U.S. Department of Labor

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

BRB Nos. 21-0154 BLA
and 21-0157 BLA

DEBRA McCLANAHAN (o/b/o and Widow of ELSTER McCLANAHAN)	)	
Claimant-Respondent	)	
v.	)	
BREM COAL COMPANY, LLC	)	
and	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 4/27/2022
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order on Remand Awarding Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for Claimant.

Denise Hall Scarberry and Paul E. Jones (Jones & Jones Law Office, PLLC), Pikeville, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order on Remand Awarding Benefits (2013-BLA-05128; 2018-BLA-05069) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on December 12, 2011, and a survivor's claim filed on June 9, 2017. The miner's claim is before the Benefits Review Board for a second time.[1]

The Board previously affirmed ALJ Alan L. Bergstrom's findings that Employer is the responsible operator and that Claimant[2] 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) (2018). *McClanahan v. Brem Coal Co.*, BRB No. 18-0052 BLA, slip op. at 3 n.3, 6 (Dec. 12, 2018) (unpub.). However, the Board vacated his determination that Employer did not rebut the presumption by disproving the Miner had pneumoconiosis. *Id.* at 7. The Board also vacated his determination that the Miner's adult child qualified as a dependent for purposes of the augmentation of benefits under 20 C.F.R. §725.209 and remanded the case for further consideration.

On remand, because ALJ Bergstrom had retired, the miner's claim was reassigned to ALJ Jennifer Whang, who consolidated the miner's and survivor's claims for hearing and decision. The case was then reassigned to ALJ Applewhite (the ALJ), who granted the parties' joint motion for a decision on the record. Addressing the Board's remand instructions in the miner's claim, the ALJ found Employer failed to rebut the Section 411(c)(4) presumption and awarded benefits. Based on the award of benefits in the miner's

[1] We incorporate the procedural history of this case and the Board's prior holdings, as set forth in *McClanahan v. Brem Coal Co., LLC*, BRB No. 18-0052 BLA (Dec. 12, 2018) (unpub.).

[2] Claimant is the widow of the Miner, who died on May 20, 2017. Claimant's Exhibit 27. In addition to her survivor's claim, she is pursuing the Miner's claim on his behalf. Claimant's Exhibits 26; 29.

[3] 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); 20 C.F.R. §718.305(b).

claim, she found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act. 30 U.S.C. §932(*l*) (2018). She further found the Miner's adult child did not qualify as a dependent under 20 C.F.R. §725.209 for augmentation of benefits.

On appeal, Employer argues the ALJ erred in finding it failed to rebut the presumption. It also argues the ALJ therefore erred in awarding Claimant derivative survivor's benefits.[4] Claimant responds in support of the ALJ's decision.[5] The Director, Office of Workers' Compensation Programs, declined to file a response brief.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order on Remand 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).

Miner's Claim: Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[7] or that "no

[4] Employer initially filed a Petition for Review and brief addressing only the miner's claim. Employer's Brief. On March 30, 2021, Employer filed a Supplemental Petition for Review and brief incorporating its initial brief as well as challenging Claimant's entitlement to benefits in the survivor's claim, accompanied by a motion to accept the pleading. Employer's Supplemental Brief. By order dated April 22, 2021, the Board granted Employer's motion and accepted its pleading. April 22, 2021 Order; 20 C.F.R. §§802.215, 802.217.

[5] We affirm, as unchallenged on appeal, the ALJ's determination that the Miner's adult child does not qualify as a dependent under 20 C.F.R. §725.209. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 9.

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner 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 25, 28.

[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

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)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit has held this standard requires Employer to establish the Miner'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).

Employer relies on the medical opinion of Dr. Dahhan[8] who opined the Miner had a severe obstructive ventilatory defect caused by smoking and entirely unrelated to coal mine dust exposure. Miner's Claim Director's Exhibit 17; Employer's Exhibits 7; 10 at 7.

---

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).

[8] The ALJ also considered the medical opinions of Drs. Habre, Fino, Vuskovich, and Ebeo. Decision and Order at 5-8. Dr. Habre opined the Miner had legal pneumoconiosis. Miner Director's Exhibit 16. Dr. Fino diagnosed severe emphysema, stated that he was unable to exclude coal mine dust exposure as a factor in the Miner's impairment, and did not specifically opine as to whether the Miner had legal pneumoconiosis. Claimant's Exhibit 4 at 6-7. Drs. Vuskovich and Ebeo did not provide an opinion as to whether the Miner had legal pneumoconiosis. Claimant's Exhibit 22; Employer's Exhibit 4. As these opinions do not assist Employer in establishing that the Miner did not have legal pneumoconiosis, we need not address its allegations of error with respect to the ALJ's analysis of Drs. Habre's and Fino's opinions. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011) ("[R]ebuttal requires an affirmative showing . . . that the [Miner] does not suffer from pneumoconiosis . . . ."); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Supplemental Brief at 8-9.

The ALJ found Dr. Dahhan's opinion unpersuasive and insufficient to satisfy Employer's burden of proof. Decision and Order on Remand at 8.

Employer argues the ALJ applied an incorrect legal standard because she required Dr. Dahhan to effectively "rule out" coal mine dust exposure to disprove legal pneumoconiosis. Employer's Supplemental Brief at 9-10. Employer further contends the ALJ erroneously "focused only on whether or not [the Miner] suffered from a chronic lung disease." *Id.* at 8-9. We disagree.

As the ALJ correctly observed, because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to rebut the presumed existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order on Remand at 3. She correctly noted that this requires Employer prove the Miner's pulmonary impairment was not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 5, *citing* 20 C.F.R. §718.201(b); *see Young*, 947 F.3d at 405; *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 667 (6th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013); 20 C.F.R. §718.201(a)(2).

Contrary to Employer's argument, the ALJ did not discredit Dr. Dahhan's opinion based on an incorrect standard. Rather, she accorded his opinion "less weight" and found it insufficient to meet Employer's burden to disprove legal pneumoconiosis because, though Dr. Dahhan acknowledged the Miner "had enough coal mining exposure to be injurious in a susceptible host," he did not adequately address the possible additive nature of smoking and coal mine dust exposure in the Miner's respiratory impairment. Decision and Order on Remand at 8; *see* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *A&E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Employer's Exhibit 10 at 6. She further permissibly discredited his opinion because he did not adequately explain why the Miner could not have suffered from an impairment caused by both smoking and coal mine dust exposure or why the Miner's thirty-six years of coal mine employment did not significantly aggravate his respiratory or pulmonary impairment, along with smoking.[9] *See Kennard*, 790 F.3d at

[9] Employer further argues Dr. Dahhan's opinion should have been credited because he considered the Miner's smoking and employment histories. Employer's Supplemental Brief at 8. However, the ALJ did not discredit Dr. Dahhan's opinion because he failed to consider the Miner's coal mine employment and smoking histories but rather because he failed to adequately address the potential additive nature of smoking and coal mine dust exposure or explain why coal mine dust exposure could not have contributed, along with smoking, to the Miner's impairment. Decision and Order on Remand at 8.

668; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order on Remand at 8.

Because the ALJ permissibly discredited Dr. Dahhan's opinion, the only opinion supportive of Employer's burden on rebuttal, we affirm her determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing the Miner did not have pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1).

Disability Causation

To disprove disability causation, Employer must establish "no part of the [M]iner's disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). Employer raises no specific allegations of error regarding the ALJ's findings other than its assertion that the Miner did not have legal pneumoconiosis, which we have rejected. Thus, we affirm the ALJ's determination that Employer failed to establish no part of the Miner's respiratory disability was caused by legal pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 9.

Survivor's Claim

The ALJ found Claimant is entitled to derivative survivor's benefits pursuant to Section 422(*l*) of the Act. 30 U.S.C. §932(l) (2018); Decision and Order on Remand at 10. Because we have affirmed the award in the Miner's claim and Employer raises no additional error in the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

[10] Because we have affirmed the ALJ's finding that Employer failed to disprove legal pneumoconiosis, we need not address Employer's challenges to her finding it also failed to disprove clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Decision and Order at 5; Employer's Supplemental Brief at 6-7.

Accordingly, we affirm the ALJ's Decision and Order on Remand Awarding Benefits.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge