U.S. Department of Labor

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

BRB No. 23-0466 BLA

BUSTER VIRES Claimant-Petitioner v. ICG HAZARD, LLC and AIG ASSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 09/30/2024 DECISION and ORDER

Appeal of Decision and Order Denying Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Buster Vires, Ricetown, Kentucky.

Timothy J. Walker and Daniel G. Murdock (Fogle Keller Walker, PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

BOGGS and JONES, Administrative Appeals Judges:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Denying Benefits (2021-BLA-05029) rendered on a claim filed on February 22, 2018,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found 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.[3] In addition, the ALJ found Claimant established 13.03 years of coal mine employment and, thus, 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).[4] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established clinical pneumoconiosis arising out of coal mine employment, legal pneumoconiosis, and a totally disabling respiratory or pulmonary impairment, but did not establish total disability due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b)(2), 718.204(c). Thus, he denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs (the Director), declined to file a response.

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*

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

[2] The ALJ found that Claimant filed his claim on February 22, 2018, based on the date he signed it, and not March 5, 2018, the date the district director determined it was filed. Decision and Order at 2 n.4; Director's Exhibits 2, 3, 64.

[3] We affirm the ALJ's finding that Claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis because the record contains no evidence that Claimant has complicated pneumoconiosis. *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 15 & n.46.

[4] 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.

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).

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 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 determination if it is based on a reasonable method of calculation and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The ALJ considered Claimant's statement on his claim forms and his hearing testimony, alleging twenty-five years of coal mine employment; the district director's crediting of twelve years; Employer's stipulation to thirteen years; and Claimant's Employment History Form identifying coal mine employment from 2003 to May 24, 2010. Decision and Order at 3-4; Director's Exhibits 2 at 1; 3 at 1; 4; 64 at 9; Hearing Transcript at 16, 27. The ALJ also considered Claimant's Social Security Administration (SSA) earnings records, which reflected earnings from coal mine employment from 1977 to 1985, 1987, and 2001 to 2011. Decision and Order at 4-6; Director's Exhibits 11, 12.

The ALJ found the record did not support a finding of twenty-five years of coal mine employment and therefore relied on Claimant's SSA earnings records. Decision and Order at 4-6; Director's Exhibits 11, 12. He credited Claimant for each employer that was named as a coal mine operator or identified as coal mine employment on Claimant's Employment History Forms.[6] Decision and Order at 5; Director's Exhibits 4, 5, 11, 12.

[5] 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 3; Hearing Transcript at 15.

[6] Specifically, the ALJ credited as coal mine employment Claimant's work with ICG (Pine Branch Resources), Dylan Mining, Buffalo Creek Reclamation, Kennerco, Invesco, Cortland Coal, Mistletoe Energy, Fordy Coal, Caudill Construction, and MGA of Kentucky found on the SSA earnings records. Decision and Order at 5-6; Director's

The ALJ did not credit Claimant with any earnings from self-employment listed on the SSA earnings records during the years of 1991, 1993 to 2000, or 2003 because Claimant described his self-employment as a logger without identifying it as coal mine work on his Employment History Forms and his Description of Coal Mine Work Forms. Decision and Order at 6; Director's Exhibits 4-7, 11.

Based on the SSA earnings records, the ALJ divided Claimant's annual SSA-reported earnings by the average daily wage in Exhibit 610 to the *Office of Workers' Compensation Programs (Black Lung Benefits Act) Procedure Manual* to determine the number of days Claimant worked each year.[7] Decision and Order at 5-6. Where that number amounted to at least 125 working days, the ALJ credited him with a full year of employment. *Id*. Where the number amounted to less than 125 days, he credited him with a fractional year based on the ratio of actual days worked to 125 days. *Id*. Using this method, the ALJ found Claimant had 13.03 years of coal mine employment from 1977 to 2011.[8] *Id*.; *see Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019).

As the ALJ's method of calculating Claimant's length of coal mine employment is reasonable, supported by substantial evidence, and in accordance with the law of the United States Court of Appeals for the Sixth Circuit, we affirm his finding that Claimant established 13.03 years of coal mine employment.[9] *See Shepherd*, 915 F.3d at 402; *Muncy*,

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Exhibits 4, 5, 11, 12. He did not credit as coal mine employment work with Gregory Company, Bill Barker Reclamation, Becky Ann Energy, Christlind Enterprises, Fleetwood Johnson Construction, Hannco Energy, and Leslie Resources because these employers did not appear on Claimant's Employment History Forms or were not identified as coal mine operators on the SSA earnings records. Decision and Order at 5-6 & n.13; Director's Exhibits 4, 5, 11, 12.

[7] 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 and is referenced in 20 C.F.R. §725.101(a)(32)(iii).

[8] The ALJ's crediting of Claimant with 7.14 years of coal mine employment with Employer from 2004 to 2011 is supported by Claimant's hearing testimony that he worked for Employer for about seven years. *See* Decision and Order at 5-6; Hearing Transcript at 23; *see also* Director's Exhibit 33 at 5.

[9] Because Claimant's 1977 SSA earnings record shows he earned at least $50.00 in each quarter, the ALJ could have credited him with one full year of coal of coal mine

25 BLR at 1-27; Decision and Order at 3-6. Because we affirm the ALJ's finding that Claimant established less than fifteen years of coal mine employment, we also affirm his finding that Claimant is not entitled to invoke the Section 411(c)(4) presumption.[10] *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i).

Entitlement Under 20 C.F.R. Part 718 – Disability Causation

To be entitled to benefits under the Act without the Section 411(c)(3) or (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 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).

We affirm, as unchallenged on appeal and not prejudicial to Claimant, the ALJ's findings that Claimant established clinical pneumoconiosis arising out of coal mine employment, legal pneumoconiosis,[11] and a totally disabling respiratory or pulmonary

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employment for 1977 instead of the 0.86 fractional year he calculated. *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 405-06 (6th Cir. 2019); Decision and Order at 5; Director's Exhibit 12 at 3-4. Any error is harmless because even if the ALJ had credited Claimant with one full year in 1977, Claimant still would not have established the requisite fifteen years of coal mine employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[10] The ALJ accurately stated that, had he included Claimant's employment with White Cat for the four or five months in 2003 that Claimant alleged on his Employment History Forms, Claimant still could not establish fifteen years of coal mine employment. Decision and Order at 6; Director's Exhibits 4, 5. This is true even if the 0.14 fractional year from 1977, which was not included in the ALJ's calculation, is included in the total number of years Claimant worked in coal mine employment (the 13.03 years ALJ found + the 0.14 year not included in 1977 + the 5 months not included in 2003 = 14.17 years at most, allowing for one full year or 125 working days in 2003).

[11] "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.

impairment.[12] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b)(2); Decision and Order at 14, 19, 28; Employer's Brief at 8-9 ("Since Judge Golden resolved all issues, with the exception of causation, in favor of the [C]laimant, the crux of this appeal rests with [Judge] Golden's analysis of that issue.").

To establish disability causation, Claimant must prove his pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); *see Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 599 (6th Cir. 2014).

The ALJ accurately observed there is no medical opinion in the record to establish that Claimant is totally disabled due to clinical or legal pneumoconiosis, as no physician, including Dr. Ajjarapu, opined pneumoconiosis substantially caused, contributed to, or

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§718.201(a)(1). The ALJ gave the most weight to the preponderant x-ray evidence finding clinical pneumoconiosis over the contrary medical opinion and treatment record evidence, and thus found Claimant established the existence of clinical pneumoconiosis. Decision and Order at 19. The ALJ also found that Claimant established his simple clinical pneumoconiosis arose out of his coal mine employment as Claimant is entitled to the presumption at 20 C.F.R. §718.203(b), and Employer did not rebut it. *Id*. at 28-29.

"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). The ALJ credited Dr. Ajjarapu's opinion diagnosing legal pneumoconiosis over the contrary opinions of Drs. Jarboe and Broudy, and thus found Claimant established the existence of legal pneumoconiosis. Decision and Order at 28.

[12] The ALJ found Claimant established total disability, based on the preponderant weight of the pulmonary function studies and blood gas studies supporting total disability (crediting the exercise blood gas study performed longer than the other one), and gave "some weight" to Dr. Ajjarapu's opinion because it is consistent with the weight of the objective evidence. Decision and Order at 7-14.

aggravated Claimant's total respiratory or pulmonary disability. Decision and Order at 29. Drs. Jarboe and Broudy did not diagnose clinical or legal pneumoconiosis and opined Claimant is not totally disabled; therefore, they concluded Claimant is not totally disabled by either disease. Employer's Exhibits 1 at 3-4; 2 at 10-11; 3 at 19-21.

Dr. Ajjarapu provided the Department of Labor (DOL)-sponsored complete pulmonary evaluation of Claimant on March 28, 2018. Director's Exhibit 18. In her initial report, she noted Claimant had a negative x-ray for "cwp [coal workers' pneumoconiosis]" and diagnosed chronic bronchitis based on his respiratory symptoms. *Id*. at 6-7. She indicated Claimant had legal pneumoconiosis, attributing Claimant's chronic bronchitis to both smoking and coal dust exposure. *Id*. at 6. Further, she opined Claimant is totally disabled based on the pulmonary function studies showing a severe pulmonary impairment and the blood gas studies showing severe hypoxia. *Id.* at 7.

At the hearing, the ALJ indicated that he was holding the record open in order for the Director to obtain a supplemental report from Dr. Ajjarapu because her opinion was incomplete as to the disability causation issue. Hearing Transcript at 28-33; *see* Director's Exhibit 18 (Dr. Ajjarapu's initial report). Subsequently, the Director asked Dr. Ajjarapu to clarify whether Claimant's "legal pneumoconiosis is a substantially contributing cause of [his] totally disabling respiratory or pulmonary impairment." Director's Exhibit 75 at 3. The ALJ admitted Dr. Ajjarapu's supplemental report into the record as Director's Exhibit 75. *See* Order Granting Motion to Admit dated March 16, 2022.

In her supplemental report, Dr. Ajjarapu noted Claimant described symptoms consistent with chronic bronchitis, explained that when a person is exposed to two toxins, both of them may contribute to chronic bronchitis symptoms, and "it is virtually impossible to identify which toxin played a role to what extent in contributing to his symptoms." Director's Exhibit 75 at 1. She considered Claimant's "extensive smoking history," that his x-ray was negative for pneumoconiosis, and that emphysema was not radiographically diagnosed despite Claimant's smoking history, and she determined that the negative reading may not be accurate; however, she concluded Claimant does not have clinical pneumoconiosis or emphysema. *Id.* Further, she opined Claimant has a severe pulmonary impairment based on his spirometry and blood gas studies showing moderate resting and severe exercise-induced hypoxia. *Id.* Noting Claimant's work history of fourteen to twenty years of surface coal mine employment and his smoking history of ninety pack-years, she observed the "risk of smoking is 4.5 times that of his coal mine dust exposure, however there was no mention of emphysema [by x-ray]." *Id.* She concluded:

> Pneumoconiosis is a progressive disease, and if he has recent x-rays that would show he has pneumoconiosis, then dust exposure would be considered a factor. Currently, with chest x ray being negative for pneumoconiosis, the

> etiology for his pulmonary impairment is his tobacco exposure. He is totally and completely disabled, not from pneumoconiosis, but from tobacco smoking.

Id. at 1-2.

The ALJ permissibly gave no weight to Dr. Ajjarapu's opinion that Claimant's pulmonary impairment was related entirely to smoking because it was based, in part, on her erroneous conclusion that "Claimant's chest x-ray is negative for pneumoconiosis," contrary to the ALJ's finding that Claimant has the disease. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514 (6th Cir. 2003); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12 (4th Cir. 2000); Decision and Order at 23 n.65; Director's Exhibit 75.

Regarding Dr. Ajjarapu's "alternative opinion," that if Claimant's later x-rays showed he had clinical pneumoconiosis, then dust exposure would be considered a factor in his respiratory impairment, the ALJ permissibly found her opinion legally insufficient to satisfy Claimant's burden of proof because Dr. Ajjarapu did not opine that pneumoconiosis was a *substantially* contributing cause of Claimant's total disability.[13] *Groves*, 761 F.3d at 599; Decision and Order at 29-30; Director's Exhibit 75. Thus, we affirm the ALJ's finding that Claimant did not establish disability causation at 20 C.F.R. §718.204(c) and his denial of benefits. Further, we affirm the ALJ's conclusion that despite the flaws in Dr. Ajjarapu's opinion, Claimant had received a complete pulmonary evaluation because the physician had addressed all of the requisite elements of entitlement. *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 640 (6th Cir. 2009); Decision and Order at 30 n.77.

[13] The ALJ permissibly found, "No physician, including Dr. Ajjarapu opined that pneumoconiosis substantially caused, contributed to, or aggravated Claimant's total respiratory or pulmonary disability. No physician provided opinions or testimony from which I could infer the same." Decision and Order at 29; *see Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 599 (6th Cir. 2014); Director's Exhibit 75.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GRESH, Chief Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from the majority's opinion upholding the ALJ's finding that despite the flaws in Dr. Ajjarapu's opinion, Claimant had received a complete pulmonary evaluation because the physician had addressed all of the requisite elements of entitlement. While I agree with the ALJ that Dr. Ajjarapu's opinion is both not well-reasoned and legally insufficient to satisfy Claimant's burden of proof, I would vacate his determination that Claimant received a complete pulmonary evaluation.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges*, 18 BLR at 1-88 n.3. To fulfill its obligations under the Act, the DOL must "provid[e] 'a medical opinion that addresses all of the essential elements of entitlement.'" *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 640 (6th Cir. 2009), *quoting Smith v. Martin Cnty. Coal Corp.*, 233 F. App'x 507, 512 (6th Cir. 2007).

While Dr. Ajjarapu concluded Claimant does not have clinical pneumoconiosis, she did diagnose legal pneumoconiosis, attributing Claimant's chronic bronchitis to both smoking and coal dust exposure. Director's Exhibit 18 at 6; Director's Exhibit 75 at 1. The Director asked Dr. Ajjarapu to clarify whether Claimant's "legal pneumoconiosis is a substantially contributing cause of [his] totally disabling respiratory or pulmonary impairment." Director's Exhibit 75 at 3. But it is not clear from her supplemental opinion stating that Claimant "is totally and completely disabled, not from pneumoconiosis, but from tobacco smoking," Director's Exhibit 75 at 1, whether she is referring to clinical or legal pneumoconiosis, which are two different diseases. As Dr. Ajjarapu already indicated that coal dust exposure contributed to Claimant's chronic bronchitis, it constitutes legal pneumoconiosis. But she did not indicate whether Claimant's chronic bronchitis due to smoking and coal dust exposure substantially contributed to Claimant's disability or,

rather, whether it has "a material adverse effect on the [Claimant's] respiratory or pulmonary condition" or if it "[m]aterially worsens [Claimant's] totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); *see Groves*, 761 F.3d at 599.

Thus, despite the Director's attempt to obtain a supplemental report from Dr. Ajjarapu specifically addressing the issue of disability causation, the physician did not address the fundamental question presented to her, which is whether Claimant's chronic bronchitis due to both smoking and coal dust exposure "or legal pneumoconiosis" is a substantially contributing cause of his respiratory disability. *See* Director's Exhibit 75. I therefore would conclude Claimant did not receive a complete pulmonary evaluation to substantiate his claim on the issue of disability causation and thus would vacate the ALJ's finding at 20 C.F.R. §718.204(c) and his denial of benefits. I would order the ALJ, on remand, to take appropriate action and instruct the Director to satisfy his obligation to provide Claimant with a complete pulmonary evaluation on the issue of whether Claimant is totally disabled due to legal pneumoconiosis. 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406, 725.456(e); *Greene*, 575 F.3d at 641-42; *Hodges*, 18 BLR at 1-88 n.3.

I otherwise concur with the majority in all other respects.

DANIEL T. GRESH, Chief
Administrative Appeals Judge