U.S. Department of Labor

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

BRB No. 24-0437 BLA

JERRY L. REID Claimant-Petitioner v. US MINING & EXPLORATION and OLD REPUBLIC INSURANCE COMPANY INCORPORATED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 08/06/2025 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Jerry L. Reid, Oneida, Kentucky.

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

Before: ROLFE and JONES, Administrative Appeals Judges, ULMER, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Denying Benefits (2020-BLA-05052) rendered on a claim filed on July 9, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 8.94 years of 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).[2] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant failed to establish either clinical pneumoconiosis arising out of coal mine employment or legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b)(2), 718.204(c). Thus, he denied benefits.

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

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 findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in 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, 361-62 (1965).

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

[2] 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.

[3] 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); Decision and Order at 3; Hearing Tr. at 11.

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 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 if it is based on a reasonable method of calculation and supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The ALJ considered Claimant's statements on his claim forms alleging twenty years of coal mine employment from 1966 to 2000, Claimant's hearing testimony that he worked about twelve years "over the course" of fifteen years as a miner, the district director's finding that he worked 8.4 years in coal mine employment, Employer's stipulation to 8.4 years of coal mine employment, and Claimant's Social Security Earnings Record (SSER) reflecting coal mine employment earnings from 1968 to 1982.[4] Decision and Order at 3-5; Director's Exhibits 2 at 1; 3 at 1; 5 at 3-4; 6 at 1-3; Hearing Tr. at 17-19. Although Claimant alleged more coal mine employment on his claim forms and in his hearing testimony than the reported earnings on his SSER, the ALJ found Claimant to be an unreliable historian as his statements concerning his employment are inconsistent with each other and the SSER, and Claimant did not explain the discrepancies.[5] Decision and Order at 3-5. As substantial evidence supports this finding, the ALJ permissibly found the SSER most probative of the periods and length of Claimant's coal mine employment. *Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 352-53 (6th 2007); *Brumley v. Clay Coal Corp.*, 6 BLR 1-956, 1-959 (1984) (fact-finder may credit SSER as most probative of length of coal mine employment); Decision and Order at 4-5; Director's Exhibits 2 at 1; 3 at 1; 5 at 3-4; 6 at 1-3; Hearing Tr. at 17-19.

[4] The SSER indicates the district director requested a statement of Claimant's annual reported employment earnings for years 1965 through 1977 and years 1978 through 2017. Director's Exhibits 5 at 1, 6 at 1. These statements show Claimant had quarterly reported earnings with various employers between 1968 and 1977, annual reported earnings with various employers between 1978 and 1982, and "no other earnings recorded under [his] social security number for [the] years requested." Director's Exhibits 5, 6.

[5] The ALJ accurately observed Claimant did not testify about, or explain in his brief, the discrepancy between his alleged periods of coal mine employment and those for which his SSER reflected earnings from coal mine employment. Decision and Order at 4-5.

The ALJ used two different methods for calculating the length of Claimant's coal mine employment based on the SSER. First, for the years prior to 1978, the ALJ credited Claimant with full quarters of coal mine employment for each quarter in which he earned at least $50.00 from a coal mine operator. *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 405-06 (6th Cir. 2019); *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 n.2 (1984); Decision and Order at 4-5. Finding the record supported twenty-nine of the SSER's reported thirty-four quarters of earnings were with coal mine operators, he credited Claimant with a total of twenty-nine quarters, or 7.25 years, of coal mine employment from 1968 to 1977.[6] Decision and Order at 4.

Next, for the years 1978 through 1982, the ALJ divided Claimant's annual coal mining wages reported in his SSER by the average daily wage in Exhibit 610 to the *Office of Workers' Compensation Programs (Black Lung Benefits Act) Procedure Manual* to determine the number of days Claimant worked each year.[7] Decision and Order at 4. When that number amounted to at least 125 working days, the ALJ credited him with a full year of employment. *Id.* When the number amounted to less than 125 days, he credited him with a fractional year based on the ratio of actual days worked to 125 days. *Id.* Using this method, the ALJ found Claimant had an additional 1.68 years of coal mine employment between 1978 and 1982, for a total of 8.94 years of coal mine employment.[8] *Id.* at 4-5; *see Shepherd*, 915 F.3d at 402.

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[6] The ALJ accounted for all earnings reported in Claimant's SSER. He credited Claimant with the following periods of coal mine employment between 1968 and 1977: eighteen quarters (4.5 years) in 1968-1973 with Greer Brothers & Young, one quarter (0.25 years) in 1974 with United Coal, one quarter (0.25 years) in 1974 with M & H Coal, four quarters (1.0 year) in 1975 with Greer, three quarters (0.75 years) in 1976-1977 with Genex Greer, and two quarters (0.5 years) in 1977 with US Mining & Exploration Natural Resources. Decision and Order at 4; Director's Exhibit 6. He excluded Claimant's four quarters (1 year) of earnings with G B & Y Incorporated between 1973 and 1974 and one quarter (0.25 years) of earning with Clark & Hirt Bulldozer Service in 1976, explaining the record does not establish either employer is a coal mine operator. Decision and Order at 4 n.3; *see* Director's Exhibit 6.

[7] 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 and 125-days' earnings during a year of employment in coal mining. 20 C.F.R. §725.101(a)(32)(iii).

[8] The ALJ accounted for all earnings reported in Claimant's SSER between 1978 and 1982. He credited the following earnings as coal mine employment: $9,430.07 during 1978 with US Mining & Exploration Natural Resources (0.94 years); $67.50 during 1979

Review of the ALJ's findings reflect that his methods of computation are reasonable and there are no errors in his math. *See Shepherd*, 915 F.3d at 402, 405-06. Although Claimant's SSER shows he had an additional five quarters of employment earnings exceeding $50.00 between 1968 and 1977 (1.25 years of employment), $2,448.25 of earnings in 1978 (0.24 years of employment), and $8,196.86 of earnings in 1979 (0.75 years of employment) that the ALJ excluded as not coal mine employment, any error the ALJ may have made in excluding these earnings from his calculation is harmless as their inclusion would amount to only an additional 2.24 years of coal mine employment, or 11.18 years total.[9] *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-244 (2007) (en banc); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We thus affirm the ALJ's finding that Claimant established less than fifteen years of coal mine employment and did not invoke the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b)(1)(i); Decision and Order at 3-5.

Entitlement Under 20 C.F.R. Part 718

To be entitled to benefits under the Act, 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. Statutory presumptions may assist a claimant in establishing these elements when certain conditions are met, but failure to establish any element 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 did not establish the existence of clinical or legal pneumoconiosis.[10]

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with KY Gem Coal (0.006 year); $5,409.40 during 1980 with Elmo Greer & Sons, Don Wooton Mining, and Melco Greer (0.5 years); $2,821.00 during 1981 with Don Wooton Mining (0.23 years); and $136.50 during 1982 with Don Wooton Mining (0.01 years). Decision and Order at 4; Director's Exhibit 5. He excluded Claimant's reported earnings of $2,448.25 in 1978 with Resource Construction (0.24 years) and $8,196.86 in 1979 with Anderson Tank & Pipeland (0.75 years), finding the record does not establish either employer is a coal mine operator. Decision and Order at 4 n.6; Director's Exhibit 5 at 3.

[9] There is no indication in the record that this employment constituted coal mine employment and the time (even if counted) would not entitle Claimant to the presumption under Section 411(c)(4) of the Act or otherwise affect the ALJ's analysis and conclusions.

[10] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition

Clinical Pneumoconiosis

The ALJ considered five readings of two x-rays dated July 30, 2018, and September 25, 2020. Decision and Order at 5-6. All the physicians who interpreted the x-rays are dually qualified as Board-certified radiologists and B readers. Director's Exhibits 10 at 23; 17 at 4-9; Claimant's Exhibit 1; Employer's Exhibits 1, 2.

Dr. Crum interpreted the July 30, 2018 x-ray as positive for simple pneumoconiosis, while Dr. Meyer interpreted it as negative. Director's Exhibit 17 at 2; Employer's Exhibit 1 at 2-3. Dr. DePonte interpreted it as having 0/1 profusion and checked a box indicating the presence of parenchymal abnormalities consistent with pneumoconiosis. Director's Exhibit 10 at 23. The ALJ correctly noted that Dr. DePonte's 0/1 reading does not support a finding of pneumoconiosis.[11] Decision and Order at 6 (citing 20 C.F.R. §718.102(d)(3)). Thus, the ALJ found a preponderance of the readings of the July 30, 2018 x-ray weigh against a finding of clinical pneumoconiosis. Decision and Order at 6.

Dr. Kendall read the September 25, 2020 x-ray as negative for simple pneumoconiosis, and Dr. Crum noted small opacities in five lung zones with a profusion of 0/1. Employer's Exhibit 2; Claimant's Exhibit 1. Based on the physicians' uncontradicted negative readings, the ALJ found the September 25, 2020 x-ray negative for clinical pneumoconiosis. Decision and Order at 6.

Because the ALJ found both x-rays negative for simple pneumoconiosis, we affirm his finding that Claimant failed to establish clinical pneumoconiosis based on the x-ray evidence. 20 C.F.R. §718.202(a)(1); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994); *Staton v. Norfolk & W. Ry. Co.*, 65 F.3d 55, 59

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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). "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] The regulation at 20 C.F.R. §718.102(d)(3) specifically states that "[a] chest radiograph classified under any of the foregoing [International Labour Organization] classification systems as Category 0, including subcategories 0-, 0/0, or 0/1, does not constitute evidence of pneumoconiosis." 20 C.F.R. §718.102(d)(3); *see Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1233 (1984).

(6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); Decision and Order at 6.

The ALJ also considered the medical opinions of Drs. Ajjarapu, Rosenberg, and Vuskovich. Director's Exhibit 10 at 7-9; 15; Employer's Exhibits 5-7. He correctly observed that none of the physicians diagnosed clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 7; Director's Exhibits 10 at 8; 15 at 1; Employer's Exhibits 5 at 4; 6 at 2; 7 at 15. Because there is no other evidence supportive of Claimant's burden of proof, we affirm the ALJ's finding that Claimant failed to establish clinical pneumoconiosis.[12] 20 C.F.R. §718.202(a); Decision and Order at 7.

Smoking History

Before addressing whether the medical opinion evidence establishes legal pneumoconiosis, the ALJ determined Claimant has a substantial cigarette smoking history. Decision and Order at 8-9.

The length and extent of Claimant's smoking history is a factual determination for the ALJ to make. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co*., 7 BLR 1-683, 1-686 (1985). Here, the ALJ considered Claimant's hearing testimony to about three pack-years; his response to Employer's interrogatories indicating about twenty-two pack-years between 1974 and 2018; his July 30, 2018 report to Dr. Ajjarapu that he had smoked 3/4 pack per day for the last eight years but did not remember when he had begun smoking; his report to Dr. Rosenberg of about eight pack-years; and the objective testing showing Claimant was still smoking as of 2020 despite his statements to the contrary. Decision and Order on Remand at 9; Hearing Transcript at 16-17; Director's Exhibit 10 at 8; Employer's Exhibits 5 at 3-4; 8 at 10. As there is no consistency in any of Claimant's reported smoking histories, the ALJ found "Claimant is a poor historian regarding his smoking history" and is more likely to underestimate rather than overestimate it. Decision and Order at 9. The ALJ thus discounted the lesser smoking histories that Claimant reported at the hearing and to Dr. Rosenberg and gave greater weight to the histories he reported in response to Employer's interrogatories and to Dr. Ajjarapu. *Id.* He thus found Claimant had a significant smoking history markedly exceeding the history Claimant gave to Drs. Ajjarapu and Rosenberg.[13]

[12] As there is no biopsy evidence in the record, Claimant cannot establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). In addition, Claimant cannot invoke the presumptions under 20 C.F.R. §§718.304 and 718.305 and therefore cannot establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3).

[13] As Claimant's response to Employer's interrogatories indicates Claimant smoked 1/2 pack per day between 1974 and 2018 (22 pack-years), and Claimant reported to Dr.

Id.; Director's Exhibit 10 at 8; Employer's Exhibit 8 at 10. As the ALJ considered all relevant evidence and substantial evidence supports his credibility determinations, we affirm his finding that Claimant's smoking history is substantial. *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); *Maypray*, 7 BLR at 1-686; Decision and Order at 9.

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.'").

The ALJ considered Dr. Ajjarapu's opinion that Claimant has legal pneumoconiosis and the opinions of Drs. Rosenberg and Vuskovich that he does not. Decision and Order at 9-11; Director's Exhibits 10, 15; Employer's Exhibits 5-7. The ALJ acted within his discretion in finding Dr. Ajjarapu's opinion entitled to no weight.[14] Decision and Order at 9-12.

Dr. Ajjarapu performed the Department of Labor (DOL) complete pulmonary evaluation of Claimant on July 30, 2018. She diagnosed chronic bronchitis and a severe pulmonary impairment based on Claimant's symptoms and pulmonary-function-test spirometry. Director's Exhibit 10 at 7-8; 15 at 1. She identified several contributing causes of impairment, including morbid obesity, coronary artery disease, an eight-year history of surface coal mine dust exposure, and a six pack-year smoking history (3/4 pack per day for eight years). Director's Exhibits 10 at 7, 9; 15 at 1; 43 at 1.

The ALJ found Dr. Ajjarapu's opinion internally inconsistent and insufficiently documented and reasoned. Decision and Order at 10-11. Although Dr. Ajjarapu conceded

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Ajjarapu in July 2018 that he was uncertain as to the length of his smoking history but he smoked about 3/4 pack per day for the last eight years (6 pack-years between 2010 and 2018), the ALJ found Claimant smoked 1/2 pack per day between 1974 and 2009 (18 pack-years) and 3/4 pack per day between 2010 and 2018 (6 pack-years), for a total of 24 pack-years. Decision and Order at 9 n.12.

[14] The ALJ correctly found the opinions of Drs. Rosenberg and Vuskovich do not aid Claimant in proving legal pneumoconiosis. Decision and Order at 11.

she was "unclear" about the extent of Claimant's smoking and initially stated coal dust exposure "could" have contributed to his impairment, she ultimately concluded coal dust was the "major contributing factor." Director's Exhibit 10 at 9. The ALJ permissibly found Dr. Ajjarapu did not reconcile her conflicting statements as to coal dust being a possible or definitive causal factor and relied on a significantly understated smoking history in identifying coal dust as "the major" cause of Claimant's impairment. Director's Exhibits 10 at 9; 43 at 1; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); Decision and Order at 11.

Dr. Ajjarapu also explained she ruled in coal dust exposure as a contributing cause of impairment because Dr. DePonte's 0/1 classification of Claimant's July 30, 2018 x-ray supports his having had an "ample amount of dust and coal inhalation" and because "[r]esearch shows that rock dust causes more severe disease than just coal dust alone." Director's Exhibits 10 at 9; 43 at 1. However, the ALJ permissibly found Dr. Ajjarapu cited no specific medical studies or science to support these assertions and did not otherwise explain how she determined coal mine dust contributed to Claimant's pulmonary impairment. *See Crisp*, 866 F.2d at 185; *Trumbo*, 17 BLR at 1-89; Decision and Order at 11.

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. Ajjarapu's opinion, the only opinion supportive of Claimant's burden to establish legal pneumoconiosis, we affirm his 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 12.

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.[15] *Anderson*, 12 BLR at 1-112; *Perry*, 9 BLR at 1-2.

[15] Because we have affirmed the ALJ's determination that Claimant did not establish pneumoconiosis, an essential element of entitlement, we need not address his finding that Claimant failed to establish his totally disabling pulmonary or respiratory impairment is due to pneumoconiosis.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GLENN E. ULMER
Acting Administrative Appeals Judge