U.S. Department of Labor

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

BRB No. 18-0482 BLA

DONALD COLLINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
A & G COAL CORPORATION	)	DATE ISSUED: 10/30/2019
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH 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 William T. Barto, Administrative Law Judge, United States Department of Labor.

Donald Collins, Wise, Virginia.

Sarah Y. M. Himmel (Two Rivers Law Group P.C.), Christiansburg, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2016-BLA-05540) of Administrative Law Judge William T. Barto on a claim filed pursuant to 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 July 15, 2014.

The administrative law judge accepted the parties' stipulation to at least twenty-four years of surface coal mine employment but found that only ten years were spent in conditions substantially similar to those in an underground mine. Therefore, he determined claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C §921(c)(4) (2012). Considering whether claimant is entitled to benefits without the presumption, the administrative law judge found claimant failed to establish pneumoconiosis, a requisite element of entitlement, and denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer/carrier (employer) responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the administrative law judge's findings if they are rational, supported by substantial evidence, and in accordance 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] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on claimant's behalf, that the Board review the administrative law judge's decision, but is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Under Section 411(c)(4) of the Act, 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 coal mine 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) (2012); *see* 20 C.F.R. §718.305.

[3] Because claimant's last coal mine employment was in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v.*

Invocation of the Section 411(c)(4) Presumption - Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, claimant must establish the miner had at least fifteen years of employment "in one or more underground coal mines" or in surface mines "in conditions substantially similar to those in underground mines." 30 U.S.C. §921(c)(4) (2012); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). "The conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

The administrative law judge found "[c]laimant has not established by a preponderance of the evidence" that he was regularly exposed to dust during at least fifteen of his twenty-four years of surface coal mine employment. Decision and Order at 7. In making this determination, the administrative law judge observed that on his Employment History Form (CM-911a), claimant listed his employment with employer from 1991 to 2001 and indicated that he was exposed to dust, gases or fumes during this time. Decision and Order at 7; Director's Exhibit 3. The administrative law judge found claimant established he was regularly exposed to dust during this ten-year period.[4] Decision and Order at 7. The administrative law judge further found, however, that claimant did not list any other periods of employment on his Employment History Form, and there was no other evidence which established an additional five years of regular dust exposure between 1971 and 1991, when he began working for employer. *Id.*

As the administrative law judge observed, claimant testified he worked as a foreman beginning in 1974 and described his job duties;[5] however, with the exception of the period 1991 to 1999 noted on his employment history form, he did not describe the conditions in

---

Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 5; Hearing Transcript at 7.

[4] This period included claimant's last two years of coal mine employment as a dozer operator. Director's Exhibit 3. Claimant testified that while the dozer had an enclosed cab with air conditioning, it did not work all the time. Decision and Order at 7; Hearing Transcript at 11.

[5] Claimant testified he worked as a foreman from 1974 to 1999, "generally doing anything I was supposed to do," *e.g.*, setting pumps, working around drills, helping load shots, and doing paperwork. Hearing Transcript at 12, 16. He further stated he did not wear a mask and worked six days a week for ten to twelve hours per day. *Id.* at 12.

which he worked. Decision and Order at 7; Hearing Transcript at 12. Prior to that period, he testified he drove a coal truck in his "early years," but again he did not describe the conditions in which he worked or state which years those were. *Id*. When asked which job exposed him to the most coal dust, claimant stated that it was as a drill operator, which was also in his "earlier years." *Id*. While claimant described these years as "very dusty" because he stood next to the drill and breathed in the dust, he did not indicate how long he performed this job.[6] *Id*.

Based on the lack of evidence concerning the conditions in which claimant worked, the administrative law judge permissibly found claimant did not establish that he was regularly exposed to coal mine dust during at least fifteen years of his surface coal mine employment. *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); Decision and Order at 6-7. We therefore affirm, as supported by substantial evidence, the administrative law judge's conclusion that claimant did not demonstrate he worked for the requisite fifteen years in conditions substantially similar to those in an underground coal mine. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 481 (7th Cir. 2001); 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013) (unnecessary for a claimant to prove anything about dust conditions existing at an underground mine; claimant need only develop evidence addressing the dust conditions at the non-underground mine); *see also Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1343-44 (10th Cir. 2014); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988). Consequently, we affirm the administrative law judge's finding that claimant cannot invoke the Section 411(c)(4) presumption.

Entitlement under 20 C.F.R. Part 718

As claimant did not invoke the Section 411(c)(4) presumption, he must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability

[6] While the administrative law judge correctly observed "claimant only testified to coal mine dust exposure in his 'earlier years,'" his additional statement that this "presumably includes the ten-year period [from 1991 to 2001] reported on his application for benefits" is unexplained. Decision and Order at 7. Claimant spent his last ten years, not his early years, with employer. Any error is harmless, however, because even if claimant worked as a driller from 1971 when he began his coal mine employment to 1974, when he began work as a foreman, these three additional years of dust exposure would not establish the requisite fifteen years of substantially similar employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

causation (pneumoconiosis substantially contributed to the disability). 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. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Existence of Pneumoconiosis

The administrative law judge considered seven interpretations of three x-rays dated August 20, 2014, August 27, 2015, and August 3, 2016. Decision and Order at 8-9. Drs. DePonte and Alexander, both dually-qualified as B readers and Board-certified radiologists, read the August 20, 2014 x-ray as positive for pneumoconiosis, whereas Drs. Adcock and Meyer, also both dually-qualified, read it as negative. Decision and Order at 8; Director's Exhibits 11, 14; Claimant's Exhibit 4; Employer's Exhibit 4. The administrative law judge permissibly found the readings of this x-ray to be in equipoise based on the equal number of positive and negative readings by the dually-qualified readers. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 272-76 (1994); Decision and Order at 15. Dr. Adcock, a dually-qualified reader, read the August 27, 2015 chest x-ray as negative for pneumoconiosis; this reading is uncontradicted. Decision and Order at 8; Director's Exhibit 12; Employer's Exhibit 1. Finally, Dr. Alexander read the August 3, 2016 x-ray as positive, whereas Dr. Adcock read it as negative. Decision and Order at 9; Claimant's Exhibit 1; Employer's Exhibit 3. The administrative law judge permissibly found the readings of this x-ray to be in equipoise. Having found the record contains one negative and inconclusive readings of two x-rays, the administrative law judge permissibly concluded the preponderance of the x-ray evidence insufficient to establish clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1); *see Ondecko*, 512 U.S. at 280-81; *see also Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); Decision and Order at 8-9.

We also affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), as the record contains no biopsy or autopsy evidence. Decision and Order at 8 n.46. Further, the presumptions at 20 C.F.R. §§718.304 and 718.305 are not applicable.[7] 20 C.F.R. §718.202(a)(3).

The administrative law judge next evaluated whether the medical opinion evidence established pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 9-14.

[7] The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. In addition, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he did not establish at least fifteen years of qualifying coal mine employment. Decision and Order at 7.

Concerning clinical pneumoconiosis, the administrative law judge considered Dr. Ajjarapu's opinion, diagnosing clinical pneumoconiosis, and the contrary opinions of Drs. Fino and Rosenberg. Decision and Order at 9-10; Director's Exhibits 11, 12, 16; Employer's Exhibits 6, 7. The administrative law judge permissibly gave less weight to Dr. Ajjarapu's opinion because she provided no explanation for her conclusion, beyond her assertion that the x-ray conducted in conjunction with her examination was positive.[8] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210-11 (4th Cir. 2000); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Underwood*, 105 F.3d 949; Decision and Order at 9-10; Director's Exhibits 10, 11. Because the administrative law judge permissibly discredited the only medical opinion diagnosing clinical pneumoconiosis, we affirm his finding that the medical opinion evidence does not establish the existence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4).

In evaluating whether claimant established legal pneumoconiosis,[9] the administrative law judge considered Dr. Ajjarapu's opinion diagnosing legal pneumoconiosis in the form of chronic bronchitis due to smoking and coal dust exposure,

[8] In her August 20, 2014 initial report, Dr. Ajjarapu diagnosed clinical pneumoconiosis based on Dr. DePonte's positive reading of the August 20, 2014 x-ray. Director's Exhibit 11. In her December 7, 2015 supplemental report, following a review of Dr. Fino's opinion, Dr. Ajjarapu stated: "[Claimant's] chest x-ray was read positive for [coal workers pneumoconiosis] and there is a wide range of differences among [B]-readers, who read the same x-ray from negative to positive. A positive x-ray rules in the presence of the disease." Director's Exhibit 10.

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

the contrary opinions of Drs. Fino and Rosenberg,[10] and the hospital treatment records.[11] Decision and Order at 10-14; Director's Exhibit 11-12; Claimant's Exhibits 7-8; Employer's Exhibit 6-7. The administrative law judge found none of the medical opinions well-reasoned and well-documented, and therefore accorded them little weight. Decision and Order at 13-14.

Specifically, the administrative law judge permissibly discredited, within his discretion, Dr. Ajjarapu's opinion because she did not adequately explain her conclusion claimant's chronic bronchitis was due to smoking and coal dust exposure, beyond her assertion that both smoking and coal mine dust can cause chronic obstructive pulmonary disease and it is difficult to separate their effects. *See* 20 C.F.R. §718.201(b); *Underwood*, 105 F.3d at 949; Decision and Order at 13. Because the administrative law judge permissibly found the record contains no credible medical opinion evidence supportive of a finding of legal pneumoconiosis and the Board may not reweigh the evidence or substitute its own judgment for that of the administrative law judge, *see Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 310, 25 BLR 2-115, 2-122 (4th Cir. 2012), quoting *Smith v. Chater*, 99 F.3d 635, 637-38 (4th Cir. 1996), we affirm this finding. 20 C.F.R. §§718.201, 718.202(a)(4).

Thus, the administrative law judge rationally found claimant failed to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a). Because the administrative law judge permissibly found that claimant failed to establish pneumoconiosis, an essential element of entitlement, we affirm the administrative law judge's denial of benefits. *See Trent*, 11 BLR at 1-27.

[10] Drs. Fino and Rosenberg diagnosed claimant with severe pulmonary emphysema and/or severe airflow obstruction caused entirely by smoking. Director's Exhibit 12; Employer's Exhibits 6, 7. While finding both opinions well-documented, the administrative law judge discredited them as inadequately explained. Decision and Order at 13-14.

[11] The administrative law judge noted claimant's hospital treatment records contain repeated diagnoses of chronic obstructive pulmonary disease. Decision and Order at Claimant's Exhibits 7, 8.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge