 presumption is inapplicable.[10] *See* 20 C.F.R. §718.202(a)(3).

Finally, the administrative law judge reviewed the medical opinions of Drs. Jarboe, Broudy, and Noble pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge accurately observed that both Dr. Jarboe, who examined claimant on behalf of the Department of Labor, and Dr. Broudy, who examined claimant on behalf of employer, opined that claimant has neither clinical nor legal pneumoconiosis. Director's Exhibit 19; Employer's Exhibits 1, 3, 4. In contrast, Dr. Noble, claimant's treating physician, provided an October 5, 2015 note stating:

[9] The record also contains a negative interpretation of the September 1, 2011 x-ray by Dr. Wolfe, a Board-certified radiologist and B reader. Employer's Exhibit 2. The administrative law judge failed to include this interpretation in his summary of the x-ray evidence. However, because this reading further supports the administrative law judge's conclusion that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. 718.202(a)(1), this error is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 8-9.

[10] The administrative law judge further found that claimant was not eligible to invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis, set forth at 20 C.F.R. §718.305, as claimant failed to establish fifteen years of qualifying coal mine employment. However, as discussed *supra*, we have vacated that finding. On remand, if the administrative law judge again determines that claimant is unable to invoke the Section 411(c)(4) presumption, the administrative law judge may reinstate his finding that claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).

> This [patient] has documented COPD[;] given his occupational exposure to coal mining[,] it is with a reasonable medical certainty he qualifies for Black Lung benefits.

Claimant's Exhibit 1. The administrative law judge correctly noted, however, that Dr. Noble failed "to state the coal mine employment history or smoking history that he took into consideration." Decision and Order at 9. The administrative law judge further observed that Dr. Noble failed "to state the basis of his opinion that the [c]laimant suffers from COPD or that the COPD is related to coal dust exposure, other than his statement that the [c]laimant has coal dust exposure." Decision and Order at 9. Therefore, the administrative law judge permissibly found that Dr. Noble's opinion is unreasoned and undocumented, and not entitled to any weight, despite his status as claimant's treating physician. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003) (administrative law judge must consider whether the treating physician has offered a persuasive opinion entitled to deference); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 9. Substantial evidence supports the administrative law judge's finding that the medical opinion evidence did not establish the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge's finding is therefore affirmed. Thus, we affirm the administrative law judge's finding that without the benefit of the Section 411(c)(4) presumption, claimant failed to affirmatively establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[11]

Remand Instructions

If the administrative law judge finds that claimant has established at least fifteen years of coal mine employment, he must further determine whether claimant's employment constitutes *qualifying* coal mine employment for purposes of invoking the Section 411(c)(4) presumption, i.e., was "in one or more underground mines" or "in conditions substantially similar to those in underground mines." 20 C.F.R. §718.305(b)(1)(i). If so, the administrative law judge must also determine whether claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) and, thus, can invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b). Should the administrative law judge determine that claimant has invoked the presumption, he must then assess whether employer has rebutted the presumption by affirmatively establishing that claimant has neither legal nor clinical

[11] The record does not contain any "other medical evidence," such as computed tomography scans, that could establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.107.

pneumoconiosis, or that "no part of [claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii).

If the administrative law judge finds that claimant cannot invoke the Section 411(c)(4) presumption, the administrative law judge may reinstate the denial of benefits based on his finding that claimant did not meet his burden to establish the existence of pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge