U.S. Department of Labor

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

BRB No. 23-0009 BLA

JERRY JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL MINES CORPORATION	)	
	)	
and	)	DATE ISSUED: 03/22/2024
	)	
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 Monica Markley, Administrative Law Judge, United States Department of Labor.

Jerry Johnson, Sevierville, Tennessee.

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

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Monica Markley's Decision and Order Denying Benefits (2019-BLA-06289) rendered on a subsequent claim filed on July 18, 2017,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found no evidence of complicated pneumoconiosis, and thus 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. In addition, the ALJ found Claimant established 12.43 years of coal mine employment and, therefore, 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, the ALJ found the new evidence did not establish pneumoconiosis or a totally disabling respiratory or pulmonary impairment, and

[1] 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. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant filed three prior claims. Decision and Order at 3. He withdrew his third claim. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306(b). The district director denied his second claim because Claimant failed to establish any element of entitlement. Decision and Order at 3. When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she 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). Because Claimant failed to establish any element of entitlement in his prior claim, he had to submit new evidence establishing at least one element to obtain review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c); 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); 20 C.F.R. §718.305.

thus did not establish a change in an applicable condition of entitlement. 20 C.F.R. §§718.202(a), 718.204(b)(2), 725.309(c). Therefore, she 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, has not filed a response brief.

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 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 applicable law.[4] 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, 361-62 (1965).

The Section 411(c)(3) Presumption

Section 411(c)(3) of the Act provides an irrebuttable presumption a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. None of Claimant's x-rays were interpreted as positive for complicated pneumoconiosis, and the record does not contain any biopsy evidence. There are also no computed tomography scans and no medical diagnoses of complicated pneumoconiosis. Consequently, the ALJ accurately found no evidence of complicated pneumoconiosis. Decision and Order at 26. We therefore affirm the ALJ's finding that Claimant did not invoke the Section 411(c)(3) presumption.

The 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 of proof 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

[4] 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 3; Hearing Transcript at 15.

(1985). The Board will uphold an ALJ's determination on length of coal mine employment if it is based on a reasonable method of calculation that is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The ALJ considered Claimant's work history form (CM-911a), hearing testimony, deposition testimony, a 1990 W-2, and his Social Security Administration (SSA) earnings record. Decision and Order at 9-13; Director's Exhibits 3, 6, 8; Employer's Exhibit 1 at 5-14; Hearing Transcript at 14-16. She found Claimant had periods of coal mine employment between calendar years 1970 and 1989. Decision and Order at 11-12. On his claim forms, Claimant alleged eleven years and two months of coal mine employment, from July 1978 to September 1989. Director's Exhibits 2 at 1; 3 at 1; 4 at 1. In his deposition, Claimant testified he worked for Employer from 1976 or 1978 through 1989 or 1990 and that he had worked for Yankee Clipper Coal Company (Yankee Clipper) for three months prior to beginning work with Employer. Employer's Exhibit 1 at 7. During the hearing, Claimant testified he worked for Employer from 1978 through September 1989, when the mine shut down. Hearing Transcript at 14-16. His SSA earnings record documents that Claimant earned income from Yankee Clipper in 1970 and 1971 and from Employer from 1978 through 1990. Director's Exhibit 8. Although his SSA earnings record documents earnings from Employer in 1990, the ALJ credited Claimant's 1995 statement that he worked for Employer through September 1989 but was paid through February 1990. Decision and Order at 11 n.15 (quoting Director's Exhibit 5 at 1). She therefore excluded the 1990 earnings from her calculations. *Id.*

The ALJ found the record insufficient to identify the specific beginning and ending dates of Claimant's coal mine employment. Decision and Order 11. Therefore, for the years prior to 1978, the ALJ credited Claimant with a full quarter of coal mine employment for each quarter in which he earned at least fifty dollars from coal mine operators, as reflected in his SSA earnings record, resulting in 0.50 year of coal mine employment. Decision and Order at 12; *see Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). For the years 1978 through 1989, the ALJ divided Claimant's annual SSA-reported earnings by the average daily wage in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual* to determine the number of days worked each year.[5] Decision and Order at 12. Where Claimant's earnings exceeded the annual average for 125 working days, the ALJ credited him with a full year of employment. *Id.* Where the earnings fell short of 125 days, she credited him with a fractional year based

[5] 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).

on the ratio of actual days worked to 125 days. *Id.* at 11-12. Using this method, the ALJ found Claimant had 11.93 years of coal mine employment from 1978 through 1989, for a total of 12.43 years of coal mine employment. *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 and in accordance with the law of the United States Court of Appeals for the Sixth Circuit, we affirm her finding that Claimant established 12.43 years of coal mine employment. *See Shepherd*, 915 F.3d at 400-05; *Muncy*, 25 BLR at 1-27; Decision and Order at 13. Because the ALJ rationally found Claimant established less than fifteen years of coal mine employment, we affirm her finding Claimant did not invoke the Section 411(c)(4) presumption. *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

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 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).

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 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).

The ALJ considered six readings of two x-rays dated November 3, 2017, and November 5, 2018. All the physicians who interpreted these x-rays are dually-qualified B readers and Board-certified radiologists. Director's Exhibits 14; 17 at 5; 19 at 5; Employer's Exhibit 6 at 6. Drs. DePonte and Crum read the November 3, 2017 x-ray as positive for pneumoconiosis whereas Dr. Meyer read it as negative. Director's Exhibits 12 at 17; 18 at 2-3; 19 at 2. The ALJ permissibly found the November 3, 2017 x-ray positive for clinical pneumoconiosis based on a preponderance of positive readings by dually-qualified radiologists. Decision and Order at 26. Dr. Crum read the November 5, 2018 x-ray as positive for pneumoconiosis, whereas Drs. Meyer and Adcock read it as negative. Director's Exhibits 20 at 2-3; 21 at 2; Employer's Exhibit 4 at 2-3. The ALJ permissibly

found the November 5, 2018 x-ray negative for clinical pneumoconiosis based on a preponderance of negative readings by the dually-qualified radiologists. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); Decision and Order at 26.

Because one x-ray was positive for pneumoconiosis and the other negative for the disease, the ALJ permissibly found the weight of the x-ray evidence in equipoise. *See Staton v. Norfolk & W. Ry. Co.*, 65 F.3d 55, 58-60 (6th Cir. 1995); *Woodward*, 991 F.2d at 321; 20 C.F.R. §718.202(a)(1); Decision and Order at 26. As it is supported by substantial evidence, we affirm the ALJ's finding that the new x-ray evidence does not establish that Claimant has clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 272-76 (1994).

The ALJ also considered Dr. Shah's medical opinion diagnosing clinical pneumoconiosis and the opinions of Drs. Dahhan and Fino that Claimant does not have the disease. Decision and Order at 26-28; Director's Exhibits 12 at 10; 15 at 3; Employer's Exhibit 2 at 5. The ALJ permissibly accorded Dr. Shah's opinion little weight because the physician relied on Dr. DePonte's positive reading of the November 3, 2017 x-ray to diagnose clinical pneumoconiosis while the ALJ found the overall weight of the x-ray evidence to be in equipoise. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 27. Because the ALJ permissibly discredited Dr. Shah's opinion, the only opinion supporting Claimant's burden to establish clinical pneumoconiosis, we affirm her finding that the new medical opinion evidence does not support a finding of clinical pneumoconiosis. 20 C.F.R. §718.201(a)(4); Decision and Order at 28. We further affirm her overall finding that Claimant did not satisfy his burden to establish he has clinical pneumoconiosis. Decision and Order at 28.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has a chronic lung disease or 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 has held a claimant can satisfy this burden "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.'").

Before considering the medical opinion evidence, the ALJ considered the length of Claimant's cigarette smoking history. Decision and Order at 8-9. Claimant testified at his deposition that he started smoking in his twenties and smoked "off and on" for forty years,

averaging a pack per day. Employer's Exhibit 1 at 19-20. Claimant testified at the hearing that, on average, he smoked a pack per day for twenty-to-twenty-five years and that he quit when he was around sixty years old, over ten years prior to the hearing. Hearing Transcript at 17. Dr. Shah noted Claimant reported smoking a pack per day, with some breaks, quitting sometime in 2010 or 2011. Director's Exhibit 12 at 2, 7. Dr. Dahhan documented that Claimant reported smoking a pack per day for forty-two years, stopping when he was 62. Director's Exhibit 15 at 2. The ALJ further noted Claimant's treatment records indicate he reported smoking a pack per day for thirty years and as much as thirty-four years. Decision and Order at 9; *see* Claimant's Exhibit 2 at 2, 9. Based on the evidence presented, the ALJ determined Claimant began smoking around 1970 and quit in 2010 at an average of a pack per day. Decision and Order at 9. She therefore found Claimant has a smoking history of approximately forty pack-years. *Id.* As it is supported by substantial evidence, we affirm the ALJ's finding that Claimant has a forty pack-year smoking history. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985); Decision and Order at 9.

The ALJ considered Dr. Shah's medical opinion that Claimant has legal pneumoconiosis and the opinions of Drs. Dahhan and Fino that he does not. Decision and Order at 26-28; Director's Exhibits 12 at 10; 15 at 3; Employer's Exhibit 2 at 5. We see no error in the ALJ's determination that Dr. Shah's opinion is entitled to little weight. Decision and Order at 27.

Dr. Shah performed the Department of Labor's complete pulmonary evaluation of Claimant and opined he has a "symptom complex of progressive worsening shortness of breath, wheezing and daily productive cough with mild amount [of] expectoration suggesting chronic obstructive pulmonary disease, dust related diffuse pulmonary fibrosis, emphysema and chronic bronchitis." Director's Exhibit 12 at 10. She further opined coal mine dust and cigarette smoke exposure both contribute to his pulmonary impairment. *Id.*

The ALJ permissibly discredited Dr. Shah's opinion because the physician relied on a "significant" history of coal mine dust exposure of 22 years, whereas the ALJ found only 12.43 years of coal mine employment, and she relied on a smoking history of only twenty-one pack-years, whereas the ALJ found a smoking history of approximately forty pack-years. *See Huscoal, Inc., v. Director, OWCP* [*Clemons*], 48 F.4th 480, 491 (6th Cir. 2022) (effect of an inaccurate coal mine dust exposure history on the credibility of a medical opinion is a determination for the ALJ to make); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988) (ALJ has discretion in determining the effect of an inaccurate smoking history on the credibility of a medical opinion); Decision and Order at 27.

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if the evidence is found insufficient to establish a required element of

entitlement. *See Ondecko*, 512 U.S. at 281; *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because the ALJ permissibly discredited Dr. Shah's opinion, the only opinion supportive of Claimant's burden to establish legal pneumoconiosis, we affirm her determination that Claimant did not establish legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Rowe*, 710 F.2d at 255; Decision and Order at 28.

Because Claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the ALJ's denial of benefits.[6] *Anderson*, 12 BLR at 1-112; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[6] Because we have affirmed the ALJ's determination that Claimant did not establish pneumoconiosis, an essential element of entitlement, we need not address her finding that Claimant failed to establish total disability.