U.S. Department of Labor

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

BRB No. 21-0107 BLA

ROSCOE E. ASHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEQUOIA ENERGY LLC	)	
	)	
and	)	
	)	
AIG/CHARTIS CASUALTY COMPANY	)	DATE ISSUED: 4/27/2022
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Roscoe E. Asher, Baxter, Kentucky.

Timothy J. Walker (Fogle Keller Walker PLLC), Lexington, Kentucky, for Employer.

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

BOGGS, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Claimant appeals[1] Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Denying Benefits (2019-BLA-05590) rendered on a subsequent claim filed on January 14, 2013,[2] pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with thirty-two years of qualifying coal mine employment, based on the parties' stipulation, and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2)(i), (iv). She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4), and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.[4] She further found Employer rebutted the presumption and denied benefits.

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

[2] This is Claimant's second claim for benefits. As the ALJ correctly observed, the record indicates Claimant's initial claim, filed September 2, 2014, was "administratively closed" but contains no further information regarding this claim. Decision and Order at 3; Director's Exhibits 1, 59. The ALJ thus presumed Claimant failed to establish any element of entitlement in his prior claim. Decision and Order at 3.

[3] 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.

[4] 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); *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 the ALJ presumed Claimant did not establish any element of entitlement in his prior claim, he had to submit evidence establishing at least one element

On appeal, Claimant is self-represented and generally challenges the denial of benefits. Employer responds in support of the decision. The Director, Office of Workers' Compensation Programs, declined to file a response brief in this appeal.[5]

In an appeal filed by a self-represented claimant, 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.[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).

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[7] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(i), (iii); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). The ALJ found Employer established rebuttal by both methods. Decision and Order at 34, 36.

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to obtain review of the merits of his current claim. 20 C.F.R. §725.309(c)(3); Decision and Order at 3, 6.

[5] Because Employer does not challenge the ALJ's findings that Claimant invoked the Section 411(c)(4) presumption and thus established a change in an applicable condition of entitlement, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 6, 22.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[7] "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" 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).

Clinical Pneumoconiosis

The ALJ considered medical opinions, treatment records, and nine interpretations of four chest x-rays. Decision and Order at 25-27. She determined each x-ray reader is dually qualified as a Board certified radiologist and B reader, and therefore each one is entitled to the same amount of weight when considering their readings of the x-rays. Decision and Order at 26. Dr. Miller read the June 6, 2017 x-ray as positive for pneumoconiosis with a profusion rating of 1/0, while Drs. DePonte and Adcock read it as negative for the disease. Director's Exhibits 11 at 23, 21 at 3-4; Employer's Exhibit 1. Drs. Kendall and DePonte read the April 2, 2018 x-ray as negative for simple pneumoconiosis. Director's Exhibit 26 at 5-7; Claimant's Exhibit 2. Dr. Ramakrishnan read the August 12, 2019 x-ray as positive for pneumoconiosis with a profusion rating of 1/0, while Dr. Tarver read it as negative for the disease. Claimant's Exhibit 1; Employer's Exhibit 13. Dr. DePonte read the August 29, 2019 x-ray as positive for pneumoconiosis with a profusion rating of 1/0, while Dr. Kendall read it as negative for the disease. Claimant's Exhibit 3; Employer's Exhibit 3.

Because two physicians read the June 6, 2017 x-ray as negative for pneumoconiosis and one read it as positive, the ALJ determined this x-ray is negative for pneumoconiosis. Decision and Order at 26. She determined the April 2, 2018 x-ray is negative for pneumoconiosis because two physicians read it as negative while none read it as positive. *Id.* The ALJ further determined the August 12, 2019 and August 29, 2019 x-rays are in equipoise as each was read as positive by one reader and negative by another. *Id.* Therefore, determining there are two negative x-rays and two in equipoise, the ALJ permissibly concluded the x-ray evidence is negative for pneumoconiosis and thus assists Employer in satisfying its burden on rebuttal. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); Decision and Order at 26.

Turning to the medical opinions, the ALJ considered the opinions of Drs. Ajjarapu,[8] Tuteur, and Jarboe, and accurately noted each physician opined Claimant does not have clinical pneumoconiosis. Decision and Order at 27; Director's Exhibits 11 at 3; 26 at 4;

[8] The ALJ noted Dr. Ajjarapu indicated in her supplemental opinion that Claimant has clinical pneumoconiosis based on the x-ray evidence. Decision and Order at 27 n.38, *citing* Director's Exhibit 19 at 3. As the ALJ correctly observed, however, the basis for this statement is unclear, as Dr. Ajjarapu initially opined Claimant did not have clinical pneumoconiosis, Director's Exhibit 11 at 3, and the only other x-ray report she reviewed was Dr. Kendall's negative reading of the April 2, 2018 x-ray. Director's Exhibits 19 at 1; 26 at 5-7. The ALJ therefore determined this statement was made in error. Decision and Order at 27 n.38.

Employer's Exhibits 4 at 8-9; 5 at 12-14; 6 at 19. She therefore permissibly determined the medical opinion evidence weighs against a finding of clinical pneumoconiosis and supports the conclusion Employer rebutted the presumed existence of clinical pneumoconiosis. *See Tennessee 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, 34. She further permissibly concluded the treatment notes do not support or rebut the existence of pneumoconiosis. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 33-34. Based on her consideration of all the evidence, the ALJ found Employer established Claimant does not have clinical pneumoconiosis. Decision and Order at 27, 34. As substantial evidence supports this determination, we affirm it. 20 C.F.R. §718.305(d)(1)(i)(B); *see Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986).

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have 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), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8. The United States Court of Appeals for the Sixth Circuit holds this standard requires Employer to show Claimant's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id*. at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014). The ALJ considered the medical opinions of Drs. Tuteur, Jarboe, and Ajjarapu. Decision and Order at 27-31.

Dr. Ajjarapu opined Claimant has legal pneumoconiosis in the form of chronic bronchitis due to cigarette smoking and coal mine dust exposure. Director's Exhibits 11, 19. Dr. Tuteur opined Claimant does not have legal pneumoconiosis but instead has a restrictive impairment caused entirely by heart disease and congestive heart failure in conjunction with diabetes, obesity, and scarring due to open heart surgery. Director's Exhibit 26 at 3-4; Employer's Exhibits 6 at 20-22; 11. Dr. Jarboe opined Claimant does not have legal pneumoconiosis but rather a restrictive impairment caused by "longstanding and severe chronic systolic heart failure" and obesity. Employer's Exhibits 4 at 10-11; 5 at 19-23. The ALJ found Drs. Tuteur's and Jarboe's opinions better reasoned and better documented than Dr. Ajjarapu's. Decision and Order at 31.

In discussing the medical opinions, the ALJ focused on Drs. Tuteur's and Jarboe's belief that Claimant's disabling restrictive impairment is due to his cardiac condition and Dr. Ajjarapu's belief that it is not. Decision and Order at 28-31. She thoroughly explained why she discredited Dr. Ajjarapu for having an incomplete knowledge of Claimant's cardiac history, but she did not discuss the credibility of the other physicians' opinions as to the role that coal dust played in Claimant's impairment. She thus failed to properly

evaluate whether Employer met its affirmative burden to establish that Claimant's thirty-two years of qualifying coal mine dust exposure did not "significantly contribute to, or substantially aggravate," his restrictive impairment. 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). We therefore vacate the ALJ's finding that the medical opinion evidence, and the evidence overall, established Claimant does not have legal pneumoconiosis as well as the determination that Employer rebutted the Section 411(c)(4) presumption.

Remand Instructions

On remand, the ALJ must reconsider whether Employer has rebutted the presumed existence of legal pneumoconiosis. When weighing the opinions of Drs. Tuteur and Jarboe on this issue, the ALJ must consider the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. In so doing, she must set forth her findings in detail, including the underlying rationale. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

If the ALJ determines Employer has established Claimant does not have legal pneumoconiosis, Employer will have rebutted the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. If she finds Employer has not rebutted the presumed fact of legal pneumoconiosis, she must reconsider whether Employer has established that no part of Claimant's total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge:

I concur with my colleagues' decision that the Miner invoked the 15-year presumption. I write separately, however, to clarify the remand instructions regarding how Employer may rebut it. 30 U.S.C. §921(c)(4) (2018).

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to rebut under two prongs: (1) by showing the Miner had neither legal nor clinical pneumoconiosis; or (2) by showing that "no part" of the miner's respiratory or pulmonary total disability was caused by legal or clinical pneumoconiosis. 20 C.F.R. §718.305(d)(i), (iii); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015)

I agree with my colleagues that Employer rebutted clinical pneumoconiosis by establishing Claimant does not suffer from the disease. But I believe their remand instructions regarding legal pneumoconiosis do not accurately reflect the circumstances of this case.

As the majority correctly points out, an employer's burden in rebutting the existence of legal pneumoconiosis under the first prong normally is to show it is more likely than not that the miner did not suffer from 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(a)(2), 718.305(d)(1)(i)(A).

Here, however, Drs. Tuteur and Jarboe both definitively concluded that coal dust did not contribute in any way to Claimant's disabling respiratory impairment, ruling out any contribution whatsoever from Claimant's thirty-two years of coal dust exposure in

causing or aggravating it. Decision and Order at 28 ("Both Dr. Tuteur and Dr. Jarboe rejected the idea that Claimant's occupational coal dust exposure played any role in his pulmonary impairment."). Vitally, none of Employer's experts opined that coal dust played a role in causing or aggravating the impairment, but not a significant enough one under the legal standard for the impairment to qualify as legal pneumoconiosis; they ruled it out entirely. *See, e.g.*, Director's Exhibit 26 at 4 (Dr. Tuteur stated, "[f]inally, had Mr. Asher never inhaled coal mine dust, the clinical picture depicted in this [report] would be no different."); Employer's Exhibit 4 at 44 (Dr. Jarboe, "[w]ithin reasonable medical certainty, I am able to rule out coal dust as having caused any part of the claimant's impairment or disability.").

The remaining issue regarding legal pneumoconiosis thus is not the ability to meet the usual "significantly related to or substantially aggravated by" standard, but rather the credibility of Employer's doctors in supporting their conclusions. If the ALJ finds they were not credible in completely ruling out coal dust as contributing to Claimant's respiratory impairment as they attempted to do, or if the ALJ finds they simply did not adequately explain why Claimant's thirty-two years of dust exposure could not have aggravated the impairment, she must award benefits. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013) (physician opinions to be credited must be adequately reasoned and documented to support their conclusions).

In all other aspects, I agree with the majority.

JONATHAN ROLFE
Administrative Appeals Judge