U.S. Department of Labor

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

BRB No. 21-0616

ROGER L. EDWARDS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EDWARDS TRUCKING COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 01/12/2023
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 of Jodeen M. Hobbs, Administrative Law Judge, United States Department of Labor.

Roger L. Edwards, Clinchco, Virginia.

T. Jonathan Cook (Cipriani & Werrner, PC) Charleston, West Virginia, for Employer.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Denying Benefits (2020-BLA-05080) rendered on a claim

[1] On Claimant's behalf, Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, the Benefits Review Board review the

filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on June 21, 2016.[2] 20 C.F.R. §725.309.

The ALJ found Claimant established 19.75 years of coal mine employment but credited him with less than six years of qualifying 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).[3] Considering entitlement under 20 C.F.R. Part 718,[4] the ALJ found Claimant established total disability at 20 C.F.R. §718.204(b)(2) and thereby established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). She also found that, based on all the evidence, Claimant did not establish he has clinical or legal pneumoconiosis at 20 C.F.R. §§718.202(a) and therefore denied benefits.[5]

ALJ's decision, but Ms. Combs is not representing Claimant on appeal. *See Shelton v. Claude*,19 BLR 1-88 (1995) (Order).

[2] Claimant filed six previous claims for benefits on July 26, 1991, April 5, 1993, October 18, 1994, May 13, 1999, May 16, 2011, and March 29, 2013. Director's Exhibits 1-6, 44 at 7. Claimant withdrew his fifth and sixth claims. Director's Exhibits 5, 6. A withdrawn claim is "considered not to have been filed." 20 C.F.R. §725.306(b). Because the records for Claimant's prior claims were destroyed in accordance with the Department of Labor's records retention policy, the ALJ treated Claimant's last claim, filed on May 13, 1999, as having been denied for failure to establish any element of entitlement. Decision and Order at 3.

[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] As the record contains no evidence of complicated pneumoconiosis, Claimant is unable to 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).

[5] 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). This definition encompasses 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). 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

On appeal, Claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed without representation, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the ALJ's Decision and Order if it is 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 (1965).

Invocation of the Section 411(c)(4) Presumption

Length of Coal Mine Employment

Claimant bears the burden to establish the length of his coal mine employment. 20 C.F.R. §718.305(b)(1)(i); *see 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); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

In determining the length of Claimant's coal mine employment, the ALJ considered his CM-911 Claim form, his CM-911a Employment History form, his CM-913 Description of Coal Mine Work form, his self-reported employment histories provided to the physicians of record, his Social Security Administration Earnings Record (SSER), and his hearing testimony. Decision and Order at 6-9; Hearing Transcript at 13-16; Director's Exhibits 8-11, 16, 27; Employer's Exhibit 2. She found the evidence "not in full agreement" and that the SSER "provides the most reliable detail of [his] employment history." Decision and Order at 7. Thus, she considered Claimant's statements reliable to the extent they did not conflict with his SSER. *Id.* at 7-9.

The ALJ noted Claimant's SSER showed earnings spanning twenty-two years from the second quarter of August 1968 to sometime in 1990 and that Claimant indicated, and his SSER confirmed, he worked in coal mine employment for Kim Coal from August 1968

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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).

[6] 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); Director's Exhibit 12.

until August 1970. Decision and Order at 8-9; Director's Exhibit 9. Because the beginning and ending dates of Claimant's employment with various companies for the periods of 1969 through 1985 and during 1990 were not ascertainable, the ALJ calculated the length of his employment in these years with reference to the formula set forth at 20 C.F.R. §725.101(a)(32)(iii) and the decision of the United States Court of Appeals for the Sixth Circuit in *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (2019).[7] The ALJ credited Claimant with 15.333 years of coal mine employment for this period, representing thirteen full years of employment in 1969 to 1972, 1974, 1976 to 1981, 1983, and 1984, and 2.333 fractional years in 1973, 1975, 1982, 1985, and 1990, based on the industry's average 125-day earnings set forth in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*. Decision and Order at 8-9. Although Claimant had no reported earnings in coal mine employment between 1986 and 1989, the ALJ found Claimant's testimony that he drove a coal truck for Employer during this period to be consistent with his application for benefits, CM-911a Employment History form, and the employment histories he provided to Drs. Ajjarapu and McSharry. Decision and Order at 9; Hearing Transcript at 15-16; Director's Exhibits 9, 16 at 7, 30 at 1-2.[8] She therefore

[7] In *Shepherd*, the Sixth Circuit held a miner need only establish 125 working days during a calendar year to be credited with a full year of coal mine employment. 915 F.3d at 401-02. Thus, in calculating a miner's length of coal mine employment pursuant to 20 C.F.R. §725.101(a)(32)(iii), *Shepherd* provides:

> [I]f the beginning and ending dates of the miner's employment cannot be determined or – even if such dates are ascertainable – if the miner was employed by the mining company for "less than a calendar year," the adjudicator may determine the length of coal mine employment by dividing the miner's yearly income from coal mine employment by the average daily earnings of an employee in the coal mining industry. If the quotient from that calculation yields at least 125 working days, the miner can be credited with a year of coal mine employment, regardless of the actual duration of employment for the year. 20 C.F.R. § 725.101(a)(32)(iii). If the calculation shows that the miner worked fewer than 125 days in the calendar year, the miner still can be credited with a fractional portion of a year based on the ratio of the days worked to 125. 20 C.F.R. § 725.101(a)(32)(i).

Id. at 402.

[8] In this regard there is a conflict between the SSER (which did not report employment) and Claimant's testimony. The ALJ does not explain why she credited the testimony despite the discrepancy; however, no party has contested the ALJ's determination and, to the extent that the determination affects qualification for the §411(c)(4) presumption, any error is harmless for the reasons we set forth below.

credited Claimant with an additional four years of coal mine employment during this period and concluded he established a total of 19.75 years of coal mine employment. Decision and Order at 9.

Because the ALJ applied a reasonable method in determining the length of Claimant's coal mine employment, and we discern no error in her calculations, we affirm her finding of 19.75 years of coal mine employment. *See Shepherd*, 915 F.3d at 402; *Muncy*, 25 BLR at 1-27 (2011); *Vickery*, 8 BLR at 1-432.

Substantially Similar Surface Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mine employment, or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). The conditions in a surface mine are "substantially similar" to those underground if "the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90 (6th Cir. 2014).

The ALJ found Claimant worked five years in underground coal mine employment between 1976 and 1980 with Thyssen Mining Construction Incorporated (Thyssen Mining) and the remainder of his 14.75 years of coal mine employment in 1968 to 1975 and 1981 to 1990 above ground.[9] Decision and Order at 11; Hearing Transcript at 15; Director's Exhibits 9, 11. We see no error in this finding.[10]

[9] On his CM-911a Employment History form, Claimant stated he worked underground for Thyssen Mining from 1975 to 1981; performed "strip [mining]" for "Kim [Coal]," "Daniels, Morris + Marshall," and "Name?" between August 1968 and 1975; "trucking" for "Edwards + Son Trucking" in 1981 to 1989; and "tipple [work]" for "Name?" from 1989 to 1990. Director's Exhibit 9.

[10] Although Claimant's CM-911a Employment History form alleges seven years of underground coal mine employment with Thyssen Mining, and while Dr. McSharry stated Claimant worked ten years in underground coal mine employment, Claimant identified only his work with Thyssen Mining as underground coal mine employment. Director's Exhibits 9, 30. As substantial evidence supports the ALJ's finding that Claimant's SSER shows Claimant had only five years of earnings with Thyssen Mining, she permissibly credited it over Claimant's and Dr. McSharry's general assertions. *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983); *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-

In addressing whether Claimant's 14.75 years of surface employment was substantially similar to underground mining, the ALJ accurately observed Claimant check-marked a box on his CM-911a Employment History form indicating he was exposed to "dust, gases, or fumes" in all his coal mine employment positions. Decision and Order at 11 (citing Director's Exhibit 9 at 2). However, she found Claimant's mere affirmative response to the question regarding exposure to "dust, gases, or fumes" does not, by itself, indicate he was "regularly" exposed to coal mine dust and, with the exception of Claimant's testimony concerning his partial year of coal mine employment in 1990, the record does not contain a description of the dust conditions at any of Claimant's surface mining jobs.[11] *Id.* Thus, the ALJ found Claimant did not establish at least fifteen years of qualifying coal mine employment.[12] *Id.*

The ALJ permissibly noted that with no other details in the record regarding Claimant's coal dust exposure, merely checking the box on his application for benefits does not supply the necessary information to make a finding of regular dust exposure. 20 C.F.R. §718.305(b)(2); *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 11. Additionally, substantial evidence supports the ALJ's finding that the record contains no other evidence regarding the dust conditions of Claimant's surface coal mine employment during 1968 to 1975 and 1981 to 1989. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005). Because the ALJ acted within her discretion in assessing the credibility of the evidence and whether Claimant satisfied his burden of proof, we affirm her finding that Claimant established fewer than six years of qualifying coal mine employment. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Crisp*, 866 F.2d at 185. Because Claimant established fewer than fifteen years of qualifying

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841 (1984) (ALJ may credit SSER over testimony and other sworn statements); Decision and Order at 8-9; Director's Exhibit 11.

[11] Although Dr. McSharry indicated Claimant worked above ground "about 16 years" and "had a long history of coal dust exposure," the ALJ permissibly found he did not explain the basis of his assertion. Decision and Order at 12; Employer's Exhibit 2 at 3.

[12] The ALJ found Claimant credibly testified that the dust conditions during his 1990 coal mine employment were substantially similar to underground mining. Decision and Order at 12. As she found Claimant's SSER demonstrates 57 days of employment in 1990, the ALJ found Claimant established less than one year of work in substantially similar dust conditions. *Id.* Adding this qualifying employment to Claimant's five years of underground employment, the ALJ found Claimant established less than six years of qualifying coal mine employment. *Id.*

coal mine employment, we therefore affirm her finding that Claimant did not invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b)(1)(i).

Entitlement under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(4) presumption, 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).

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 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). Claimant may establish the existence of pneumoconiosis by x-rays, autopsies or biopsies, operation of one the presumptions described in 20 C.F.R. §§718.304-306, or a physician's opinion. 20 C.F.R. §718.202(a)(1)-(4). The ALJ must consider all relevant evidence and weigh the evidence as a whole to determine if it establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

The ALJ considered six readings of three x-rays dated March 14, 2018, January 26, 2021, and February 17, 2021. Decision and Order at 22-24. All of the physicians who read the x-rays are Board-certified radiologists and B readers. Drs. DePonte, and Meyer, interpreted the March 14, 2018 x-ray as negative, while Dr. Miller read it as positive. Director's Exhibit 16 at 23; Director's Exhibits 27, 29. The ALJ thus found this x-ray negative for pneumoconiosis. Decision and Order at 23.

Dr. Adcock interpreted the January 26, 2021 x-ray as negative for pneumoconiosis. Employer's Exhibit 1 at 1-3. The ALJ found this x-ray negative for pneumoconiosis as there were no other interpretations. Decision and Order at 23.

Finally, Drs. Crum and Adcock interpreted the February 17, 2021 x-ray. Claimant's Exhibit 1 at 4; Employer's Exhibit 1 at 2-3. Dr. Crum read the x-ray as positive for pneumoconiosis, while Dr. Adcock interpreted the x-ray as negative for the disease. Claimant' Exhibit 1 at 1; Employer's Exhibit 4 at 21. The ALJ found the readings of this x-ray in equipoise. Decision and Order at 24.

As the ALJ found two x-rays negative for pneumoconiosis and the readings of one x-ray in equipoise, she found Claimant did not establish clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 24. We affirm the ALJ's determination as she conducted a proper quantitative and qualitative evaluation of the x-ray evidence, and substantial evidence supports her findings. *See Staton v. Norfolk & W. Ry. Co.*, 65 F.3d 55, 58-60 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993). As the record contains no biopsy or autopsy evidence, no evidence of complicated pneumoconiosis, and no medical opinions diagnosing clinical pneumoconiosis for consideration at 20 C.F.R. §718.202(a)(2)-(4), the ALJ permissibly found Claimant did not establish clinical pneumoconiosis at 20 C.F.R. §718.202(a). Decision and Order at 22-24.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has a chronic lung disease or an 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 holds that a miner can establish a lung impairment is significantly related to coal mine dust exposure "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 two medical opinions. Decision and Order at 24-27. Dr. Ajjarapu diagnosed Claimant with legal pneumoconiosis in the form of chronic bronchitis due to smoking and coal mine employment, while Dr. McSharry opined he did not have legal pneumoconiosis. Director's Exhibit 16; Employer's Exhibit 2. The ALJ found neither physician's opinion well-reasoned. Decision and Order at 25-26. She found Dr. Ajjarapu's opinion insufficient because "it simply notes that Claimant was employed at strip mines and as a coal truck driver but does not identify his level of coal dust exposure in these jobs" and because she "failed to document the level of coal dust to which Claimant was regularly exposed while simultaneously conceding that the majority of Claimant's impairment was caused by cigarette smoking." *Id.* at 27. The ALJ explained, that "[t]he lack of documentation in the medical report is particularly problematic given that the record establishes less than 6 years of qualifying coal mine employment." *Id.* We vacate the ALJ's credibility determination as it reflects legal error and is inadequately explained. *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 634 (6th Cir. 2009); *Martin*, 400 F.3d at 305; *Wiley v. Consolidation Coal Co.*, 892 F.2d 498, 500 (6th Cir. 1989).

Although Dr. Ajjarapu did not address whether any of Claimant's surface coal mine employment is qualifying, her diagnosis of legal pneumoconiosis is not necessarily

inconsistent with the ALJ's finding of less than six years of qualifying coal mine employment. Contrary to the ALJ's characterization, the Act recognizes all coal mine dust exposure is potentially injurious and claimants may establish legal pneumoconiosis under 20 C.F.R. Part 718 even with less than fifteen years of qualifying coal mine employment. 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000). Further, in attributing Claimant's bronchitis to both his "lengthy cigarette smoking history" and coal mine employment history,[13] Dr. Ajjarapu considered a forty-pack-year smoking history[14] and that he began working in coal mine employment in 1968, worked in both surface and underground mining, and "seldom wore a dust mask when he worked in underground mining." Director's Exhibit 16 at 2, 6. Because the ALJ did not adequately address the credibility of Dr. Ajjarapu's opinion that Claimant's coal mine dust exposure contributed to his bronchitis because he performed both surface and underground coal mine employment and seldom wore a mask in his underground employment, we vacate her finding that Claimant did not establish legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).[15] *See Greene*, 575 F.3d at 634; *Martin*, 400 F.3d at 305; *Wiley*, 892 F.2d at 500.

Remand Instructions

On remand, the ALJ must reconsider whether Dr. Ajjarapu's opinion establishes Claimant has legal pneumoconiosis. 20 C.F.R. §718.201(a)(2); *Groves*, 761 F.3d at 598-99. In so doing, the ALJ must consider Dr. Ajjarapu's explanations for her conclusions, the documentation underlying her medical judgments, and the sophistication of, and bases for, her diagnoses. *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. The ALJ must explain her findings in accordance with the Administrative Procedure Act.[16] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If the ALJ finds Claimant has established legal

[13] Dr. Ajjarapu noted Claimant alleged on his CM-911a Employment History form five years of underground coal mine employment throughout his surface mining work which began in 1968 and ended in 1990. Director's Exhibits 9, 16.

[14] The ALJ found Claimant had at least a forty-pack-year smoking history. Decision and Order at 4.

[15] To the extent the ALJ found Claimant's history of coal mine dust exposure insufficient to have been injurious, the ALJ did not adequately explain her finding. .

[16] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

pneumoconiosis, she must consider whether his legal pneumoconiosis is a substantially contributing cause of his total disability. 20 C.F.R. §718.204(c).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits and remand the case for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge