U.S. Department of Labor

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

BRB No. 21-0549 BLA

WAYNE E. GAMBREL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NAVISTAR	)	
	)	
and	)	
	)	
NAVISTAR fka INTERNATIONAL TRUCK & ENGINE CORPORATION	)	DATE ISSUED: 02/06/2023
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Wayne E. Gambrel, Arjay, Kentucky.

Carl M. Brashear (Hoskins Law Offices, PLLC) Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Denying Benefits (2019-BLA-05059) rendered on a miner's claim filed on November 8, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 6.33 years of coal mine employment and thus found he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established a totally disabling respiratory impairment but did not establish clinical or legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b). Thus, she denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer and its Carrier (Employer) respond in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response.

In an appeal filed by an unrepresented Claimant, the Board addresses 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 ALJ's Decision and Order 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 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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

[2] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled 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.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4 n.3; Director's Exhibits 3, 5.

Section 411(c)(4) Presumption - Length of Coal Mine Employment

Having established total disability, in order to invoke the Section 411(c)(4) presumption, Claimant must establish he 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). Claimant bears the burden to establish the number of years he worked in coal mine employment. *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 calculation of the length of coal mine employment if it is based on a reasonable method of computation and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986); *Hunt*, 7 BLR at 1-710-711.

Claimant alleged twenty years of coal mine employment and testified he was paid in cash for a substantial portion of his career, that he "trucked around the clock," and worked beyond "normal hours" to support his family. Decision and Order at 4, 14; Hearing Transcript at 23-24, 30-31, 34-35; Employer's Exhibit 4 at 14-17; Director's Exhibit 2. The ALJ initially determined which of Claimant's trucking jobs constituted coal mine employment under the Act. Decision and Order at 13-14. In this respect, the ALJ considered Claimant's CM-911a Employment History Form, CM-913 Description of Coal Mine Work Form, Social Security Administration (SSA) earnings records, work history table, hearing and deposition testimony, Coal Truck Driver Questionnaire forms, an employment letter from Employer, and an employment questionnaire Claimant completed. Decision and Order at 8-15; Director's Exhibits 2-12; Employer's Exhibit 4.

As the ALJ accurately noted, Claimant testified that all of his work for Employer occurred at a steel foundry or at a machine shop working on farm or industrial equipment and that none of his employment was performed in or around a coal mine.[4] Decision and Order at 13; Hearing Transcript at 16-18, 20; Employer's Exhibit 4 at 12-13. She also noted that while an employee for Employer (Navistar) indicated that some of Claimant's work occurred in Kentucky at Benham Coal, Incorporated (Benham Coal), a subsidiary of Navistar, Claimant denied that he performed any work at that location.[5] Decision and

[4] In an employment questionnaire from the district director inquiring about Claimant's work with Employer, Claimant responded that he worked as a "machine operator" and "welder" and that all of his work was in a shop and he was never at a mine site. Director's Exhibit 6. These responses are consistent with Claimant's testimony.

[5] Employer notes "Navistar did, in fact, operate a coal mine (Benham Coal) at one time. However, Navistar also operates numerous farm machinery plants." Employer's Brief at 6. It also correctly notes "Claimant testified that *all* of his work for Navistar was

Order at 13; Hearing Transcript at 21-22; Employer's Exhibit 4 at 12-13; Director's Exhibit 10. Consequently, the ALJ concluded Claimant did not work for Employer in coal mine employment.[6]

In calculating the length of Claimant's coal mine employment, the ALJ found inconsistencies and overlapping dates of employment within the documentary evidence submitted by Claimant to the district director, his SSA earnings records, and his Coal Truck Driver Questionnaires. Decision and Order at 14; Director's Exhibits 3, 5, 7, 8, 9, 11, 12. The ALJ explained she was "not persuaded by Claimant's testimony and assertions" that he had twenty years of coal mine employment because he failed to present "any other sufficiently reliable evidence" to allow her to make a "finding confidently." Decision and Order at 15; *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986) (An ALJ is granted broad discretion in evaluating the credibility of the evidence of record, including witness testimony); *Kuchwara v. Director, OWCP*, 7 BLR 1-167, 1-170 (1984). She therefore permissibly found Claimant's SSA earnings records were the only "reliable evidence" of

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at a foundry and farm machinery manufacturing plant in Louisville, Kentucky." *Id.*; *see* Hearing Transcript at 20; Employer's Exhibit 4 at 13-14. In light of Claimant's specific testimony that he never worked at Benham Coal, it is possible the Navistar employee who indicated that Claimant worked for Benham Coal (but who could not also specify the nature of that job) made a clerical error. Under the circumstances, the ALJ permissibly relied on Claimant's testimony regarding the nature of his work for Employer and his consistent position before both the district director and the ALJ that he did not work for Employer in coal mine employment. *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002).

[6] The ALJ accurately noted Claimant testified that he personally owned Gambrel Metals Incorporated and T&W and that they did not involve coal mine work. Decision and Order at 13; Hearing Transcript at 16-18, 20-21, 29; Employer's Exhibit 4 at 12-13, 17-19. Additionally, she accurately noted that while Claimant reported earnings from Over Road Trucking, Bell County Board of Education, Fawcett Printing Corporation, Great Atlantic & Pacific Tea Company Incorporated, R C Tway Company, and Dixie Warehouse & Cartage Company on his SSA earnings records, he has not provided any testimony or evidence to support a finding that he worked in coal mine employment with any of them. Decision and Order at 13-14; Director's Exhibits 11, 12. Because we see no error in the ALJ's exclusion of these companies in calculating the length of Claimant's coal mine employment, we affirm her findings.

record for establishing the length of Claimant's coal mine employment.[7] Decision and Order at 14; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

The ALJ determined Claimant's SSA earnings records "do not provide any information relating to start and end dates of employment" and, therefore, "Claimant has not established the precise beginning and end dates of any of his coal mine employment and has failed to establish any full calendar years of coal mine employment."[8] Decision and Order at 14; *see* 20 C.F.R. §725.101(a)(32); 65 Fed. Reg. 79,920, 79,959 (Dec. 20, 2000); *Clark*, 22 BLR at 1-280. Because Claimant's SSA earnings records "did not provide any information relating to the start and end dates" of Claimant's employment, the ALJ compared Claimant's yearly earnings reflected in his SSA earnings records to the yearly earnings for miners who worked 125 days set forth in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine Procedure Manual* to determine whether Claimant's wages demonstrate full or partial calendar years of coal mine employment from 1985 through 2012.[9] Decision and Order at 14-15. Where Claimant's earnings exceeded the annual average for 125 working days, the ALJ credited Claimant with a full calendar year of employment. *Id*. Where the earnings fell short, she credited him with a fractional year "based on the ratio of the actual days worked to 125 [days]." *Id*. Based on this method, the ALJ concluded Claimant established 6.33 years of coal mine employment from 1985 through 2012. *Id.*; *see Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-02 (6th Cir. 2019).

Overall, the ALJ stated that relying on Claimant's SSA earnings records eliminated much of Claimant's alleged coal mine employment, which he asserted was paid in cash.

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[7] The ALJ acknowledged that relying solely on Claimant's SSA earnings records would exclude much of Claimant's asserted coal mine employment. Decision and Order at 15.

[8] The ALJ determined that Claimant's work with Nally & Hamilton, Glenn Gambrel, Helen Smith, D&D Trucking, G&G Coal, Carol Coal Company, Paul Wells, Claude Knuckles Coal Company, HC-McDaries, H&N Trucking, Kemes Coal Company, Emeyn Coal Processing, TDC Trucking, J Hall, Blue Stone Company, B&S Trucking, and Robert Clear Coal Company constituted coal mine employment. Decision and Order at 14 n.8; Director's Exhibits 3, 5; Employer's Exhibit 4 at 14-15; Hearing Transcript at 29.

[9] The ALJ did not consider Claimant's SSA earnings records from 1965 through 1982 because she had previously determined the listed employers did not engage in qualifying coal mine work. Decision and Order at 13-15.

Decision and Order at 15. Noting correctly that Claimant has the burden of proof to affirmatively establish the length of his coal mine employment, she permissibly concluded that Claimant's testimony, standing alone, was not sufficiently persuasive to find twenty years of coal mine employment or even fifteen years as necessary to invoke the presumption. *Mabe*, 9 BLR at 1-68; *Kephart*, 8 BLR at 1-186; Decision and Order at 15. Because the ALJ's calculations are reasonable, supported by substantial evidence, and in accordance with Sixth Circuit law, we affirm the ALJ's finding that Claimant established 6.33 years of coal mine employment. *Muncy*, 25 BLR at 1-27; *see Shepherd*, 915 F.3d at 401; Decision and Order at 16. We therefore affirm her determination that Claimant is unable to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i); Decision and Order at 26-27 n.14.

Entitlement Under 20 C.F.R. Part 718

To be entitled to benefits under the Act without benefit of the Sections 411(c)(3)[10] or 411(c)(4) presumption, 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 one of these elements precludes an award of benefits. *Anderson*, 12 BLR at 1-112; *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). The ALJ denied benefits

[10] The ALJ accurately found there is no evidence of complicated pneumoconiosis and therefore Claimant cannot 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). Decision and Order at 26-27 n.14.

because she found Claimant failed to establish the existence of clinical or legal pneumoconiosis.[11]

Clinical Pneumoconiosis

The ALJ considered six interpretations of four x-rays.[12] Decision and Order at 27-28. The ALJ noted Drs. DePonte, Miller, and Meyer are dually qualified Board-certified radiologists and B readers, and she found their readings entitled to equal weight. *Id.* at 28-29; Director's Exhibits 21, 24; Employer's Exhibit 1. As Dr. Dahhan is not a Board-certified radiologist nor a B reader, she found his reading entitled to less weight. Decision and Order at 28 n.19; Director's Exhibit 26. Dr. DePonte read the August 4, 2015 and August 25, 2016 x-rays as positive for pneumoconiosis. Director's Exhibit 21. Drs. DePonte and Miller read the April 19, 2017 x-ray as negative for pneumoconiosis. Director's Exhibits 14 at 23, 24. Drs. Dahhan and Meyer read the September 27, 2017 x-ray as negative for pneumoconiosis. Director's Exhibit 26 at 6; Employer's Exhibit 1.

The ALJ stated that because pneumoconiosis is a progressive and irreversible disease, she could not reconcile Dr. DePonte's earlier positive x-ray readings with her later negative x-ray reading and thus permissibly discredited all of Dr. DePonte's x-ray readings. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 29. Because the remaining x-rays readings were all negative for pneumoconiosis, the ALJ permissibly concluded the x-ray evidence did not establish pneumoconiosis. Decision and Order at 29.

Because the record contains no biopsy or autopsy evidence, we also affirm the ALJ's determination that Claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Decision and Order at 26-27 n.14.

[11] "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). The definition includes "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 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).

[12] Dr. Lundberg read a January 10, 2018 x-ray for quality purposes only. Director's Exhibit 15.

The ALJ next considered the medical opinions of Drs. Ajjarapu and Dahhan and Claimant's treatment records. Decision and Order at 29-34. The ALJ noted that neither Drs. Ajjarapu nor Dahhan diagnosed Claimant with clinical pneumoconiosis but that Dr. Mandviwala[13] and nurse practitioners Dean and Willis, who treated Claimant, noted in Claimant's treatment records he had coal workers' pneumoconiosis. 20 C.F.R. §718.202(a)(4); *Id.* at 30-34; Director's Exhibits 14 at 7, 26 at 4; Employer's Exhibits 2, 4 at 27-28; Claimant's Exhibits 4 at 12-15, 5 at 5, 10, 16; Hearing Transcript at 33.

The ALJ permissibly gave little weight to Claimant's treatment records because neither Dr. Mandviwala nor the nurse practitioners "explained the bases for their diagnosis." Decision and Order at 31-34; *Rowe*, 710 F.2d at 255; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987) (a reasoned opinion is one supported by the underlying documentation). Additionally, the ALJ permissibly discredited Dr. Mandviwala's diagnosis, in part, because he relied on a coal mine employment history of almost twenty years, which is substantially greater than the 6.33 years that the ALJ found. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); Decision and Order at 33; Claimant's Exhibit 4 at 4, 12. Because there is no other evidence supportive of Claimant's burden of proof, we affirm the ALJ's finding that the medical opinions do not establish clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4).

Legal Pneumoconiosis

The ALJ again considered the medical opinions of Drs. Ajjarapu and Dahhan and Claimant's treatment records. Decision and Order at 29-34; Director's Exhibits 14, 26; Claimant's Exhibits 4, 5. Dr. Ajjarapu opined Claimant has legal pneumoconiosis and Dr. Dahhan opined he does not have the disease. Decision and Order at 20-23; Director's Exhibits 14 at 6-7, 26; Employer's Exhibit 2. The ALJ accurately noted Dr. Mandviwala and nurse practitioners Dean and Willis diagnosed a variety of pulmonary impairments but did not attribute any of them to his coal mine employment.[14] Decision and Order at 34; Claimant's Exhibits 4, 5.

[13] Dr. Westerfield conducted and read a computed tomography (CT) scan ordered by Dr. Mandviwala and did not identify abnormalities consistent with pneumoconiosis. Claimant's Exhibit 4 at 11.

[14] In summarizing his findings, Dr. Mandviwala opined "there does appear to be an element of airflow obstruction which could represent reactive airways disease from a long history of dust exposure." Claimant's Exhibit 4 at 15. However, any error in the ALJ's failure to specifically consider this statement is harmless as the ALJ provided an additional

The ALJ accurately noted Dr. Ajjarapu reported Claimant had twenty-one years of coal mine employment and Dr. Mandviwala reported he had almost twenty years of coal mine employment. Decision and Order at 30, 34; Director's Exhibit 14 at 7; Claimant's Exhibit 4 at 4, 12. Thus, the ALJ permissibly discredited their opinions because they relied on a coal mine employment history that was far greater than the 6.33 years she found. *See Worhach*, 17 BLR at 1-110; Decision and Order at 30, 33. Consequently, because it is supported by substantial evidence, we affirm the ALJ's determination that Claimant did not establish legal pneumoconiosis. 20 C.F.R. §718.202(a)(4).

Based on her consideration of all the evidence, the ALJ found Claimant failed to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 34. As substantial evidence supports this determination, we affirm it. *See Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). Because Claimant did not establish pneumoconiosis, a requisite element of entitlement, we affirm the ALJ's finding that Claimant is not entitled to benefits. *See Trent*, 11 BLR at 1-27; Decision and Order at 34-35.

reason for discrediting Dr. Madviwala's opinion on legal pneumoconiosis, as discussed below. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge