U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0367 BLA

CHARLES PREECE, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PREECE COAL COMPANY	)	DATE ISSUED: 05/05/2017
	)	
and	)	
	)	
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 Larry W. Price, Administrative Law Judge, United States Department of Labor.

Jonathan C. Masters (Masters Law Office, PLLC), South Williamson, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2009-BLA-05467) of Administrative Law Judge Larry W. Price rendered on a claim filed on May 2, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with eight years of underground coal mine employment.[1] Because claimant established less than fifteen years of coal mine employment, the administrative law judge found that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2012). The administrative law judge also found that the evidence did not establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304. He therefore determined that claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act,[3] 30 U.S.C. §921(c)(3). In addition, the administrative law judge found that the evidence did not establish the existence of either clinical or legal pneumoconiosis[4] pursuant to 20 C.F.R. §718.202(a). Further, assuming that claimant

[1] Claimant's coal mine employment was in Kentucky. Director's Exhibit 7; Employer's Exhibit 21 at 12. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption of total disability due to pneumoconiosis in cases where claimant establishes fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

[4] "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). "Legal pneumoconiosis" includes any chronic

established the existence of complicated pneumoconiosis or clinical pneumoconiosis, the administrative law judge found that claimant did not establish that the pneumoconiosis arose at least in part out of his coal mine employment under 20 C.F.R. §718.203(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in his determination of the length of claimant's coal mine employment. Claimant also argues that the administrative law judge erred in weighing the x-ray evidence when he found that neither complicated pneumoconiosis nor simple clinical pneumoconiosis was established.[5] Employer/carrier responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his total disability is caused by pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Claimant contends that the administrative law judge erred in failing to find that the evidence established at least ten years of coal mine employment.[6] Specifically, claimant

---

lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that the biopsy evidence, CT-scan evidence, and medical opinion evidence did not establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b),(c), simple clinical pneumoconiosis at 20 C.F.R. §718.202(a)(2),(4), or legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7-12.

[6] The regulations provide that "[i]f a miner who is suffering . . . from pneumoconiosis was employed for ten years or more in one or more coal mines, there

contends that the administrative law judge erred in failing to fully credit claimant's testimony as to his employment history. Claimant's Brief at 7-8. For the reasons set forth below, we disagree.

Claimant bears the burden of establishing the number of years he actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). The administrative law judge noted claimant's concession that his Social Security Administration (SSA) earnings records established 7.6979 years of coal mine employment. Decision and Order at 4, *citing* Claimant's Post-Hearing Brief at 3. The administrative law judge further noted claimant's argument that his "testimony supports an upward calculation of 10 years," because claimant testified at the hearing that he had additional coal mine employment for which "he was often paid in cash." Decision and Order at 4-5. Specifically, the administrative law judge noted that claimant "testified that he was paid cash 'at the first mines' where he worked for about a year." *Id*. at 5, *quoting* Hearing Transcript (Hr'g Tr.) at 19.

The administrative law judge found that claimant's testimony regarding payment in cash was not sufficiently credible to establish "an additional two-plus years of coal mine employment," because claimant's testimony as to the total length of his coal mine employment was not consistent. Decision and Order at 5. The administrative law judge explained that claimant "shifted throughout the hearing from estimating nine or ten years of coal mine employment to a definitive ten years and again to 'seven years or longer.'" *Id*., *quoting* Hr'g Tr. at 20. Additionally, the administrative law judge reiterated that claimant testified that the period for which he was paid in cash was "about a year" at "the first mines" where he worked. Hr'g Tr. at 19. Weighing all of claimant's hearing testimony, the administrative law judge found that the evidence established eight years of coal mine employment. Decision and Order at 5.

Claimant argues that the administrative law judge should have credited his testimony regarding cash payments as establishing at least ten years of coal mine employment. Claimant's Brief at 8. Claimant's argument lacks merit. Determining the credibility of witness testimony is within the sound discretion of the administrative law judge. *See Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986). The administrative law judge permissibly found that, given the variability of claimant's testimony, it was not sufficiently credible to establish as much additional coal mine employment as claimant alleged. *See Lafferty*, 12 BLR at 1-192; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en

---

shall be a rebuttable presumption that the pneumoconiosis arose out of such employment." 20 C.F.R. §718.203(b).

banc). The Board is not empowered to reweigh the evidence. *Anderson*, 12 BLR at 1-113. We therefore affirm the administrative law judge's finding that claimant's SSA earnings records and his hearing testimony established eight years of coal mine employment. Decision and Order at 4-5.

Because claimant established less than fifteen years of coal mine employment, we affirm the administrative law judge's determination that claimant is unable to invoke the Section 411(c)(4) presumption. Additionally, because claimant established less than ten years of coal mine employment, he is not entitled to the rebuttable presumption that his pneumoconiosis, if established, arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b).

With respect to the issue of pneumoconiosis, the administrative law judge found that the weight of the x-ray evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), or simple clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Relevant to the issue claimant raises on appeal, the administrative law judge found that the two most recent x-rays, taken in 2015, were in equipoise, as one was read as positive for both Category A large opacities and simple pneumoconiosis, while the other was read as completely negative for pneumoconiosis.[7] Decision and Order at 6-7. Claimant argues that the administrative law judge erred in weighing the conflicting x-ray evidence under 20 C.F.R. §718.304(a) and 20 C.F.R. §718.202(a)(1), because he did not adequately explain why the positive reading from a more highly-qualified physician was not credited.[8] Claimant's Brief at 3-5.

We need not address claimant's argument that the administrative law judge erred in weighing the conflicting x-ray evidence regarding the existence of pneumoconiosis,

[7] The administrative law judge also considered two x-rays dated May 21, 2008 and September 21, 2011, both of which were read as negative for pneumoconiosis. Decision and Order at 6-7. Citing "the recency rule," the administrative law judge stated that he "weighed the latest [x]-rays from 2015 together" to determine whether claimant established the existence of pneumoconiosis. Decision and Order at 7.

[8] Claimant notes that Dr. Crum, who is dually qualified as a Board-certified radiologist and B reader, read the August 12, 2015 x-ray as positive for a Category A large opacity and for simple clinical pneumoconiosis, "1/0," while Dr. Broudy, a B reader, read the November 6, 2015 x-ray as negative for simple and complicated pneumoconiosis. Claimant's Brief at 4; Claimant's Exhibit 1; Employer's Exhibit 1. Claimant argues that, apart from noting the physicians' qualifications and that their readings conflicted, the administrative law judge did not explain why their readings were in equipoise, given Dr. Crum's superior radiological credentials. Claimant's Brief at 4-7.

because claimant does not challenge the administrative law judge's alternative finding that claimant failed to establish another necessary element of his claim. Specifically, the administrative law judge found that even had claimant established the existence of either complicated or simple clinical pneumoconiosis, he did not establish that the pneumoconiosis arose out of coal mine employment.

The administrative law judge correctly noted that, because claimant established less than ten years of coal mine employment, he was required to establish with "competent evidence" that his pneumoconiosis arose out of coal mine employment.[9] 20 C.F.R. §718.203(c); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 339, 24 BLR 2-1, 2-31-32 (4th Cir. 2007); *Southard v. Director, OWCP*, 732 F.2d 66, 70, 6 BLR 2-26, 2-32 (6th Cir. 1984). The administrative law judge noted that only the medical opinion of Dr. Ammisetty addressed this issue. Decision and Order at 12; Claimant's Exhibit 3. Citing the August 12, 2015 x-ray, Dr. Ammisetty diagnosed claimant with an "A opacity in the right upper lung," and simple pneumoconiosis, "1/0." Claimant's Exhibit 3 at 2. Based on claimant's pulmonary function study, Dr. Ammisetty also diagnosed severe chronic obstructive pulmonary disease. *Id.* Dr. Ammisetty opined that claimant has "legal pneumoconiosis as well as clinical pneumoconiosis," concluding that "the etiology is most likely secondary to smoking, but coal dust exposure significantly exacerbated the symptoms." *Id.*

The administrative law judge discounted Dr. Ammisetty's opinion, finding that the doctor relied on a "significantly inaccurate" history of twenty-one years of coal mine employment. Decision and Order at 12. The administrative law judge further found that Dr. Ammisetty "did not specifically opine on the etiology of the clinical pneumoconiosis," and that to the extent he discussed the etiology of claimant's lung disease, he provided only "a conclusory statement, without specifics or support." *Id.* The administrative law judge therefore found Dr. Ammisetty's opinion "insufficient to satisfy [c]laimant's burden of proof" at 20 C.F.R. §718.203(c), and concluded that "the record does not support a finding that the pneumoconiosis [is] related to [claimant's] coal mine employment." *Id.*

[9] The applicable regulation provides that "[i]f a miner who is suffering . . . from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship." 20 C.F.R. §718.203(c).

Claimant does not challenge the finding that he failed to meet his burden under 20 C.F.R. §718.203(c). Therefore, that finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). As claimant did not establish that his pneumoconiosis arose out of coal mine employment, a necessary element of entitlement, we affirm the denial of benefits, and we need not reach claimant's arguments on the issue of pneumoconiosis. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge