U.S. Department of Labor

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

BRB No. 17-0590 BLA

RUBBLE MORGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED, self-insured through SUNCOAL COMPANY, INCORPORATED	)	DATE ISSUED: 09/20/2018
	)	
Employer-Respondent	)	
	)	
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 in a Subsequent Claim of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Rubble Morgan, Stinett, Kentucky.

Ronald Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits in a Subsequent Claim (2014-BLA-05582) of Administrative Law Judge Richard M. Clark, issued under the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2102) (the Act).[1] The administrative law judge credited claimant with 8.39 years of coal mine employment and therefore found that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act.[2] Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established a totally disabling respiratory or pulmonary impairment and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] However, as the administrative law judge found that the evidence was insufficient to establish that the existence of pneumoconiosis, a requisite element of entitlement, he denied benefits accordingly.

On appeal, claimant generally challenges the denial of his claim. Employer responds, urging affirmance of the administrative law judge's findings and the denial of

[1] Claimant filed an initial claim on February 12, 2001, which was denied by Administrative Law Judge Stuart A. Levin on June 10, 2004, for failure to establish any element of entitlement. Director's Exhibit 1. Claimant appealed to the Board and the denial was affirmed. *Morgan v. Shamrock Coal Co.*, BRB Nos. 04-0770 BLA and 04-0770 BLA-A (May 26, 2005) (unpub.). Claimant took no further action with regard to the denial until he filed this subsequent claim on April 3, 2013. Director's Exhibit 3.

[2] Under Section 411(c)(4) of the Act there is a rebuttable presumption of total disability due to pneumoconiosis if 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); 20 C.F.R. §718.305.

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge 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); *see 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). In this case, because claimant's prior claim was denied for failure to establish all of the requisite elements, he had to establish one element in order to obtain a review of his claim on the merits. 20 C.F.R. §725.309(c).

benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the findings rendered in the Decision and Order below are rational, supported by substantial evidence, and in accordance with applicable law.[4] *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's findings if they satisfy these criteria. 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).

I. Invocation of the Section 411(c)(4) Presumption - Length of Coal Mine Employment

Claimant bears the burden of establishing the length of his 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); *Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984). In the absence of specific statutory guidelines for calculating length of coal mine employment, the administrative law judge is granted broad discretion in deciding this issue, and his or her determination will be upheld 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); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986); *Maggard v. Director, OWCP*, 6 BLR 1-285, 1-286 (1983).

Claimant alleges fifteen to sixteen years of coal mine employment. Director's Exhibit 3. In calculating the length of claimant's coal mine employment, the administrative law judge noted that the Social Security Administration (SSA) itemized statement of earnings established eight years of coal mine employment with employer, from 1953, on and off, through June 29, 1989. Decision and Order at 4-5; Director's Exhibit 8. However, he relied on a letter from employer, dated June 28, 2001, which identified the beginning and ending dates of claimant's employment as February 10, 1981 through June 28, 1989. Director's Exhibit 1 at 883. The administrative law judge found that employer's letter established 8.39 years of coal mine employment. Decision and Order at 5.

[4] Claimant's coal mine employment was in Kentucky. Director's Exhibit 4. 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).

In a 2014 deposition, claimant alleged that he worked for "less than a year, probably six months" for Asher & Asher Coal Company (A&A Coal), prior to working for employer. Director's Exhibit 19 at 10-11. The administrative law judge found that the SSA records reflect earnings with A&A Coal in the amount of $12.80 for the first quarter of 1958, and $9.20 for the second quarter of 1958. Decision and Order at 5; Director's Exhibit 8. We see no error in the administrative law judge's finding, based on the SSA record, that these earnings were "too minimal to be credited and [c]laimant's testimony [was] too vague" to credit his employment with A&A Coal as coal mine employment.[5] Decision and Order at 5; *see Muncy*, 25 BLR at 1-27.

Claimant also alleged that he worked in coal mine employment from 1954 to 1962, helping his father, Robert Morgan, haul supplies to different coal mines but paid no taxes for that work. Decision and Order at 5; Director's Exhibits 19 at 11; 4. Claimant submitted ten affidavits attesting that he worked for Robert Morgan, from 1955 through 1962, hauling timbers, sand, and rock dust to Debbie Coal Company, and that he also hauled coal to homes from Debbie Coal Company.[6] Decision and Order at 5.

The administrative law judge correctly found that claimant's work delivering "house" coal to consumers cannot be credited as coal mine employment, as hauling prepared coal to the ultimate consumer does not constitute coal mine employment. Decision and Order at 5, *citing Foster v. Director, OWCP*, 8 BLR 1-188 (1985); *see* 30 U.S.C. §902(d); 20 C.F.R. §§725.101(a)(19), 725.202(a); *Navistar, Inc. v. Forester*, 767 F.3d 638, 641 (6th Cir. 2014)*; Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 929-30 (6th Cir. 1989). The administrative law judge also rationally found that "the amount of time [c]laimant spent cutting timbers and hauling coal to consumers versus hauling supplies to the mines and the extent of time he actually spent in or around a coal mine and exposed to coal dust is unknown."[7] Decision and Order at 5; *see* Director's

[5] In a 2014 deposition, claimant alleged that he worked for "less than a year, probably six months" for Asher & Asher Coal Company (A&A Coal), prior to working for employer. Director's Exhibit 19-10. The administrative law judge found that the SSA records reflect earnings with A&A Coal of $12.80 during the first quarter and $9.20 for the second quarter of 1958.

[6] The administrative law judge noted that there are no wages reported for claimant's work with either Robert Morgan or Debbie Coal Company in the Social Security Administration records. Decision and Order at 5.

[7] Claimant indicated that he worked "2-3 hours per day" on a mine site while working for his father. Director's Exhibit 1-430. Claimant did not indicate, however, how many days for each year, from 1954 to 1962, he was at a mine site, and thus did not provide

Exhibits 4 at 1; 5 at 3; 6 at 2-11; 8 at 3-4; 19 at 11. Thus, we affirm the administrative law judge's finding that the record does not provide a basis to credit claimant's work with his father from 1954 to 1962 as coal mine employment. *See Kephart*, 8 BLR at 1-186; *Hunt*, 7 BLR at 1-710-11; *Shelsky*, 7 BLR at 1-36.

Because the administrative law judge's findings are reasonable and based on substantial evidence, we affirm the administrative law judge's determination that claimant established 8.39 years of coal mine employment. *See Muncy*, 25 BLR at 1-27. As claimant established fewer than fifteen years of coal mine employment, we affirm the administrative law judge's finding that claimant is unable to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b)(1)(i); Decision and Order at 27.

II. 20 C.F.R. Part 718 – Existence of Pneumoconiosis

In order to establish entitlement to benefits without aid of the Section 411(c)(3) or Section 411(c)(4) presumptions,[8] claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the total disability was due to pneumoconiosis. 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. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

The administrative law judge denied benefits because he found that claimant failed to establish either clinical or legal pneumoconiosis.[9] The administrative law judge

---

a basis to credit any of his work during that period as coal mine employment. *See Shelsky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984) (Claimant has the burden to establish the length of his coal mine employment).

[8] The administrative law judge correctly found that there is no evidence that claimant has complicated pneumoconiosis and therefore claimant is not able to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

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

correctly found that because each of the seven interpretations of the three x-rays of record was negative, claimant is unable to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R §718.202(a)(1). Decision and Order at 27; Director's Exhibits 11, 12; Claimant's Exhibits 1, 2; Employer's Exhibit 1. As there is no biopsy evidence, and because claimant is not eligible for any of the regulatory presumptions,[10] the administrative law judge also properly found that claimant is unable establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) or (a)(3). Decision and Order at 27.

In considering the medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge noted correctly that none of the physicians[11] diagnosed clinical pneumoconiosis, and that only one physician, Dr. Habre, diagnosed legal pneumoconiosis. Dr. Habre conducted the Department of Labor examination and opined that claimant has chronic obstructive pulmonary disease (COPD) due to smoking and coal dust exposure. Director's Exhibit 11. The administrative law judge permissibly gave Dr. Habre's opinion little probative weight on the issue of legal pneumoconiosis because the physician did not have an accurate understanding of the length of claimant's smoking history. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1994); Decision and Order at 29. Dr. Habre reported a smoking history of seven pack-years, while the administrative law judge found that claimant had a twenty pack-year history.[12] Decision and Order at 7; *see Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR

[10] Because claimant did not invoke the Section 411(c)(3) or Section 411(c)(4) presumption, claimant could not establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).

[11] The newly submitted medical opinions in this subsequent claim are from Drs. Habre, Rosenberg and Vuskovich. Director's Exhibits 11, 12; Employer's Exhibits 4, 5, 10, 11.

[12] The administrative law judge found that "[c]laimant provided the most complete information as to his smoking history when answering interrogatories in 2001, wherein he affirmed that he smoked on pack of cigarettes per day beginning in 1951 and ending in 1971." Decision and Order at 7, *citing* Director's Exhibit 1 at 429, 430. The administrative law judge further noted that claimant reported "the same number of pack[-]years to at least some of the physicians treating him." Decision and Order at 8; *see* Director's Exhibit 1 at 500, 804. We affirm the administrative law judge's finding that claimant has a twenty pack-year smoking history, as it is supported by substantial evidence. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.").

1-52, 1-54 (1988) (The effect of an inaccurate smoking history on the credibility of a medical opinion is a determination is to be made by the administrative law judge).

With respect to claimant's treatment records, the administrative law judge correctly found that while there were notations of "CWP [coal worker's pneumoconiosis]" or "history of black lung" by Dr. Alam, claimant's treating physician, and Mr. Overbee, a registered nurse, neither stated the basis for these diagnoses. Decision and Order at 30; Claimant's Exhibits 7, 9. Furthermore, although Dr. Alam diagnosed COPD and emphysema, the administrative law judge correctly found he did not identify the etiology of these conditions. Decision and Order at 30; Claimant's Exhibits 6, 10. We therefore affirm the administrative law judge's finding that the treatment records are insufficient to establish either clinical or legal pneumoconiosis. *See 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). Thus, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), as it is supported by substantial evidence. Because claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, benefits are precluded. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge