U.S. Department of Labor

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

BRB No. 21-0414 BLA

BARBARA SAYLOR (o/b/o JAY B. SAYLOR) Claimant-Petitioner v. HARRY H. PHILPOT TRUCKING, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY, INCORPORATED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 6/23/2022 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Michael A. Pusateri (Greenberg Traurig, LLP), Washington D.C., for Employer and its Carrier.

Barbara Saylor, Stoney Fork, Kentucky.

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

PER CURIAM:

Claimant[1] appeals, without representation,[2] Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Denying Benefits (2020-BLA-05200), rendered on a claim filed on October 26, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

Pursuant to an Order issued on June 19, 2020, the ALJ canceled the scheduled hearing and granted the parties' request for a decision on the record. Consistent with Claimant's and Employer's joint stipulations, the ALJ credited the Miner with 10.58 years of coal mine employment.[3] Jan. 7, 2021 Joint Stipulations. He thus found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to 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 failed to establish the Miner had pneumoconiosis. 20 C.F.R. §718.202. Accordingly, he denied benefits.

[1] Claimant is the surviving spouse of the Miner, who died on April 28, 2019. Director's Exhibits 12, 26. She is pursuing the miner's claim on his behalf. Director's Exhibit 26.

[2] 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 Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] The parties' stipulation appears to be based on the district director's finding, in his August 21, 2019 Proposed Decision and Order, that the Miner's Social Security Earnings Record establishes 10.58 years of coal mine employment between 1975 and 1988. Director's Exhibit 31 at 9; January 7, 2021 Joint Stipulations at 1; Employer's Closing Brief at 4.

[4] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability was due to pneumoconiosis if he had 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.

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

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, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with 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).

Entitlement under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3)[6] and (c)(4) presumptions,[7] Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the Miner performed his coal mine employment in Tennessee and Kentucky. *Shupe v. Director,* OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[6] The irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 is not applicable because there is no evidence in the record that the Miner had complicated pneumoconiosis. 30 U.S.C. §921(c)(3) (2018); Decision and Order at 14-16.

[7] Claimant is unable to invoke the Section 411(c)(4) presumption based on the parties' stipulation that he worked less than fifteen years in coal mine employment – a requisite element for invocation is at least fifteen years of qualifying coal mine employment. Stipulations of fact entered into freely and fairly are not to be set aside except to avoid manifest injustice. *Fairway Constr. Co. v. Allstate Modernization, Inc.*, 495 F.2d 1077, 1079 (6th Cir. 1974); *Nippes v. Florence Mining Co.*, 12 BLR 1-108, 1-109 (1985). Although the Miner initially alleged eighteen years of coal mine employment between 1981 and 1998 on his claim form, he subsequently confirmed his coal mine employment ended in 1988. Director's Exhibits 4, 7. As the Miner's Social Security Earnings Record shows he worked in coal mine employment between 1975 and 1988, we discern no error by the ALJ in accepting the parties' stipulation to less than fifteen years of coal mine employment within these dates. *Fairway Constr. Co.*, 495 F.2d at 1079; *Nippes*, 12 BLR at 1-109; Decision and Order at 3. Consequently, we affirm the ALJ's finding that Claimant is unable to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305; Decision and Order at 13.

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 (1986) (en banc).

In considering whether Claimant established clinical pneumoconiosis,[8] the ALJ considered three readings of one x-ray dated January 14, 2019. Decision and Order at 14. Drs. DePonte and Meyer, both Board-certified radiologists and B-readers, interpreted the x-ray as negative, while Dr. Ramakrishnan, a Board-certified radiologist, read it as positive. Director's Exhibit 15; Claimant's Exhibit 1; Employer's Exhibit 1. The ALJ gave Dr. Ramakrishnan's reading less weight because "there is no evidence in the record that Dr. Ramakrishnan was a certified B-reader at the time of his interpretation."[9] Decision and Order at 15. Further, the ALJ noted that even "assuming Dr. Ramakrishnan is a currently certified B-reader," he "would still find that this x-ray does not support a finding of clinical pneumoconiosis because of the negative interpretations from Dr. DePonte and Dr. Meyer." *Id.* The ALJ thus found the preponderance of the x-ray evidence does not establish the Miner had clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Id*. We affirm the ALJ's determination as he conducted a proper quantitative and qualitative evaluation of the x-ray evidence, and substantial evidence supports his 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 14-16.

[8] "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).

[9] The ALJ accurately observed Dr. Ramakrishnan's B-reader certification expired on March 31, 2019, prior to his August 25, 2020 x-ray interpretation. Decision and Order at 14 n.21; Claimant's Exhibit 1 at 6.

In considering whether Claimant established the Miner had legal pneumoconiosis,[10] the ALJ considered three medical opinions. Decision and Order at 16-17. Dr. Forehand diagnosed the Miner with legal pneumoconiosis, while Drs. Vuskovich and Rosenberg opined he did not have legal pneumoconiosis.[11] Director's Exhibit 15; Employer's Exhibits 2, 3. The ALJ permissibly found Dr. Forehand's opinion insufficient to establish coal dust exposure contributed to the Miner's lung disease because Dr. Forehand relied on an inflated coal mine employment history. *See Creech v. Benefits Review Board*, 841 F.2d 706, 709 (6th Cir. 1988) (ALJ may discount a physician's diagnosis of legal pneumoconiosis that is based on an inflated coal mine employment history); Decision and Order at 16. Because the ALJ permissibly discredited Dr. Forehand's opinion, the only opinion supportive of Claimant's burden of proof,[12] we affirm his determination that Claimant did not establish the Miner had legal pneumoconiosis. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). As Claimant failed to establish the existence of either clinical or legal pneumoconiosis, a requisite element of entitlement, we affirm the ALJ's denial of benefits. *Anderson*, 12 BLR at 1-112; *Trent,* 11 BLR at 1-27.

[10] "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).

[11] Dr. Forehand diagnosed mixed restrictive-obstructive lung disease, which he attributed to Claimant's alleged eighteen years of coal mine employment and smoking histories "regardless of how long [the Miner] smoked cigarettes." Director's Exhibit 15 at 4.

[12] The ALJ accurately observed the opinions of Drs. Vuskovich and Rosenberg cannot assist Claimant in establishing the Miner suffered from legal pneumoconiosis as neither physician diagnosed the disease. Decision and Order at 17; Employer's Exhibits 2 at 9, 3 at 3-5.

Accordingly, we affirm the Decision and Order Denying Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge