U.S. Department of Labor

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

BRB Nos. 22-0456 BLA
and 22-0456 BLA-A

FREDDIE W. SMITH[1]	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
DLM COAL CORPORATION	)	DATE ISSUED: 5/26/2023
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Denying Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

[1] Claimant died on April 3, 2019. Director's Exhibit 18. His widow, Mary K. Smith, is pursuing the claim on behalf of his estate.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Chris M. Green and Wesley A. Shumway (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals, and Employer and its Carrier (Employer) cross-appeal, Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Denying Benefits (2020-BLA-06042) rendered on a claim filed on December 27, 2018, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 4.45 years of qualifying 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).[2] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant did not establish he had pneumoconiosis, an essential element of entitlement, and denied benefits.

On appeal, Claimant argues the ALJ erred in determining that only 4.45 years of his coal mine employment was qualifying and therefore also erred in finding he was not entitled to invoke the Section 411(c)(4) presumption. Employer responds in support of the denial of benefits. On cross-appeal, Employer argues the ALJ erred in discrediting the opinions of Drs. Basheda and Zaldivar on the issue of pneumoconiosis and in finding Claimant had a totally disabling respiratory impairment. Claimant responds to Employer's cross-appeal. The Director, Office of Workers' Compensation Programs (the Director), has not filed a substantive response to either appeal.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in

[2] Section 411(c)(4) of the Act 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); *see* 20 C.F.R. §718.305.

accordance with applicable law.[3] 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

Qualifying Coal Mine Employment

Claimant bears the burden 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 (1985). The Board will uphold an ALJ's determination 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).

Additionally, to invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines, or surface coal mines in conditions "substantially similar" to underground mines. 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).

Claimant argues the ALJ erred in finding only 4.45 years of his twenty-one years of coal mine work were in conditions substantially similar to an underground mine.[4] We disagree.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 27.

[4] For the years between 1957 and 1977, the ALJ credited Claimant with a quarter-year of employment for each quarter in which his Social Security Administration (SSA) earnings records indicate he earned at least $50.00 from coal mine operators. Decision and Order at 5 (citing *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984)). For the years from 1978 onward, the ALJ "considered the highest earnings [for each of the two employers, respectively] to be approximately one year of work." Decision and Order at 6. Using these two methods, the ALJ calculated 21.2 years of coal mine employment. *Id.* As neither party challenges the ALJ's finding of approximately 21 years of coal mine employment, we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

In evaluating whether Claimant's coal mine employment was qualifying for purposes of invoking the Section 411(c)(4) presumption, the ALJ considered Claimant's Forms CM-911 and CM-913, a Coal Truck Driver Questionnaire, and a statement from Clara B. Kelley, secretary and treasurer for Kelley Trucking, for whom Claimant worked driving a truck hauling coal. Decision and Order at 4-8. The ALJ permissibly gave little weight to Ms. Kelley's statement, finding there was no information to suggest she had firsthand knowledge of Claimant's working conditions, whereas Claimant would have had knowledge of his own working conditions.[5] *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984); Decision and Order at 8.

The ALJ noted that the record did not establish whether Claimant worked aboveground at an underground mine site,[6] and she indicated the record as a whole contained "little information" concerning whether Claimant was regularly exposed to coal mine dust. Decision and Order at 8. Specifically considering Claimant's Coal Truck Driver Questionnaire for Kelley Trucking and his Form CM-913, the ALJ found the only two periods of employment for which there was evidence of regular coal dust exposure were when Claimant worked for K&K Coal Company and Kelley Trucking. Decision and Order at 7-8, *citing* Director's Exhibits 4-5. She further noted the only other evidence regarding the dust conditions at Claimant's other coal mine employers was Form CM-911a, "Employment History," where Claimant checked boxes indicating he was exposed to dust, gases, or fumes in each of his job positions. Decision and Order at 8; *see* Director's Exhibit

[5] On his "Coal Truck Driver Questionnaire," Claimant indicated the coal pick up and drop off areas for Kelley Trucking "had a lot of coal dust," that his "clothes and skin [were] black from coal dust," and that he could see and "even taste" the dust in the air. Director's Exhibit 5. On his "Description of Coal Mine Work and Other Employment" (Form CM-913), Claimant indicated he worked at the tipple shoveling coal and that there were "4 to 5 inches of coal dust at the tipple" that he had to lay down in to perform repairs and load equipment. Director's Exhibit 4. In her statement, Ms. Kelley stated that the trucks had air conditioning with cab recirculation and drivers were instructed to keep the windows closed, that the roads were watered down, that surgical masks were provided for drivers, and that drivers were to keep their trucks clean. Director's Exhibit 9. In addition, she stated that her husband also drove coal trucks and, contrary to Claimant's description, never came back "black with dust." *Id*. She further provided that "[t]here was never 5 inches of [coal] dust" on the ground and that Claimant never shoveled coal on train cars or worked at or hauled to the main tipple during his employment for Kelley Trucking. *Id*.

[6] If a miner worked on the surface at the site of an underground mine, he need not establish "substantial similarity." *Muncy*, 25 BLR at 1-29.

3. She therefore found Claimant established only 4.45 years of qualifying coal mine dust exposure for purposes of invoking the Section 411(c)(4) presumption.[7] 20 C.F.R. §718.305(b)(1)(i); Decision and Order at 8.

Contrary to Claimant's contention, marking a "yes" response to the question on Form CM-911a regarding being exposed to dust, gases, or fumes is not, alone, sufficient to establish Claimant was exposed to *coal mine dust* and that such exposure occurred *regularly*, as the regulations require.[8] 20 C.F.R. §718.305(b)(1)(i), (2); *see Sargent v. Island Fork Constr., Ltd*., BRB No. 19-0054 BLA, slip op. at 5-7 (Jan. 29, 2020) (unpub.) (noting the phrasing of the question on Form CM-911a that asks whether a miner was exposed to dust, gases, or fumes instead of asking whether the miner was regularly exposed to coal dust). Further, contrary to Claimant's assertion, we see no error requiring remand in the ALJ's interpretation of Claimant's statement describing the dust conditions he worked in when he "started in 1956 and during employment[.]" Claimant's Brief at 7, *quoting* Director's Exhibit 4. The ALJ permissibly explained that she relied on Claimant's SSA earnings records and Form CM-911a to presume that Claimant was referring to K&K Coal Company as the employer he worked for in 1956 and permissibly credited him with a full year of qualifying coal mine employment based on the four quarters of work where he earned at least fifty dollars a quarter over the three years he worked there.[9] *Looney*, 678

[7] Relying on her total years of coal mine employment determinations, the ALJ credited Claimant with one year of qualifying coal mine employment with K&K Coal Company and 3.45 years with Kelley Trucking Company. Decision and Order at 5-6, 8.

[8] Claimant relies on *Bonner v. Apex Coal Corp*., 25 BLR 1-279, 1-282-84 (Jan. 24, 2022), to support its assertion that an employment history form alone is sufficient to establish regular coal dust exposure in a particular job. Claimant's Brief at 5-8. We reject this comparison. *Bonner* rested almost entirely on the sufficiency of lay evidence from a surviving spouse to establish dust conditions and in this case, although Claimant's widow testified about Claimant's coal mine employers, dates of coal mine employment, and job titles, she did not testify regarding the dust conditions of his coal mine work aside from those at Kelley Trucking, which the ALJ credited as qualifying. *See* Decision and Order at 3-4, 8; Hearing Transcript at 1-28.

[9] Claimant's SSA earnings records provide that Claimant worked for K&K Coal Company for four total quarters in 1957, 1960, and 1961. Director's Exhibit 12. No coal mine employers are identified on the records in 1956 and K&K Coal Company is the first coal mine employer Claimant worked for in 1957. *Id*. Further, on Claimant's Form CM-911a, he indicated he worked for K&K Coal Company from 1956-57. Director's Exhibit 3.

F.3d at 316-17; Decision and Order at 5, 8; Director's Exhibits 4, 5, 12. Claimant has not provided any support for his assertion that his statement of "during employment" referred to the entirety of his coal mine employment and not, as the ALJ determined, solely to his years of employment with K&K Coal Company.[10] Claimant's Brief at 7.

Claimant's arguments amount to a request to reweigh the evidence, which the Board may not do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). *Looney*, 678 F.3d at 310; *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999). Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant had at most 4.45 years of qualifying coal mine employment and therefore could not invoke the Section 411(c)(4) presumption. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174 (4th Cir 1997); Decision and Order at 5-8.

Claimant has not otherwise challenged, and we therefore affirm, the ALJ's finding that he failed to establish the existence of pneumoconiosis,[11] an essential element of entitlement,[12] and consequently we also affirm the denial of benefits. *Skrack*, 6 BLR at 1-711; *Trent*, 11 BLR at 1-27; Decision and Order at 23.

Employer's Cross-Appeal

On cross-appeal, Employer sets forth multiple arguments in the event the denial of benefits is vacated, urging the Board to instruct the ALJ on remand to reconsider her

[10] It is within the province of the ALJ to draw inferences and determine the meaning of the testimony. Thus, the ALJ's interpretation in this regard is permissible as within her discretion. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997).

[11] The ALJ found there is no evidence Claimant had complicated pneumoconiosis and therefore he 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); *see* 20 C.F.R. §718.304; Decision and Order at 19 n.15.

[12] Without the benefit of the Section 411(c)(3) and (c)(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*, 12 BLR at 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).

findings concerning the existence of pneumoconiosis and a totally disabling pulmonary or respiratory impairment. Employer's Brief at 22-27. Because we affirm the denial of benefits, we need not address Employer's cross-appeal.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge