U.S. Department of Labor

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

BRB No. 21-0117 BLA

WALTER WEBB	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TERRY GLENN COAL COMPANY, ET AL	)	
	)	DATE ISSUED: 4/27/2022
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 Carrie Bland, Administrative Law Judge, United States Department of Labor.

Walter Webb, St. Charles, Virginia.

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

Before: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Carrie Bland's[2] Decision and Order Denying Benefits (2018-BLA-05288), rendered on a subsequent claim[3] filed on October 22, 2015, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 10.68 years of coal mine employment and thus found he could not invoke the presumption of total disability due to pneumoconiosis at 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, she found Claimant failed to establish the existence of pneumoconiosis. 20 C.F.R. §718.202. She therefore found Claimant failed to establish a change in an applicable condition of entitlement,[5] 20 C.F.R. §718.309(c), and denied benefits.

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[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the ALJ's decision on Claimant's behalf, but Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] This claim was previously before ALJ Jennifer Whang, who conducted a hearing on June 7, 2019. ALJ Whang left the Office of Administrative Law Judges, and the case was reassigned to ALJ Bland (the ALJ).

[3] This is Claimant's fourth claim for benefits. Director's Exhibits 1-3. ALJ Linda S. Chapman denied his most recent claim, filed on September 30, 2009, because he failed to establish the existence of pneumoconiosis. Director's Exhibit 1 at 346.

[4] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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.

[5] Where 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)(1); *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 did not establish the existence of pneumoconiosis in his prior claim, he had to submit evidence establishing this element to obtain review of the merits of his current claim. *Id*.

On appeal, Claimant generally challenges the ALJ's denial of benefits; therefore, the Board addresses whether substantial evidence supports the ALJ's 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 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).

Section 411(c)(4) Presumption: Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, 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 establishing 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 calculation of the length of coal mine employment 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).

The ALJ considered Claimant's employment history forms, Social Security Administration (SSA) earnings records, hearing testimony, and former coworkers' affidavits. Decision and Order at 5; Director's Exhibits 3 at 963-66; 6-9. The ALJ noted Claimant alleged between 18 and 21 years of coal mine employment on his benefits application and in his hearing testimony, Director's Exhibit 5; Hearting Transcript at 10, but permissibly credited periods of employment that were corroborated by his SSA records and coworkers' affidavits. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ evaluates the credibility of the evidence of record, including witness testimony); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Mabe*, 9 BLR at 1-68; Decision and Order at 8.; Decision and Order at 5.

For the years prior to 1978, the ALJ adopted and incorporated ALJ Chapman's calculations from Claimant's prior claim, crediting him each quarter his SSA records reflect at least $50 of income, for a total of 4.25 years of coal mine employment. Decision and Order at 5; *Webb v. Terry Glenn Coal Co.*, OALJ Case No. 2012-BLA-05189, slip op. at 4 (Sept. 15, 2014); *see Shrader v. Califano*, 608 F.2d 114, 117 n.3 (4th Cir. 1979) (crediting a miner with a full quarter of coal mine employment when the miner earned

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as Claimant last performed coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

$50.00 or more during that time period is "an appropriate yardstick for determining quarters which will be fully credited to a black lung claimant"); *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984). As this calculation is based on a reasonable method and supported by substantial evidence, we affirm it.

For 1978 through 1989, the ALJ relied on the income reported in Claimant's SSA records and, given the absence of evidence regarding the specific beginning and ending dates of that employment, permissibly applied Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine Procedure Manual*[7] to determine the number of days Claimant worked each year. 20 C.F.R. §725.101(a)(32)(iii); Decision and Order at 5; *Webb*, OALJ Case No. 2012-BLA-05189, slip op. at 4-6. Then, dividing the number of days worked by 125, the ALJ found the SSA records established 3.93 years of coal mine employment from 1978 through 1989. Decision and Order at 5; *Webb*, OALJ Case No. 2012-BLA-05189, slip op. at 4-6.

The ALJ also considered affidavits from Claimant's former coworkers stating he was paid in cash for working four months in each of 1978, 1979, and 1980, and nine months in each of 1982 and 1983. Decision and Order at 5; Director's Exhibit 3 at 963-66. Based on these affidavits, the ALJ credited Claimant with an additional thirty months, or 2.5 years, of coal mine employment. Decision and Order at 3. She thus credited Claimant with a total of 10.68 years of underground coal mine employment. Decision and Order at 5.

Because the ALJ's finding that Claimant has less than fifteen years of coal mine employment is supported by substantial evidence, we affirm her determination that Claimant is unable to invoke the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4) (2018); *Muncy*, 25 BLR at 1-27; 20 C.F.R. §718.305(b)(1)(i).

20 C.F.R. Part 718: Pneumoconiosis

To be entitled to benefits under the Act without the application of the Section 411(c)(4) presumption, Claimant must establish disease (pneumoconiosis); disease

[7] 20 C.F.R. §725.101(a)(32)(iii) provides that if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the ALJ may determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics (BLS). The BLS wage information is published in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, entitled "Average Wage Base."

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). The ALJ found Claimant failed to establish the existence of clinical or legal pneumoconiosis,[8] and therefore did not establish a change in an applicable condition of entitlement.

Clinical Pneumoconiosis

The ALJ first considered ten interpretations of five x-rays dated November 5, 2015, November 18, 2015, August 24, 2016, July 17, 2018, and November 6, 2018. Decision and Order at 7, 19. All the physicians who interpreted these x-rays are dually-qualified as B readers and Board-certified radiologists. Director's Exhibits 20-23; Employer's Exhibits 6, 11. Dr. DePonte read the November 5, 2015 x-ray as positive for simple pneumoconiosis, while Drs. Tarver and Meyer read it as negative. Director's Exhibits 20, 23; Employer's Exhibit 1. Dr. DePonte read the November 18, 2015 x-ray as positive for simple pneumoconiosis, whereas Dr. Wolfe read it as negative.[9] Director's Exhibits 14, 21. Dr. DePonte read the August 24, 2016 x-ray as positive for simple pneumoconiosis, while Dr. Meyer read it as negative. Director's Exhibit 22; Claimant's Exhibit 1. Dr. DePonte read the July 17, 2018 x-ray as positive for pneumoconiosis, whereas Dr. Adcock read it as negative. Claimant's Exhibit 1; Employer's Exhibit 10. Finally, Dr. Kendall read the November 6, 2018 x-ray as negative for pneumoconiosis. Employer's Exhibit 5.

[8] 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 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] Dr. Gaziano read the November 18, 2015 x-ray for quality purposes only. Director's Exhibit 16.

The ALJ found the readings of the November 18, 2015, August 24, 2016, and July 17, 2018 x-rays equally balanced as to whether Claimant had simple pneumoconiosis. Decision and Order at 19. She determined the November 5, 2015 x-ray is negative for the disease as two of the three equally-qualified readers interpreted it as negative. *Id.* She further found the November 6, 2018 x-ray negative based on Dr. Adcock's uncontradicted reading. *Id.* Having determined that two of the x-rays are negative, three are equally balanced, and none are positive, the ALJ found the x-ray evidence does not establish the existence of clinical pneumoconiosis. Because these findings are supported by substantial evidence, we affirm them. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); 20 C.F.R. §718.202(a)(1).

Because the record contains no biopsy or autopsy evidence, we also affirm the ALJ's determination that Claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Decision and Order at 19.

The ALJ next considered the medical opinions of Dr. Ajjarapu, who diagnosed clinical pneumoconiosis, and Drs. Fino and Rosenberg, who opined Claimant does not have the disease. Decision and Order at 19-20; Director's Exhibits 14, 18, 23; Employer's Exhibits 3, 7, 9. Dr. Ajjarapu diagnosed clinical pneumoconiosis based on her review of Dr. DePonte's reading of the November 18, 2015 x-ray. Director's Exhibit 14 at 3, 7. The ALJ permissibly accorded less weight to Dr. Ajjarapu's diagnosis because it conflicted with her finding that the x-ray evidence does not establish pneumoconiosis. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 19.

Because no other physician diagnosed clinical pneumoconiosis, we affirm the ALJ's finding that the medical opinions do not establish the disease. 20 C.F.R. §718.202(a)(4).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has a "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).

The ALJ considered the medical opinion of Dr. Ajjarapu that Claimant has legal pneumoconiosis, and those of Drs. Fino and Rosenberg that he does not have the disease.[10]

[10] Employer and it's Carrier (Employer) contend the ALJ erred in evaluating the opinions of Drs. Fino and Rosenberg. Employer's Response at 14-19. As Employer acknowledges, any such error is harmless as these opinions do not assist Claimant in his

Decision and Order at 20-23; Director's Exhibits 14, 18, 23; Employer's Exhibits 3, 7, 9. The ALJ found Dr. Ajjarapu's opinion insufficiently reasoned to satisfy Claimant's burden of proof and determined the opinions of Drs. Fino and Rosenberg are entitled to little weight. Decision and Order at 20, 23.

We see no error in the ALJ's finding that Dr. Ajjarapu's opinion is not sufficiently reasoned. Dr. Ajjarapu performed the Department of Labor's pulmonary examination of Claimant and diagnosed chronic bronchitis due to a combination of coal mine dust exposure and smoking. Director's Exhibit 14 at 7. She explained the inhalation of coal mine dust and tobacco smoke causes airway inflammation, leading to bronchospasm, excessive airway secretions, and bronchitis symptoms. *Id.* She reported Claimant's smoking history as one-half of a pack per day for three years, *id.* at 1-2, while the ALJ found Claimant smoked for up to thirty-six years at a rate of one-half to one-and-a-half packs per day.[11] Decision and Order at 6. The ALJ thus permissibly rejected Dr. Ajjarapu's opinion because she based her opinion in part on an inaccurate understanding of Claimant's smoking history. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1994); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988) (ALJ may reject medical opinions that rely on an inaccurate smoking history); Decision and Order at 20. Because there is no other evidence supporting a finding of legal pneumoconiosis, we affirm the ALJ's determination that the new medical opinions do not establish the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 23.

Because Claimant did not establish pneumoconiosis, which is required for an award of benefits, we affirm the ALJ's finding that Claimant did not establish entitlement under Part 718 or a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Trent*, 11 BLR at 1-27.

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burden to establish the existence of legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Response at 14.

[11] The ALJ observed that Claimant has not consistently reported his smoking history. Decision and Order at 6. Based on the various reported smoking histories by Claimant and the medical experts, the ALJ permissibly determined Claimant has a "lengthy smoking history" of a "half pack up to a pack and a half a day" beginning "as young as age 18, and covering the time period up to possibly 2005." Decision and Order at 6.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge