U.S. Department of Labor

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

BRB No. 23-0347 BLA

GERALD THACKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CHEROKEE COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 06/25/2024
	)	
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 Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

Gerald Thacker, Norton, Virginia.

Michael A. Pusateri (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Denying Benefits (2020-BLA-05580) rendered on a subsequent claim[2] filed on August 31, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 11.90 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).[3] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established he has a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and thus established a change in an applicable condition of entitlement,[4] 20 C.F.R. §725.309(c). However, he found Claimant did not establish the existence pneumoconiosis, and thus denied benefits. 20 C.F.R. §718.202.

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

[2] Claimant filed two prior claims. Director's Exhibits 1, 2. The district director denied his initial claim, filed on August 27, 2003, for failure to establish total disability. 20 C.F.R. §718.204; Director's Exhibit 1 at 3, 131. Claimant filed his second claim on June 4, 2013, but he later withdrew it. Director's Exhibits 1 at 162; 2. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306.

[3] Section 411(c)(4) of the Act 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.

[4] Where 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 that "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 failed to establish total disability in his prior claim, he had to submit new evidence establishing that element in order to obtain review of his current claim on the merits. *See* 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer and its Carrier respond in support of the denial.[5] The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.[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, 361-62 (1965).

Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines, or "substantially similar" surface coal mine employment. 20 C.F.R. §713.305(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 determination 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).

The ALJ considered Claimant's employment history forms, claim for benefits forms, testimony, treatment records, medical reports, and Social Security Administration (SSA) earnings records. Decision and Order at 8-10; Director's Exhibits 1 at 66, 127, 131; 4; 5; 7-9; 13 at 1; Claimant's Exhibit 3 at 1; Employer's Exhibits 2; 3 at 4 (unpaginated); Hearing Tr. at 17-25. Claimant testified he worked in coal mines for Crystal Coal, B J Coal Company, Double H Enterprises, Coal Processing Corporation, Shelby W Smoot & William W Hawkins, and Cherokee Coal Company. Director's Exhibits 1 at 127; 5; Hearing Tr. at 18-28. The ALJ found the dates and length of coal mine employment Claimant reported on his forms, to the physicians, and in his hearing testimony were inconsistent and thus utilized Claimant's earnings as set forth in the SSA earnings records,

[5] We affirm, as unchallenged on appeal, the ALJ's conclusions that Claimant established total disability and a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.204(b)(2), 725.309(c); Decision and Order at 19.

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5; Hearing Tr. at 16.

as he permissibly found them to be the most probative evidence. *See Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984) (ALJ may credit SSA earnings records over a miner's testimony and other sworn statements); Decision and Order at 8; Director's Exhibits 7-9.

For Claimant's pre-1978 coal mine employment, the ALJ permissibly credited him with a quarter of a year of coal mine employment for each quarter in which his SSA earnings records indicate he earned at least $50.00 from coal mine operators. *See Shrader v. Califano*, 608 F.2d 114, 117 n.3 (4th Cir. 1979) (income exceeding fifty dollars is "an appropriate yardstick for determining quarters which will be fully credited to a black lung claimant in determining the duration of his coal mine employment"); *Tackett*, 6 BLR at 1-841 n.2; Decision and Order at 9. Using this method, the ALJ credited Claimant with sixteen quarters, or four years, of coal mine employment before 1978. Decision and Order at 9.

For Claimant's coal mine employment from 1978 to 1985, the ALJ found Claimant was continually employed in coal mining, thereby establishing a calendar year relationship with coal mine operators in each of those years. Decision and Order at 9. However, he found the record insufficient to identify the specific beginning and ending dates of Claimant's coal mine employment during those years. *Id*. Thus, he applied the formula set forth at 20 C.F.R. §725.101(a)(32)(iii) to ascertain Claimant's number of coal mine-related working days.[7] *Id.* at 9-10. He divided Claimant's yearly earnings 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. Id.*; Director's Exhibits 7-9. If Claimant had at least 125 working days in a calendar year, the ALJ credited him with a full year of coal mine employment. Decision and Order at 9-10. If Claimant 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*. Applying this method of calculation, the ALJ found Claimant worked 7.90 years from 1978 to 1985. *Id*. at 10. Adding those years to Claimant's years of coal mine employment before 1978, the ALJ credited Claimant with a total of 11.90 years of coal mine employment. *Id*.

As the ALJ's length of coal mine employment determination is based on a reasonable method of calculation and is supported by substantial evidence, we affirm his finding that Claimant established less than fifteen years of coal mine employment. *See*

[7] If an ALJ cannot ascertain the beginning and ending dates of a miner's coal mine employment, or the miner's employment lasted less than a calendar year, the ALJ may divide the miner's annual earnings by the average daily earnings for a coal miner as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*. 20 C.F.R. §725.101(a)(32)(iii).

Daniels Co. v. Mitchell, 479 F.3d 321, 334-36 (4th Cir. 2007); *Muncy*, 25 BLR at 1-27; Decision and Order at 10. Thus we also affirm his finding that Claimant did not invoke the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(b)(1)(i); Decision and Order at 11.

Entitlement Under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions,[8] 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 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 (1986) (en banc).

The ALJ addressed whether Claimant met his burden to establish the existence of pneumoconiosis without the assistance of any statutory presumptions. 20 C.F.R. §718.202(a).

Clinical Pneumoconiosis

"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 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).

[8] The ALJ correctly noted the record contains no evidence of complicated pneumoconiosis and thus Claimant cannot invoke the Section 411(c)(3) irrebuttable presumption that he is totally disabled due to pneumoconiosis. *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 10.

The ALJ found Claimant's treatment records,[9] his x-ray evidence, and the medical opinions do not establish clinical pneumoconiosis.[10] 20 C.F.R. §718.202(a); Decision and Order at 20-28.

With respect to the x-rays, the ALJ considered seven interpretations of five x-rays dated November 12, 2003, September 18, 2018, August 22, 2019, July 28, 2020, and February 16, 2021. Decision and Order at 20-22. The ALJ noted all the physicians who interpreted the x-rays are dually-qualified B readers and Board-certified radiologists. *Id.* at 21.

Dr. Patel read the November 12, 2003 x-ray as positive for clinical pneumoconiosis. Director's Exhibit 1 at 74. Dr. DePonte read the September 18, 2018 x-ray as positive for clinical pneumoconiosis, while Dr. Tarver read it as negative for the disease. Director's Exhibit 13 at 23; Employer's Exhibit 6 at 30 (unpaginated). Dr. DePonte read the August 22, 2019 x-ray as positive for clinical pneumoconiosis, while Dr. Adcock read it as negative for the disease. Director's Exhibit 15 at 2; Employer's Exhibit 4. Dr. Adcock read the July 28, 2020 and February 16, 2021 x-rays as negative for clinical pneumoconiosis. Employer's Exhibits 1 at 6 (unpaginated); 5.

The ALJ permissibly found the interpretations of the September 18, 2018 and August 22, 2019 x-rays in equipoise because an equal number of dually-qualified radiologists read each x-ray as positive and negative for pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 276 (1994); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016); Decision and Order at 21. Based on the uncontradicted readings of each x-ray, the ALJ found the November 12, 2003 x-ray positive for clinical pneumoconiosis and the July 28, 2020 and February 16, 2021 x-rays negative for the disease. Decision and Order at 21-22. Having found one x-ray positive, two x-rays negative, and the interpretations of two x-rays in equipoise, the ALJ permissibly found the preponderance of the x-ray evidence insufficient to establish clinical pneumoconiosis. *See Ondecko*, 512 U.S. at 276; *Addison*, 831 F.3d at 256; 20 C.F.R. §718.202(a)(1); Decision and Order at 22.

---

[9] While Claimant's treatment records contain diagnoses of coal workers' pneumoconiosis, the ALJ permissibly found they do not establish clinical pneumoconiosis because none of the treating physicians identified any data they relied upon or explained the basis for their diagnosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 22-23; Claimant's Exhibit 3; Employer's Exhibit 7.

[10] The ALJ accurately noted the record contains no biopsy evidence. 20 C.F.R. §718.202(a)(2); Decision and Order at 22.

The ALJ next considered the medical opinions of Drs. Ajjarapu and Rasmussen.[11] Decision and Order at 24-27. Dr. Ajjarapu diagnosed Claimant with clinical pneumoconiosis based on Dr. DePonte's positive September 18, 2018 x-ray interpretation. Director's Exhibit 13 at 3, 6. The ALJ permissibly discredited Dr. Ajjarapu's opinion because it is contrary to his finding that the September 18, 2018 x-ray does not support clinical pneumoconiosis as the readings of it are in equipoise and his finding the totality of the x-ray evidence does not support a finding of clinical pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 26-27.

Dr. Rasmussen diagnosed Claimant with clinical pneumoconiosis based on the November 12, 2003 positive x-ray. Director's Exhibit 1 at 66-67, 70-71. The ALJ permissibly discredited his opinion because the doctor did not review the other x-ray readings of record and because his reliance on the x-ray evidence to diagnose the disease is contrary to the ALJ's finding that the x-rays do not support a finding of clinical pneumoconiosis. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; Decision and Order at 24.

Because the ALJ reasonably weighed the evidence of record individually and as a whole, we hold substantial evidence supports his determination that Claimant failed to establish clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 28. Thus, we affirm the ALJ's finding that Claimant failed to establish clinical pneumoconiosis. 20 C.F.R. §718.202(a).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must demonstrate he has 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 opinions of Drs. Ajjarapu and Rasmussen that Claimant has legal pneumoconiosis.[12] Decision and Order at 24-27. Drs. Ajjarapu and Rasmussen

[11] The ALJ also considered the medical opinions of Drs. Fino and McSharry. Decision and Order at 27. Neither physician diagnosed pneumoconiosis. Employer's Exhibits 2, 3. As Claimant bears the burden to establish pneumoconiosis under 20 C.F.R Part 718, the ALJ correctly found their opinions do not aid Claimant in establishing his burden. 20 C.F.R. §718.202(a); Decision and Order at 27.

[12] The ALJ also considered Claimant's treatment records. Decision and Order at 22-23. Although the treatment records contain various diagnoses of lung diseases or impairments, the ALJ permissibly found the treatment records do not support a finding of legal pneumoconiosis because the doctors did not opine whether the conditions they

diagnosed Claimant with chronic bronchitis based on his symptoms of chronic cough, shortness of breath, and wheezing, along with his history of coal mine dust exposure and cigarette smoking. Director's Exhibits 1 at 71; 13 at 6-7. Dr. Rasmussen attributed Claimant's chronic bronchitis to "coal mine dust exposure and cigarette smoking," Director's Exhibits 1 at 71, and Dr. Ajjarapu found the "[u]nderlying etiology of Claimant's chronic bronchitis "is his work in the mines," Director's Exhibits 13 at 6. The ALJ found the opinions of both doctors not reasoned and documented and assigned them little weight. Decision and Order at 25, 27. Specifically, the ALJ permissibly discredited their opinions because they identified no objective testing to support their conclusions. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; Decision and Order at 25, 27.

In addition, as the ALJ accurately noted, Dr. Ajjarapu documented in her medical report that Claimant had thirty or more years of coal mine employment and Dr. Rasmussen reported sixteen years of coal mine employment. Decision and Order at 24-27; Director's Exhibits 1 at 71; 13 at 1. The ALJ permissibly accorded less weight to their opinions because he found they were based upon inflated coal mine employment histories. *See Creech v. Benefits Review Board*, 841 F.2d 706, 709 (6th Cir. 1988) (ALJ may discount a physician's diagnosis of legal pneumoconiosis that is based on an inflated coal mine employment history); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988) (effect of an inaccurate exposure history on the credibility of a medical opinion is a determination for the ALJ to make).

It is the ALJ's function to weigh the evidence, draw appropriate inferences and determine credibility. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441. Even if the Board would weigh the evidence differently if considered *de novo*, we must affirm the ALJ's finding if it is supported by substantial evidence. *See Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999) (The Board must uphold decisions that rest within the realm of rationality; a reviewing court has no license to "set aside an inference merely because it finds the opposite conclusion more reasonable or because it questions the factual basis.").

As it is rational and supported by substantial evidence, we affirm the ALJ's finding that the opinions of Drs. Ajjarapu and Rasmussen are not reasoned or documented and are thus entitled to little weight. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; Decision and Order at 25, 27. We therefore affirm the ALJ's finding that Claimant failed to establish

---

diagnosed are significantly related to, or substantially aggravated by, Claimant's coal mine dust exposure. *See Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311 (4th Cir. 2012); Decision and Order at 23; Claimant's Exhibit 3; Employer's Exhibit 7.

the existence of legal pneumoconiosis based on the medical opinions and evidence as a whole. 20 C.F.R. §718.202(a)(4); Decision and Order at 28.

Therefore, we affirm the ALJ's finding that Claimant failed to establish the existence of pneumoconiosis. 20 C.F.R. §718.202; Decision and Order at 28. Thus, we affirm the ALJ's finding that Claimant failed to establish an essential element of entitlement, and therefore affirm the denial of benefits. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; Decision and Order at 28.

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge