U.S. Department of Labor

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

BRB No. 21-0094 BLA

FRANK BENNETT, III	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HYDE TRUCKING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 02/28/2022
OLD REPUBLIC 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 Dana Rosen, Administrative Law Judge, United States Department of Labor.

Frank Bennett, III, New Tazewell, Tennessee.

Laura Metcoff Klaus and Brian Straw (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Before: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] Administrative Law Judge (ALJ) Dana Rosen's Decision and Order Denying Benefits (2019-BLA-06085) rendered on a subsequent claim filed on May 9, 2018,[2] pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant did not establish complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. Based on the parties' stipulation of 13.5 years of coal mine employment, she further found 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). Considering entitlement to benefits under 20 C.F.R. Part 718, the ALJ found Claimant established clinical and legal pneumoconiosis,[4] and therefore a change in an applicable condition of

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

[2] This is Claimant's second claim for benefits. On April 18, 2017, the district director denied Claimant's initial claim, filed on April 8, 2016, for failure to establish any element of entitlement. Director's Exhibit 54 at 395-96. On April 25, 2017, Claimant requested a formal hearing. *Id.* at 382. By letter dated June 15, 2017, while the claim was pending before the district director, Claimant's lay representative requested withdrawal of his claim, noting her organization "will be representing him when he refiles in one year and thirty days from" the district director's April 17, 2017 denial. Director's Exhibit 54 at 371. Following Claimant's confirmation, the district director construed the letter as a request to withdraw Claimant's request for a hearing. Director's Exhibit 54 at 367. Claimant took no further action until filing his current claim.

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has 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] 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). Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions

entitlement,[5] but did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.202(a), 718.204(b). She therefore denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer and its Carrier (Employer) respond in support of the decision. The Director, Office of Workers' Compensation Programs, declined to file a response brief.

In an appeal filed by a self-represented claimant, 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.[6] 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).

Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act provides an irrebuttable presumption that 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 an opacity 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, would be a condition that could reasonably be expected to reveal a result equivalent to (a) or (b).

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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).

[5] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant did not establish any element of entitlement in his prior claim, he had to submit evidence establishing any one of these elements in order to obtain review of the merits of his current claim. Director's Exhibit 54 at 395-96.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 5; Director's Exhibits 4-10.

See 20 C.F.R. §718.304. The ALJ must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis before finding Claimant has invoked the presumption. *Gray v. SLC Corp.*, 176 F.3d 382, 389-90 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The ALJ considered nine interpretations of four x-rays dated June 11, 2018, June 27, 2018, February 12, 2019, and June 27, 2019. 20 C.F.R. §718.304(a); Decision and Order at 5-6, 19-20. The ALJ determined all the physicians who read the x-rays are dually-qualified B readers and Board-certified radiologists. Decision and Order at 17. Dr. DePonte read the June 11, 2018 x-ray as positive for complicated pneumoconiosis, while Dr. Meyer read the same x-ray as negative for the disease. Director's Exhibit 25; Employer's Exhibit 2. Dr. DePonte read the June 27, 2018 x-ray as positive for complicated pneumoconiosis, while Drs. Crum and Meyer read the same x-ray as negative. Director's Exhibit 22 at 9; Claimant's Exhibit 4; Employer's Exhibit 3. Drs. Ramakrishnan and Meyer read the February 12, 2019 x-ray as negative for complicated pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 10. Finally, Dr. DePonte read the June 27, 2019 x-ray as positive for complicated pneumoconiosis, while Dr. Meyer read the same x-ray as negative. Claimant's Exhibit 1; Employer's Exhibit 13.

The ALJ accurately observed that, although Dr. DePonte read the June 11, 2018, June 27, 2018, and June 27, 2019 x-rays as positive for complicated pneumoconiosis, the physician also recommended computed tomography (CT) scans to confirm the changes she identified. Decision and Order at 17; Director's Exhibits 22 at 9, 15; Claimant's Exhibit 1. She further observed Dr. Delozier did not identify pulmonary nodules, large opacities, or any form of pneumoconiosis on an August 9, 2018 CT scan. Decision and Order at 13-14, 17-18; Employer's Exhibit 8. As no other physician diagnosed complicated pneumoconiosis on the x-rays, and as Dr. Delozier did not diagnose complicated pneumoconiosis based on the CT scan, the ALJ rationally found Dr. DePonte's diagnosis of complicated pneumoconiosis outweighed by the other evidence of record.[7] *See Crockett*

[7] We note the ALJ's evaluation of the x-ray evidence does not precisely comply with the regulation which requires the ALJ to first evaluate the x-ray evidence before weighing it with other categories of evidence, such as CT scans, to determine whether a claimant has established complicated pneumoconiosis. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc); 20 C.F.R. §718.304(a)-(c). However, the ALJ also determined Dr. DePonte's positive x-ray readings were also outweighed by "the other x-ray readings which did not include any findings of large opacities of pneumoconiosis." Decision and Order at 18. Any error in evaluating the CT scan evidence alongside Dr. DePonte's readings of the x-rays is thus harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Collieries, Inc. v. Barrett, 478 F.3d 350, 356 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). The ALJ performed both a qualitative and quantitative review of the x-ray readings, resolving the conflict in the readings by taking into consideration the number of interpretations and the readers' qualifications, and further permissibly found the CT scan evidence undermined Dr. DePonte's positive x-ray readings ; therefore, we affirm her finding that the x-ray evidence does not establish complicated pneumoconiosis.[8] *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993); *see generally Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994); 20 C.F.R. §718.304(a); Decision and Order at 18.

The ALJ next considered the medical opinions of Drs. Ajjarapu, Rosenberg, and Vuskovich. Decision and Order at 18. Dr. Ajjarapu diagnosed complicated pneumoconiosis based on Dr. DePonte's reading of the June 27, 2018 x-ray, while Drs. Rosenberg and Vuskovich opined Claimant does not have the disease. Director's Exhibit 22 at 6; Employer's Exhibits 9 at 11; 11 at 5. Having found the June 27, 2018 x-ray and the x-ray evidence as a whole insufficient to establish the existence of complicated pneumoconiosis, the ALJ permissibly discredited Dr. Ajjarapu's opinion. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514 (6th Cir. 2003) (ALJ may not rely on a doctor's opinion that a miner has medical pneumoconiosis when that opinion is based entirely on x-ray evidence that the ALJ has discredited); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 18; Director's Exhibit 22 at 6, 9. We thus affirm, as supported by substantial evidence, the ALJ's finding that the medical opinion evidence does not establish Claimant has complicated pneumoconiosis. We also affirm the ALJ's finding, based on her consideration of all the relevant evidence, that Claimant failed to establish complicated pneumoconiosis at 20 C.F.R. §718.304. *See Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33; Decision and Order at 18. Therefore, we affirm the ALJ's finding that Claimant did not invoke the irrebuttable presumption at Section 411(c)(3).

Invocation of the Section 411(c)(4) Presumption: Length of Coal Mine Employment

Claimant has never alleged he worked for at least fifteen years in coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(i). On his application for benefits, he alleged only thirteen years and six months. Director's Exhibit 3 at 1. Moreover, the ALJ permissibly relied on the parties' joint stipulation of 13.5 years of coal

[8] We also affirm the ALJ's finding that Claimant could not establish complicated pneumoconiosis under 20 C.F.R. §718.304(b) because the record contains no biopsy evidence. Decision and Order at 18.

mine employment. Decision and Order at 3; Hearing Transcript at 5; ALJ's Exhibit 3 at 3. Because Claimant did not establish he has at least fifteen years of coal mine employment, we affirm the ALJ's finding he could not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(i); Decision and Order at 20.

Entitlement Under 20 C.F.R. Part 718: Total Disability

To be entitled to benefits under the Act without the benefit of statutory presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (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 element 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). The ALJ found Claimant established both clinical and legal pneumoconiosis,[9] but that Claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.202(a), 718.204(b).

A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must consider all relevant evidence and weigh the evidence supporting total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp*., 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195, 1-198 (1986), *aff'd on recon*., 9 BLR 1-236 (1987) (en banc).

The ALJ accurately found Claimant's pulmonary function studies and arterial blood gas studies, conducted on June 27, 2018 and February 12, 2019, did not produce qualifying values.[10] Decision and Order at 24; Director's Exhibit 22 at 10, 15; Employer's Exhibits

[9] Employer contends the ALJ erred in finding Claimant established clinical and legal pneumoconiosis. Employer's Brief at 14-19. However, it concedes any such error is harmless should the Board affirm the ALJ's conclusion that Claimant failed to establish total disability. *Id.* at 14; *see Larioni*, 6 BLR at 1-1278.

[10] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B

5; 6. She further correctly observed the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 24. We thus affirm her findings that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *Id.*

Turning to the medical opinion evidence, the ALJ considered Dr. Ajjarapu's opinion that Claimant is totally disabled from his usual coal mine employment, and the opinions of Drs. Rosenberg and Vuskovich that he is not.[11] *Id.* at 25; Director's Exhibit 22 at 7; Employer's Exhibits 9 at 12; 11 at 5. The ALJ permissibly accorded no weight to Dr. Ajjarapu's opinion because it is based solely on her diagnosis of complicated pneumoconiosis, contrary to the ALJ's finding that Claimant did not establish the existence of the disease.[12] *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order 25. As the ALJ permissibly rejected Dr. Ajjarapu's opinion, the only medical opinion of record that could support a finding of total disability, we affirm her finding that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Because Claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the ALJ's determination that Claimant did not establish entitlement under 20 C.F.R. Part 718. *See* 30 U.S.C. §921(c)(4); *Trent*, 11 BLR at 1-27.

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and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[11] The ALJ found the opinions of Drs. Rosenberg and Vuskovich well-supported because they are based on the non-qualifying pulmonary function test results. Decision and Order at 25.

[12] Dr. Ajjarapu further opined that, even if Claimant has the "pulmonary capacity to do his previous coal mine employment, he should not do so because continued exposure to coal dust would drastically affect his mortality and morbidity." Director's Exhibit 22 at 7. As an opinion recommending against further dust exposure does not constitute a diagnosis of total respiratory or pulmonary disability, the ALJ permissibly discredited Dr. Ajjarapu's opinion on this basis. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989); Decision and Order at 25.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge