U.S. Department of Labor

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

BRB No. 24-0167 BLA

OSCAR WYNN Claimant-Petitioner v. HARLAN KY VA COAL INCORPORATED and EMPLOYERS INSURANCE OF WAUSAU Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	**NOT-PUBLISHED** DATE ISSUED: 11/14/2024 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Oscar Wynn, Flat Lick, Kentucky.

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

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Denying Benefits (2020-BLA-06132) rendered on a claim filed on November 21, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found no evidence of complicated pneumoconiosis, and thus Claimant 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. In addition, the ALJ found Claimant established less than fifteen years of coal mine employment and, therefore, found he could not invoke the rebuttable 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 the medical evidence did not establish that Claimant has pneumoconiosis. 20 C.F.R. §718.202(a). Therefore, he 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.

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.[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).

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[1] On Claimant's behalf, 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, but she is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] 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); 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*

Section 411(c)(3) Presumption

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. None of Claimant's x-rays was interpreted as positive for complicated pneumoconiosis, and the record does not contain any biopsy evidence. There are also no computed tomography scans and no medical opinions or hospitalization and treatment notes of complicated pneumoconiosis. Consequently, the ALJ accurately found the record lacks evidence to establish Claimant has complicated pneumoconiosis. Decision and Order at 18 & n.103. We therefore affirm the ALJ's finding that Claimant did not invoke the Section 411(c)(3) presumption.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground or "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 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation and is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The ALJ considered Claimant's Employment History Form CM-911a, his hearing and deposition testimony, and his Social Security Administration (SSA) earnings records. Decision and Order at 4-7; Director's Exhibits 3; 5; 6; 25 at 14-16; Hearing Transcript at 8-11. He found Claimant had periods of coal mine employment from 1970 to 1973 and 1981 to 1991. Decision and Order at 6-7.

The ALJ found the record insufficient to establish the specific beginning and ending dates of Claimant's coal mine employment. Decision and Order at 4-7. Turning first to Claimant's employment with Eastover Mining Company, the ALJ permissibly credited

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Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Director's Exhibit 3; Hearing Transcript at 7.

Claimant with one year of coal mine employment because his SSA earnings records contained a total of four quarters of earnings greater than $50.00 in 1970 and 1973, while Claimant's deposition testimony that he worked there for three or four years was uncorroborated. *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 405-06 (6th Cir. 2019) (acknowledging Board's holding that a reasonable method of calculating length of coal mine employment for pre-1978 years is crediting Claimant with every quarter in which he earned at least $50.00); *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 & n.2 (1984) (ALJ may credit SSA earnings records over a miner's testimony); Decision and Order at 6; Director's Exhibits 5 at 4; 25 at 14-15.

Despite Claimant's SSA earnings records reflecting only $12 in earnings in 1971 with Karst Robbins Coal Company, the ALJ permissibly found Claimant's deposition testimony that he worked there one year and was paid in cash to be credible and consistent with Claimant's statement on his Employment History Form that he worked at Karst Robbins from 1970 to 1971.[4] *See Calfee v. Director, OWCP*, 8 BLR 1-7, 1-9 (1985) (ALJ need not credit SSA earnings records where testimony and other documentary evidence constitute substantial evidence in support of the ALJ's findings); Decision and Order at 6; Director's Exhibits 3 at 1; 5 at 5; 25 at 15-16.

For the years 1981 through 1991, the ALJ divided Claimant's annual SSA-reported earnings by the coal mine industry's average daily wage set forth in Exhibit 610 to the *Office of Workers' Compensation Programs Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual* to determine the number of days he worked each year.[5] Decision and Order at 6-7. Where Claimant's earnings exceeded the annual average for 125 working days, the ALJ credited him with a full year of employment. *Id.* Where the earnings fell short of 125 days, the ALJ credited him with a fractional year based on the ratio of actual days worked to 125 days. *Id.* Using this method, the ALJ permissibly found Claimant had 6.97 years of coal mine employment from 1981 through 1991, and a total of 8.97 years of coal mine employment. *See Shepherd*, 915 F.3d at 405-06; Decision and Order at 6-7; Director's Exhibit 6.

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[4] On his Employment History Form, Claimant referred to Karst Robbins Coal Company as "Carson Robbins Coal." Director's Exhibit 3 at 1.

[5] Exhibit 610 to the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*, entitled "Average Wage Base," contains the average daily earnings of employees in coal mining and the earnings for those who worked 125 days during a year; it is referenced in 20 C.F.R. §725.101(a)(32)(iii).

As the ALJ's method of calculating Claimant's length of coal mine employment is rational, supported by substantial evidence, and in accordance with the applicable law of the United States Court of Appeals for the Sixth Circuit, we affirm his finding that Claimant established 8.97 years of coal mine employment. *See Shepherd*, 915 F.3d at 405-06; *Muncy*, 25 BLR at 1-27; Decision and Order at 6-7; Director's Exhibits 3; 5; 6; 25 at 14-16. Because the ALJ permissibly found Claimant established less than fifteen years of coal mine employment, we affirm his finding that Claimant did not invoke the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i); Decision and Order at 17.

Entitlement Under 20 C.F.R. Part 718

Without the Section 411(c)(3) or Section 411(c)(4) 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 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).

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).

X-rays

The ALJ considered four readings of two x-rays taken on December 19, 2018, and August 13, 2020.[6] Decision and Order at 9. All of the physicians who interpreted these x-rays are dually-qualified B readers and Board-certified radiologists. Director's Exhibits 13, 23, 24; Employer's Exhibit 2. Dr. Crum interpreted the December 19, 2018 x-ray as positive for simple clinical pneumoconiosis, while Drs. DePonte and Meyer interpreted the x-ray as negative for pneumoconiosis. Director's Exhibits 13, 23, 24. Because a greater number of equally qualified doctors interpreted this x-ray as negative for pneumoconiosis,

[6] Dr. Gaziano, a B reader, reviewed the December 19, 2018 x-ray for film quality only. Director's Exhibit 14.

the ALJ permissibly found the December 19, 2018 x-ray is negative for pneumoconiosis. *See Staton v. Norfolk & W. Ry. Co.*, 65 F.3d 55, 58-60 (6th Cir. 1995) (requiring both a qualitative and quantitative evaluation of the x-ray evidence); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993) (same); Decision and Order at 19; Director's Exhibits 13, 23, 24.

Dr. Kendall interpreted the August 13, 2020 x-ray as negative for pneumoconiosis. Employer's Exhibit 2. As his was the only interpretation of this x-ray, the ALJ permissibly found the August 13, 2020 x-ray is negative for pneumoconiosis. 20 C.F.R. §718.202(a)(1); Decision and Order at 19; Employer's Exhibit 2.

Because the two x-rays in the record are negative for pneumoconiosis, the ALJ permissibly found the preponderant weight of the x-ray evidence does not support a finding of simple clinical pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994); 20 C.F.R. §718.202(a)(1); Decision and Order at 19. We therefore affirm the ALJ's finding that the x-ray evidence does not establish that Claimant has clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1).

Medical Opinions

The ALJ also considered the medical opinion evidence consisting of the reports of Drs. Ajjarapu, Dahhan, and Rosenberg. As none of the physicians diagnosed clinical pneumoconiosis, we affirm the ALJ's finding that the medical opinion evidence does not support a finding of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 20; Director's Exhibits 13; 18; 22 at 5-6; Employer's Exhibit 1 at 4, 12. We further affirm the ALJ's overall finding that Claimant did not establish he has clinical pneumoconiosis. Decision and Order at 20.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove 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 Sixth Circuit has held a claimant can satisfy this burden "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The ALJ considered Dr. Ajjarapu's opinion that Claimant has legal pneumoconiosis and the contrary opinions of Drs. Dahhan and Rosenberg that he does not have the disease. Decision and Order at 20-21; Director's Exhibits 13; 18; 22 at 5-6; Employer's

Exhibit 1 at 4- 12. We see no error in the ALJ's determination that Dr. Ajjarapu's opinion is entitled to little weight. Decision and Order at 20-21.

An appellate tribunal such as the Board "may not reweigh the evidence, substitute [its] judgment for that of the [ALJ], or reverse the [ALJ's] decision simply because '[it] would have taken a different view of the evidence were [it] the trier of facts.'" *Shepherd*, 915 F.3d at 398 (quoting *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 486 (6th Cir. 1985)). As the ALJ noted, Dr. Ajjarupu diagnosed chronic bronchitis based on Claimant's respiratory symptoms and attributed it to smoking and coal mine dust exposure. Director's Exhibit 13 at 6. Her sole explanation was that both etiologies "cause airway inflammation leading to bronchospasm and cause excessive airway secretions and bronchitic symptoms." Decision and Order at 20 (quoting Director's Exhibit 13 at 6). The ALJ also observed that in her supplemental report, Dr. Ajjarapu merely stated that while Claimant had a negative x-ray and coal mine employment under ten years, she believed his coal mine dust exposure had a material adverse effect on his respiratory symptom. Decision and Order at 20-21 (citing Director's Exhibit 18).

The ALJ permissibly found that Dr. Ajjarupu did not adequately explain why, under the circumstances of this particular case, she attributed Claimant's chronic bronchitis to his coal mine dust exposure. *See Grundy Mining Co. v. Flynn*, 353 F.3d 467, 483 (6th Cir. 2003) (conclusory statements do not reflect reasoned medical judgment); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc) (ALJ may reject a medical opinion that fails to adequately explain its diagnosis); Decision and Order at 20-21; Director's Exhibits 13 at 6; 18. As Drs. Dahhan and Rosenberg did not diagnose legal pneumoconiosis, the ALJ properly found their opinions did not assist Claimant in establishing the disease. Decision and Order at 21; Director's Exhibit 22 at 5-6; Employer's Exhibit 1 at 4-12.

Claimant has the burden of establishing entitlement 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 280-81; *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because we have affirmed the ALJ's giving little weight to Dr. Ajjarapu's opinion, the only opinion supportive of Claimant's burden to establish legal pneumoconiosis, we affirm his determination that Claimant did not establish legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Because Claimant did not establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under 20 C.F.R. Part 718, he has not established entitlement to benefits under the Act. *Anderson*, 12 BLR at 1-112; *Perry*, 9 BLR at 1-2; Decision and Order at 21 n.123.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge