U.S. Department of Labor

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

BRB No. 24-0013 BLA

VERNON E. COTTRELL Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	**NOT-PUBLISHED** DATE ISSUED: 02/14/2025 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on a Subsequent Claim of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Vernon E. Cottrell, London, Kentucky.

William M. Bush (Emily Su, Deputy Solicitor for National Operations; Jennifer Feldman Jones, Acting Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without representation,[1] the Decision and Order Denying Benefits on a Subsequent Claim (2020-BLA-05788) of Administrative Law Judge (ALJ) Steven D. Bell rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on November 1, 2019.[2]

Initially, the ALJ found Claimant established 1.76 years of coal mine employment. Thus, he determined Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). Considering entitlement to benefits under 20 C.F.R. Part 718, the ALJ found Claimant failed to establish the presence of pneumoconiosis or that he has a totally disabling respiratory or pulmonary impairment, two requisite elements of entitlement. 20 C.F.R. §§718.202(a), 718.204(b)(2). Thus, the ALJ denied benefits.

[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 does not represent Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant filed his first claim for benefits on April 25, 2016. Director's Exhibit 1. The district director denied that claim, finding Claimant was not a miner as defined by the Act. *Id.*

When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the subsequent claim must also be denied unless the ALJ finds "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). The ALJ treated the prior claim as if no element of entitlement was established, and the Director does not challenge this finding. Decision and Order at 3. Thus, Claimant had to submit new evidence establishing at least one element of entitlement to obtain a review of the current claim on the merits. 20 C.F.R. §725.309(c); *see White*, 23 BLR at 1-3; Director's Exhibit 1.

[3] Section 411(c)(4) 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); *see* 20 C.F.R. §718.305.

On appeal, Claimant generally challenges the ALJ's denial of benefits. The Acting Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.

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 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 Associates, Inc.*, 380 U.S. 359 (1965).

Length of Coal Mine Employment

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 dates and length of employment may be established by any credible evidence, and the Board will uphold an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial evidence. 20 C.F.R. §725.101(a)(32)(ii); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

The ALJ first determined that some of Claimant's work as a security guard at various coal mining sites constituted coal mine employment because it involved duties beyond providing security.[5] Decision and Order at 9.

Turning to Claimant's length of coal mine employment, the ALJ considered Claimant's benefits application forms, hearing testimony, and Social Security Earnings Statement (SSES). Decision and Order at 9-10; Director's Exhibits 4, 5, 15; Hearing Transcript. The ALJ noted inconsistencies in Claimant's statements on his benefits application, his testimony, and SSES. Decision and Order at 4-5, 9-10. Finding insufficient evidence to establish the beginning and ending dates of Claimant's employment and finding that while Claimant was an "earnest and credible witness," he was

[4] We will apply the law of the United States Court of Appeals for the Sixth Circuit as Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 7.

[5] Because the Director has not challenged this finding in his response brief, we do not address it. Director's Response at 2 n.1.

"not an exceptional historian," the ALJ relied on his SSES as the most credible evidence regarding the length of his coal mine employment. *Id.* at 10.

Finding Claimant performed coal mining work in the years 1985, 1987 to 1990, 1998, and 2000 to 2003[6] for Storm Security, Ltd. and Jay Mac Security Service Corp., he then divided the yearly earnings reported in Claimant's SSES by the average daily earnings from Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*.[7] *Id.* at 9-10. As none of Claimant's employment in any calendar year met or exceeded 125 days of employment, the ALJ used 125 days as a divisor for the earnings in each year to credit Claimant with fractional years of employment. *Id.; see Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019). Applying this formula, he found Claimant has a total of 1.76 years of coal mine employment. Decision and Order at 10-11.

The Director contends the ALJ permissibly relied on Claimant's SSES as being the most credible evidence to calculate the length of Claimant's coal mine employment. Director's Response at 6-7. He concedes the ALJ erred in calculating the length of Claimant's coal mine employment[8] but contends the errors are harmless because under "no interpretation" could the evidence establish at least fifteen years of coal mine employment

[6] The ALJ incorrectly noted some of Claimant's employment for Storm Security, Ltd. (Storm Security) took place in 2002. Decision and Order at 7. Based on the earnings provided, the ALJ was referring to Claimant's employment with Storm Security in 2003. Director's Exhibit 15. In addition, the employment the ALJ noted Claimant had with Storm Security in 2003 actually took place in 2004. Decision and Order at 7; Director's Exhibit 15.

[7] If an ALJ cannot ascertain the beginning and ending dates of a miner's coal mine employment, or the miner's employment lasted less than a calendar year, the ALJ may divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii).

[8] The Director submits the ALJ failed to include Claimant's coal mine employment with Black Fire Mining LLC (Black Fire), Kentucky Mountain Security, Inc. (Kentucky Mountain), and Dynamic Security, Inc. (Dynamic Security). Director's Response at 7. He also contends the ALJ should have credited Claimant with a full day of employment when his calculation rendered a fraction of a day of work. *Id.* at 7 n.3 (citing 20 C.F.R. §725.101(a)(32)).

necessary to invoke the Section 411(c)(4) presumption. *Id.* at 7. By his calculation, the Director states that Claimant has 2.128 years of coal mine employment. *Id.*

Claimant initially indicated on his claim application that he worked twenty years at four coal mine companies.[9] Director's Exhibit 3, 4. He testified that he worked around coal mines for "10 to [] 13 years or longer." Hearing Transcript at 9. As the ALJ noted, the employers listed on Claimant's claim application do not align with those on his SSES.[10] Decision and Order at 10. The ALJ also noted Claimant had some difficulty during his testimony recalling whether some of his employment involved coal mining. *Id.* at 9. Given Claimant's limited earnings, the ALJ also explained that while claimants may establish undocumented employment through their testimony, he found the record at best "uncertain" and could identify no basis to make such a finding. *Id.* Thus, we hold the ALJ permissibly determined Claimant's SSES to be the most credible evidence in determining the length of Claimant's coal mine employment. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (credibility determinations are for the ALJ to decide); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989).

However, we agree with the Director's position that the ALJ erred in failing to consider other employment in his calculation which, based on his findings, would meet the definition of the work of a miner. Specifically, the ALJ noted Claimant indicated on his nightwatchman questionnaire for Dynamic Security, Inc. that he "kicked breakers" to help

[9] Claimant indicated on his CM-911(a) claim form that he worked for Sandy Fork and Chas Coal Company (which he indicated were the same company) from 1981 to 2002; Left Fork Mining from 2002 to 2008; and B & W Coal from 2008 to 2010. Director's Exhibit 4. None of these companies are listed on his SSES. *See* Director's Exhibit 15. We note he indicated that Sandy Fork and Chas Coal Company were located in Redbird, Kentucky, where he worked for Storm Security. Director's Exhibit 4; Hearing Transcript at 12.

[10] When questioned on cross-examination regarding his employment listed on his SSES, Claimant recalled that Storm Security, Jay Mac Security Service Corp, Black Fire, Kentucky Mountain, and Dynamic Security were associated with coal mining. Hearing Transcript at 12-20; Director's Exhibit 15. While he testified he could not recall the work he performed at Mountaineer Investigation & Security, Inc. (Mountaineer Investigation) or at Whitaker Security Corp., he indicated on his nightwatchman questionnaires that he performed work for these companies at coal mine sites. Director's Exhibits 7, 9, 15.

avoid flooding, which the ALJ found was work[11] that was integral to coal mining and beyond that of simply performing security guard work. Decision and Order at 5, 9; Director's Exhibit 10. In addition, the ALJ failed to note Claimant's work for Black Fire Mining, LLC, in 2001, where Claimant indicated he helped with shift changes at coal mining sites.[12] Hearing Transcript at 16-17; Director's Exhibit 15. While not addressed by the Director, we also note Claimant indicated on his nightwatchman questionnaire for Mountaineer Investigation & Security, Inc. (Mountaineer Investigation)[13] that he shoveled coal on the belt, would "keep the pumps going at the prep[aration] plant so it would not get flooded," and swept the floor, all of which is consistent with the ALJ's finding that some of Claimant's security guard work meets the definition of the work of a miner. Decision and Order at 9; Director's Exhibit 9; Director's Response at 7 (noting Claimant could not recall in his testimony if his work at Mountaineer Investigation involved coal mining). Finally, we agree with the Director that calculations rendering partial days should be rounded up to a full day when considering the length of coal mine employment, as when calculating a "day" of coal mine employment, partial days are included. *See* 20 C.F.R. §725.101(a)(32).

Nevertheless, as the Director notes in his brief, this additional employment adds little to the total amount of Claimant's coal mine employment.[14] Director's Response at 7.

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[11] The nightwatchman questionnaire for Dynamic Security also indicated Claimant shoveled coal onto the belt and swept floors. Director's Exhibit 10. Claimant worked for Dynamic Security in 2006. Director's Exhibit 15.

[12] While the Director includes Claimant's employment with Kentucky Mountain in his calculation of Claimant's coal mine employment, the ALJ did not find that the evidence demonstrated that Claimant performed work beyond that of a security guard during that employment. Director's Response at 7. As the ALJ indicated, when Claimant was asked if he performed any other duties beyond that of a security guard when working for Kentucky Mountain, Claimant stated he did not. Decision and Order at 5; Director's Exhibit 13, Hearing Transcript at 18. We also note that while Claimant performed work at a coal mine for Whitaker Security, he indicated he did not perform work other than security guard work for that employer. Director's Exhibit 7.

[13] Claimant worked for Mountaineer Investigation in 2001. Director's Exhibit 15.

[14] Additional employment Claimant had with Dynamic Security adds one day of work in 2006 ($140.00 earnings/$176.64 daily average earnings = 0.79 days), with Black Fire Mining adds approximately twenty-four days in 2001 ($3,666.00 earnings/$152.32 daily average earnings = 24.01 days), and with Mountaineer Investigation adds seven days in 2001 ($1,002.00 earnings/$152.32 daily average earnings = 6.58 days), totaling 0.26

As the ALJ was within his discretion to rely on Claimant's SSES and apply the method at 20 C.F.R. §725.101(a)(32)(iii), even when considering the ALJ's omissions, Claimant established just over two years of coal mine employment, which is insufficient to invoke any available presumption. *See* 20 C.F.R. §§718.203, 718.305. Thus, we hold the ALJ's errors in his coal mine employment calculations are harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Entitlement Under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3)[15] or Section 411(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 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 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). The ALJ determined that Claimant failed to establish either clinical or legal pneumoconiosis[16] and did not establish total disability. Decision and Order at 16, 18.

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years (32 days/125 days). Adjusting the ALJ's other calculations to provide full days for partial days results in 225 days, or 1.8 years (225/125). *See* Director's Response at 7 (excluding Black Fire, Kentucky Mountain, and Dynamic Security). Thus, the total length of coal mine employment would be 2.06 years (1.8 + 0.26).

[15] The ALJ accurately found there is no evidence of complicated pneumoconiosis and thus Claimant cannot 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). 20 C.F.R. §718.304; Decision and Order at 16.

[16] "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). "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).

Clinical Pneumoconiosis

There is one x-ray of record taken on January 27, 2020. Director's Exhibit 19 at 19. Dr. DePonte, dually qualified as a B reader and Board-certified radiologist, interpreted the x-ray as negative for pneumoconiosis. *Id.* As there are no other x-ray readings of record, the ALJ permissibly found that the x-ray evidence fails to establish the presence of clinical pneumoconiosis. Decision and Order at 15. In addition, Dr. Forehand, in the only medical opinion of record, opined Claimant does not have clinical pneumoconiosis. Director's Exhibit 19 at 3; Decision and Order at 16. Finally, as the ALJ notes, there is no biopsy evidence of record. Decision and Order at 15. Thus, we affirm the ALJ's finding that Claimant failed to establish clinical pneumoconiosis. *Id.* at 16; 20 C.F.R. §718.201(a)(1), (2).

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 holds that a miner can establish a lung impairment is significantly related to coal mine dust exposure "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.'").

As noted, Dr. Forehand provided the only medical opinion of record. Director's Exhibit 19. He opined that Claimant has mixed restrictive-obstructive lung disease due to his coal mine dust exposure, which therefore constitutes legal pneumoconiosis. *Id.* at 4. The ALJ found Dr. Forehand's opinion undermined, as it was based on the doctor's belief that Claimant had twenty years of coal mine employment, which the ALJ found was "far in excess" of the 1.76 years he found established. Decision and Order at 16; Director's Exhibit 19 at 1. As discussed above, while the ALJ committed errors in his calculation of the length of Claimant's coal mine employment, we conclude that substantial evidence still supports his credibility determination because Dr. Forehand's reliance on twenty years of coal mine employment was "far in excess" of Claimant's actual coal mine employment documented in the record. *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 636 (6th Cir. 2009) (ALJ was within her discretion to find physician's reliance on eighteen years of coal mine employment undermined his opinion when the ALJ found eleven years established); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993). Thus, we affirm the ALJ's finding that Claimant has not proven legal pneumoconiosis. Decision and Order at 16.

As Claimant failed to establish the presence of pneumoconiosis, an essential element of entitlement, analysis of the remaining elements is unnecessary. *See Anderson*, 12 BLR at 1-112; *Perry*, 9 BLR at 1-1; *Trent,* 11 BLR at 1-27.

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits on a Subsequent Claim.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge