U.S. Department of Labor

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

BRB No. 23-0410 BLA

JEFFREY HESS (o/b/o SHELDEN M. HESS, Deceased) Claimant-Petitioner v. CLINCHFIELD COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/12/2024 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Carrie Bland, Associate Chief Administrative Law Judge, United States Department of Labor.

Jeffrey Hess, Piney Flats, Tennessee.

Kendra Prince (Penn, Stuart, & Eskridge), Abingdon, Virginia, for Employer.

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

PER CURIAM:

Claimant appeals, without representation,[1] Associate Chief Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Denying Benefits (2016-BLA-05622) rendered on a claim filed on February 24, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[2]

The ALJ credited the Miner with 9.96 years of coal mine employment. Therefore, she concluded Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). Moreover, she found Claimant failed to establish pneumoconiosis, a necessary element of entitlement and therefore denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, declined to file a response brief.[4]

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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[1] On Claimant's behalf, Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested the Benefits Review Board review the ALJ's decision, but Ms. Combs is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant is the son of the Miner, who died on March 17, 2017. Director's Exhibit 48. Claimant is pursuing the miner's claim on his father's behalf.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[4] The Director noted the ALJ mistakenly applied the holding in *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019), to calculate the Miner's length of coal mine employment but that this error "did not materially affect the case's outcome." Director's Letter at 1 n.1.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in Virginia. *See Shupe*

Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines, or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). The regulations define "year" as "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 332 (4th Cir. 2007). Claimant bears the burden to establish the number of years the Miner worked in 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). The Board will uphold an ALJ's determination on length of coal mine employment if it is based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-27 (2011).

In calculating the length of the Miner's coal mine employment, the ALJ considered statements from Employer, the Miner's Employment History Form CM-911a, the self-employment forms completed by the Miner, and the Miner's Social Security Administration (SSA) earnings records. Director's Exhibits 3, 5-9; Decision and Order at 5-7. We affirm the ALJ's finding that the Miner worked with Employer for 1.92 years, or 704 days, as it is supported by Employer's statement that the Miner worked for it from September 18, 1970 to June 25, 1971 (281 days), and from January 12, 1972 to March 9, 1973 (423 days). *See Muncy*, 25 BLR at 1-27; Decision and Order at 5; Director's Exhibit 7.

With respect to the Miner's remaining coal mine employment, including his self-employment, the ALJ noted the beginning and ending dates were not ascertainable from the Miner's SSA earnings records or the employment forms he completed. Decision and Order at 6. In response, she divided the Miner's yearly earnings in coal mine employment as reported in his SSA earnings records by the coal mine industry's average daily earnings as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual.*[6] Decision and Order at 6-7; *see* 20 C.F.R.

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v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Director's Exhibit 7.

[6] Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual* is titled *Average Earnings of Employees in Coal Mining* and sets forth the average "daily earnings" of miners and the "yearly earnings (125 days)" by year for employees in coal mining, as reported by the BLS.

§725.101(a)(32)(iii). If the Miner's earnings reflected 125 or more working days in a given year, the ALJ credited him with one year of coal mine employment, applying the United States Court of Appeals for the Sixth Circuit's decision in *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-02 (6th Cir. 2019).[7] Decision and Order at 6-7 and n.10. If the Miner had less than 125 working days, the ALJ credited him with a fractional year based on the ratio of the actual number of days worked to 125. *Id*.

Based on this method, the ALJ found Claimant established the Miner had 8.04 years[8] of additional coal mine employment for a total of 9.96 years of coal mine employment. *Id*. at 7. Consequently, she found Claimant could not invoke the Section 411(c)(4) presumption because Claimant did not establish the required fifteen years of coal mine employment. *Id*.

This method does not accord with the approach taken by the Fourth Circuit, within whose jurisdiction this case arises. The Fourth Circuit holds that, before determining whether the Miner established a year of coal mine employment with Employer, the ALJ must first determine whether the Miner was engaged in coal mine employment for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Daniels Co.*, 479 F.3d at 334-36; *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). If the threshold one-year period is met, the ALJ must then determine whether the Miner worked for at least 125 working days within that one-year period. 20 C.F.R. §725.101(a)(32). Proof that the Miner worked at least 125 days or that his earnings exceeded the industry average for 125 days of work in a given year, however, does not satisfy the requirement that such employment occurred during a 365-day period of coal mine employment and therefore, in itself, does not establish one full year of coal mine employment as defined in the regulations. *See Clark*, 22 BLR at 1-281.

However, the ALJ's error in relying on the Sixth Circuit's approach in *Shepherd* to credit the Miner with coal mine employment based solely on a 125-day work-year is harmless. The ALJ's calculation of the Miner's coal mine employment based on a 125-day work-year without regard to whether he established a 365-day employment

[7] In *Shepherd*, the Sixth Circuit held that a miner is entitled to credit for a full year of coal mine employment if he establishes 125 working days in a given year; the miner need not also establish a full 365-day employment relationship with that employer. 915 F.3d at 401-02.

[8] The ALJ credited the Miner with full years of coal mine employment in 1975 and 1980; partial years in 1973 and 1974, 1976, 1978 and 1979, 1981 to 1983, 1985 to 1992, and 1995; and no years in 1977, 1984, 1993, and 1994. Decision and Order at 7.

relationship results in more years of coal mine employment credited to the Miner, not fewer. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Thus, the ALJ's calculation of 9.96 years, if anything, overstates the Miner's years of coal mine employment. Accordingly, we affirm her finding that Claimant cannot invoke the Section 411(c)(4) presumption because he did not establish the requisite fifteen years of coal mine employment. *See Muncy*, 25 BLR at 1-27.

Entitlement to Benefits under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3)[9] and (c)(4) presumptions, Claimant must establish disease (the Miner had pneumoconiosis); disease causation (his pneumoconiosis arose out of coal mine employment); disability (he had a totally disabling respiratory or pulmonary impairment); and disability 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. *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, 1-2 (1986) (en banc).

[9] Section 411(c)(3) of the Act provides an irrebuttable presumption a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Here, the ALJ indicated that Claimant was unable to invoke the irrebuttable presumption by x-ray evidence. Decision and Order at 3 n.4. The ALJ's chart identified that Dr. DePonte read the September 1, 2015 x-ray as positive for simple and complicated pneumoconiosis, Category A. Decision and Order at 8; Claimant's Exhibit 2. Still, any error by the ALJ in not specifically discussing the x-ray evidence as to the issue of complicated pneumoconiosis is harmless given her overall finding that the two conflicting readings of the September 1, 2015 x-ray are in equipoise based on the readers' qualifications, as discussed infra. *See* Decision and Order at 9. We therefore affirm the ALJ's conclusion that Claimant is unable to invoke the irrebuttable presumption. 20 C.F.R. §718.304; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 3 n.4; Director's Exhibit 17; Claimant's Exhibit 2.

Clinical Pneumoconiosis

Chest X-rays

In considering whether Claimant established simple clinical pneumoconiosis,[10] the ALJ considered nine readings of four x-rays dated November 25, 2013, May 12, 2014, October 22, 2014, and September 1, 2015. Decision and Order at 8-9. She correctly observed all of the readers of the x-rays are dually-qualified as Board-certified radiologists and B readers, except Dr. Forehand, who is a B reader only. *Id*. at 8.

Dr. Miller read the November 25, 2013 x-ray as positive for simple pneumoconiosis, while Dr. Seaman read it as negative for simple pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 6. Both Drs. Forehand and Miller read the May 12, 2014 x-ray as positive for simple pneumoconiosis.[11] Director's Exhibit 12; Claimant's Exhibit 3. Dr. Tarver read it as negative for simple pneumoconiosis. Director's Exhibit 15. Dr. DePonte read the October 22, 2014 x-ray as positive for simple pneumoconiosis, while Dr. Tarver read it as negative for pneumoconiosis. Director's Exhibits 14, 16. Finally, Dr. DePonte read the September 1, 2015 x-ray as positive for simple and complicated (Category A large opacity) pneumoconiosis, while Dr. Tarver read it as negative for pneumoconiosis. Director's Exhibit 17; Claimant's Exhibit 2.

The ALJ permissibly considered each x-ray individually and found the readings of each x-ray were in equipoise based on the equal number of positive and negative readings for each x-ray by the dually-qualified radiologists, and thus rationally concluded that the preponderance of the x-ray evidence did not establish the Miner had simple clinical pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994); *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; Director's Exhibits 12, 14-17; Claimant's Exhibits 1-3; Employer's Exhibit 6. Consequently, we affirm the ALJ's finding that Claimant did not establish the Miner had simple clinical pneumoconiosis based upon the x-ray evidence at 20 C.F.R. §718.202(a)(1).

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

[11] Dr. Ranavaya, a B reader, assessed the May 12, 2014 x-ray for film quality only. Director's Exhibit 12 at 1.

Computed Tomography (CT) Scans

The ALJ also considered four interpretations of three CT scans dated January 6, 2015, July 1, 2015, and February 25, 2017. Decision and Order at 9-11. Dr. Floyd found the January 6, 2015 CT scan had findings consistent with pulmonary fibrosis. Claimant's Exhibit 5. Dr. Tarver reviewed all three of the CT scans and diagnosed interstitial fibrosis consistent with usual interstitial pneumonitis (UIP), and stated there were no findings consistent with coal workers' pneumoconiosis. Employer's Exhibits 7-10. Consequently, we affirm the ALJ's finding that the CT scan evidence does not support a finding of simple clinical pneumoconiosis. *See Compton*, 211 F.3d at 207-08; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order at 9-11; Claimant's Exhibit 5; Employer's Exhibits 7-10.

Medical Opinions and the Miner's Treatment Records

The ALJ did not separately consider the medical opinions or the Miner's treatment records on the issue of simple clinical pneumoconiosis, but made sufficient findings such that remand is not required. 20 C.F.R. §718.202(a)(4); *see Larioni*, 6 BLR at 1-1278; Decision and Order at 15. While Dr. Forehand, who performed the Miner's Department of Labor-sponsored complete pulmonary evaluation, based his diagnosis of simple clinical pneumoconiosis on his positive reading of the May 14, 2014 chest x-ray, the ALJ found the readings of that x-ray were in equipoise based on the equal number of positive and negative readings from dually-qualified radiologists. Decision and Order at 14 n.16; Director's Exhibit 12 at 18. The Miner's treating physicians, Drs. Yogendra and Montoya, diagnosed simple clinical pneumoconiosis based on the Miner's coal mine history alone, and Dr. Perez indicated only that the Miner had a history of "simple miners[']pneumoconiosis," presumably based on a chest x-ray.[12] *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12 (4th Cir. 2000) (medical opinion diagnosing pneumoconiosis based solely on x-ray evidence which was not credited is not probative evidence of pneumoconiosis); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000) (medical opinion of clinical pneumoconiosis based on a coal mine dust exposure history alone is not a reasoned medical opinion); Decision and Order at 14; Director's Exhibits 13, 58; Claimant's Exhibit 7.

[12] Drs. Reddy, Carillo, and McSharry did not diagnose the Miner with clinical pneumoconiosis. Director's Exhibits 13, 14, 17; Employer's Exhibit 11.

Because it is supported by substantial evidence, we affirm the ALJ's overall determination that Claimant did not establish the Miner had simple clinical pneumoconiosis. 20 C.F.R. §§718.201(a)(1), 718.202(a); Decision and Order at 15.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must demonstrate the Miner had a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b).

The ALJ considered the medical opinions of Drs. Carillo, Reddy, Perez, Yogendra, Forehand, Montoya, and McSharry.[13] Decision and Order at 11-15. She accurately observed that while Drs. Carillo, Reddy, and Perez treated the miner for chronic lung conditions, they did not attribute these conditions to coal mine dust exposure, and thus their opinions do not affirmatively establish the Miner had legal pneumoconiosis. 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 14; Director's Exhibits 13, 14; Claimant's Exhibit 7.

Although Dr. Yogendra opined the Miner's chronic interstitial lung disease was due to coal mine dust exposure, the ALJ permissibly found his opinion entitled to no weight because the physician did not explain the reasoning behind his diagnosis. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1097 (4th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 14; Director's Exhibit 58 at 26.

Dr. Forehand examined the Miner on May 12, 2014, and diagnosed legal pneumoconiosis based on the Miner's exposure to coal mine dust, shortness of breath, and the results of an arterial blood gas study that showed hypoxemia. Director's Exhibit 12 at

[13] The ALJ also considered the Miner's death certificate, which listed coal workers' pneumoconiosis as an underlying condition of the cause of his death. Decision and Order at 14; Director's Exhibit 48. She reasonably gave it little weight because there was no explanation as to how pneumoconiosis contributed to the immediate cause of the Miner's death from chronic respiratory failure. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192 (4th Cir. 2000) (reference on a death certificate to pneumoconiosis as another condition contributing to death, without further explanation, does not constitute a reasoned medical opinion upon which to base an award of benefits under the Act); *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988) (ALJ erred in accepting the death certificate at face value without considering the underlying bases for its conclusions as to the cause of death); Decision and Order at 14.

6. Because the ALJ found that Dr. Forehand relied on an inaccurate coal mine history of fifteen years compared to the ALJ's finding of 9.96 years and that he did not fully address the Miner's significant smoking history in relation to his respiratory impairment,[14] we affirm her decision to give Dr. Forehand's opinion little weight. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311 n.2 (4th Cir. 2012) (effect of an inaccurate coal mine dust exposure history on the credibility of a medical opinion is a determination for the ALJ to make); *Huscoal, Inc. v. Director, OWCP* [*Clemons*], 48 F.4th 480, 491 (6th Cir. 2022) (same); Decision and Order at 14; Director's Exhibit 12 at 6.

Dr. Montoya examined the Miner on March 11, 2015, and April 15, 2015. Director's Exhibit 13. In his earlier report, he noted the Miner had a fifteen-year coal mine history and a smoking history of one-half pack per day from 1966 to 2005. *Id*. at 2, 3. He also noted a CT scan dated January 6, 2015, showed extensive fibrosis which could be due to smoking-related emphysema or pneumoconiosis, while the "[c]linical picture also could be IPF [idiopathic pulmonary fibrosis]." *Id*. at 2. Dr. Montoya diagnosed the Miner with interstitial lung disease that "more than likely" was pneumoconiosis related to coal mine dust exposure. *Id*. at 4.

Dr. McSharry examined the Miner on September 1, 2015, and diagnosed him with idiopathic pulmonary fibrosis (IPF) or UIP. Director's Exhibit 17 at 4, 10; Employer's Exhibit 11 at 16-18, 26-28. He opined that the Miner's IPF or UIP "is not a disorder [that is] caused by or aggravated by coal [mine] dust exposure." Director's Exhibit 17 at 4. Specifically, he explained that the Miner's restrictive pattern on pulmonary function testing, and clinical and x-ray findings, supported a finding of IPF/UIP. *Id*.; *see also* Employer's Exhibit 11 at 26-28.

The ALJ permissibly assigned greatest weight to Dr. McSharry's opinion because she found it well-reasoned and ruled that Dr. Montoya's opinion was "somewhat equivocal."[15] *Hicks*, 138 F.3d at 528; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438,

[14] As the ALJ noted, Dr. Forehand indicated smoking would not cause the fibrosis he saw on the x-ray he reviewed, but the physician also diagnosed simple clinical pneumoconiosis based on that film, contrary to the ALJ's finding. Decision and Order at 8, 14; Director's Exhibit 12 at 7, 18. The ALJ found the x-ray readings in equipoise as to clinical pneumoconiosis and correctly found that Dr. Forehand did not discuss the Miner's blood gas impairment in relation to his smoking history. Decision and Order at 9, 14; Director's Exhibit 12 at 7.

[15] The ALJ noted that Dr. McSharry is a Board-certified pulmonologist, whereas Dr. Montoya's credentials are not in the record. Decision and Order at 15. While this note is true, Dr. Montoya's letterhead on his report indicates that he is Board-certified in

441 (4th Cir. 1997); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988) (equivocal opinion can be discredited); Decision and Order at 15; Director's Exhibits 13, 17; Employer's Exhibit 11. The ALJ found Dr. McSharry's diagnosis of IPF credible because multiple physicians in the record had also suggested the Miner had the disease, and there was no evidence establishing that IPF is related to coal mine dust exposure to contradict his opinion. Decision and Order at 15.

Because the ALJ acted within her discretion in rendering her credibility findings, we affirm her conclusion that Claimant did not establish the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); *see Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; Decision and Order at 15.

Claimant has the burden of establishing entitlement to benefits and bears the risk of non-persuasion if the evidence is found insufficient to establish a required element of entitlement. *See Ondecko*, 512 U.S. at 281; *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). As Claimant failed to establish either clinical or legal pneumoconiosis, an essential element of entitlement, we affirm the denial of benefits. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

Pulmonary, Critical Care and Sleep Medicine. Director's Exhibit 13. Even if we assume Drs. McSharry and Montoya are equally qualified, we nonetheless affirm the ALJ's overall determination that Dr. McSharry's opinion is more persuasive. Decision and Order at 15.