U.S. Department of Labor

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

BRB No. 21-0174 BLA

TRACY R. ADDLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 4/27/2022
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Awarding Benefits (2017-BLA-05533) rendered on a claim filed on April 15, 2013, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with at least fifteen years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, it contends the ALJ erred in finding it did not rebut the presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a response, urging rejection of Employer's constitutional argument.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is 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 and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 27-30. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the

[1] 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.

[2] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established at least fifteen years of underground coal mine employment, total disability at 20 C.F.R. §718.204(b)(2), and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2, 15, 17, 20-21.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit because Claimant performed his coal mine employment in Utah. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 48.

Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

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[4] nor clinical pneumoconiosis,[5] or that "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)(1)(i), (ii); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). The ALJ found Employer failed to establish rebuttal by either method.[6]

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 ALJ considered the opinions of Drs. Tuteur and Farney that Claimant does not have legal pneumoconiosis. Decision and Order at 27-45. In their initial reports, both doctors diagnosed a disabling obstructive respiratory impairment due to Claimant's history of chronic "triad asthma."[7] Director's Exhibit 25; Employer's Exhibit 1. They explained

[4] "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).

[5] "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).

[6] The ALJ found Employer rebutted the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 39.

[7] Both doctors explained "triad asthma" is an allergic and respiratory disease characterized by three conditions that exist together: chronic asthma, nasal polyps, and aspirin sensitivity. Director's Exhibit 25; Employer's Exhibit 1.

this respiratory condition is unrelated to coal mine dust exposure. *Id*. During his deposition, however, Dr. Tuteur stated Claimant's disabling impairment was caused by asthma and occupational exposure to an epoxy resin called toluidine dye isocyanate (TDI). Employer's Exhibit 5 at 36-37, 41. He reiterated that Claimant does not have a "coal mine induced pulmonary process." *Id*. at 37.

The ALJ found Drs. Tuteur's and Farney's opinions inadequately explained and thus insufficient to rebut the presumption of legal pneumoconiosis.[8] Decision and Order at 39-46. We reject Employer's argument that the ALJ erred in discrediting their opinions. Employer's Brief at 9-11, 15-20.

Both doctors opined Claimant does not have legal pneumoconiosis, in part, because his obstructive respiratory impairment is partially reversible after the administration of bronchodilators on pulmonary function testing. Employer's Exhibits 5 at 28-29; 6 at 32-33. They explained coal mine dust exposure does not cause a reversible obstructive impairment; thus the obstruction is caused by asthma, a condition that reverses with bronchodilators. *Id*. During cross-examination, however, they both conceded Claimant still has a severe disabling obstructive impairment post-bronchodilator. Employer's Exhibits 5 at 40; 6 at 96. The ALJ permissibly found their reasoning unpersuasive to the extent both doctors failed to adequately explain why the irreversible portion of Claimant's impairment remaining after bronchodilation is not significantly related to, or substantially aggravated by, coal mine dust exposure.[9] *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d

[8] Employer argues the ALJ applied an improper standard by requiring Drs. Tuteur and Farney to "rule out" coal mine dust exposure as a causative factor for Claimant's asthma. Employer's Brief at 9-11. We disagree. The ALJ correctly recognized Employer has the burden to establish Claimant does not have a chronic lung disease or impairment significantly related to, or substantially aggravated by, coal mine dust exposure. *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i); Decision and Order at 11, 21, 39-40. Moreover, he discredited their opinions because he found they did not adequately explain why it was more likely than not that coal dust did not aggravate Claimant's preexisting asthma, not because they failed to meet a heightened legal standard. *See Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 832-33 (10th Cir. 2017) (rejecting argument that ALJ improperly applied a rule out standard where he found medical opinions excluding legal pneumoconiosis not credible); *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020); Decision and Order at 15-21, 38-45.

[9] During his deposition, Dr. Farney agreed with Claimant's counsel that if an individual has "two disease processes" such as asthma and coal mine dust contributing to his obstructive impairment, it is "possible" that the reversible portion is due to asthma and the irreversible portion is due to coal mine dust exposure. Employer's Exhibit 6 at 97. He also agreed it was possible an individual could have asthma and legal pneumoconiosis

350, 356 (6th Cir. 2007); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 41-46.

Further, Dr. Tuteur opined Claimant's clinical picture is consistent with a lung impairment caused by exposure to an epoxy resin in roof bolt glue. Employer's Exhibit 5 at 36-37, 41. This conclusion was based on his review of Dr. Sood's medical report, wherein Dr. Sood indicated Claimant worked for a five-year period underground as a roof bolter and, during this time, was exposed to isocyanates in roof bolts. Claimant's Exhibit 1.

In assessing Dr. Tuteur's opinion, the ALJ noted Claimant stopped working underground in 1990 and "therefore any exposure to isocyanates present in [] bolting resins must also have ceased by that time." Decision and Order at 42. Because Claimant's obstructive impairment did not become disabling until "years later" and Claimant continued to work until 2012, the ALJ permissibly found Dr. Tuteur did not adequately explain whether TDI exposure would account for the progression of Claimant's impairment. *Id.*; *see Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993).

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concurrently. *Id.* at 94-95. He nonetheless opined Claimant's clinic picture is more consistent with "garden variety" asthma. *Id.* at 93-94. When asked what clinical picture would warrant a diagnosis of both asthma and legal pneumoconiosis, Dr. Farney stated this is a "difficult question," but he would have to assess relative risk exposure. *Id.* In Claimant's case, he opined the "probability is low" that Claimant has legal pneumoconiosis. *Id.* The ALJ permissibly found Dr. Farney did not sufficiently explain why that was the case and why Claimant does not have both asthma and a coal dust-induced impairment "with the former being responsive to bronchodilators and the later not." Decision and Order at 44. Substantial evidence supports the ALJ's discretionary finding that Dr. Farney was "not clear" on how coal dust affected Claimant's preexisting asthma and that he therefore did not meet his burden to adequately explain why it was more likely than not coal dust did not "significantly aggravate[]" Claimant's asthma. *Id.*; *see Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1345-46 (10th Cir. 2014) (ALJ may reject an opinion based on statistical generalities, rather than the specific facts of miner's case); *Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873 (10th Cir. 1996); *Young*, 947 F.3d at 405-08; *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999) ("In referring to a singular 'reasonable mind,' the Supreme Court has directed us to uphold decisions that rest within the realm of rationality.").

Because the ALJ acted within his discretion in discrediting the opinions of Drs. Tuteur and Farney,[10] we affirm his determination that Employer did not disprove legal pneumoconiosis.[11] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order at 46, 52. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. Therefore, we affirm the ALJ's conclusion that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of the miner's 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)(ii). He permissibly discredited the disability causation opinions of Drs. Tuteur and Farney because neither diagnosed legal pneumoconiosis, contrary to his finding that Employer failed to disprove Claimant has the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 53. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii) and the award of benefits.

[10] Contrary to Employer's argument, the ALJ did not err in considering Claimant's treatment records. Employer's Brief at 21-26. The ALJ fully summarized the treatment records. Decision and Order at 48-51. Although they include diagnoses of respiratory symptoms and diseases "dating back to 1992," the records do not address the etiology of these conditions; thus, the ALJ rationally found the treatment records are insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 51; *see Pickup*, 100 F.3d at 873; *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993).

[11] Although Employer argues the ALJ erred in failing to consider the medical opinions of Drs. Sood and Gagon that Claimant has legal pneumoconiosis, the ALJ correctly found their opinions do not assist Employer in meeting its burden on rebuttal. *See Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.9 (2015); 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 46; Employer's Brief at 7-20.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge