U.S. Department of Labor

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

BRB No. 21-0378 BLA

REGINALD JOHNSON (o/b/o MILFORD O. JOHNSON)	)	
Claimant-Petitioner	)	
v.	)	
PINNACLE MINING COMPANY	)	DATE ISSUED: 4/27/2022
Employer-Respondent	)	
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 Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Cameron Blair and Joseph E. Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

James W. Heslep (Jenkins Fenstermaker, PLLC), Clarksburg, West Virginia, for Employer.

Olgamaris Fernandez (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 GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Denying Benefits (2020-BLA-05110) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[2] This case involves a miner's claim filed on September 11, 2018.

The ALJ credited the Miner with eighteen years of underground coal mine employment and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). 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) (2018). She further found, however, that Employer rebutted the presumption and thus denied benefits.

On appeal, Claimant argues the ALJ erred in finding Employer rebutted the Section 411(c)(4) presumption.[4] Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Benefits Review Board to reverse the denial of benefits as the record contains no evidence supporting rebuttal.

The 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

[1] The Miner died on April 23, 2020. Claimant's Exhibit 2. Claimant is the Miner's son and is pursuing this claim on his behalf. Hearing Tr. at 8-9.

[2] The Miner filed a prior claim but withdrew it. Director's Exhibit 1. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled 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); *see* 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established eighteen years of underground coal mine employment, total disability, 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 4-7.

with applicable law.[5] 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).

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[6] 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); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). The ALJ found Employer established rebuttal by disproving both clinical and legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 8-9.

Claimant argues the ALJ erred in finding Employer disproved legal pneumoconiosis.[7] Claimant's Brief at 10-12. We agree. 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." 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 recognized "Dr. Forehand authored the sole medical opinion" on the issue of legal pneumoconiosis. Decision and Order at 8. Dr. Forehand opined the Miner had obstructive lung disease due to cigarette smoking and coal mine dust exposure.[8] Director's

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

[6] "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).

[7] As it is unchallenged, we affirm the ALJ's finding that Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 8.

[8] Dr. Forehand opined the Miner "was exposed to freshly cut, respirable silica and coal dust on a regular basis for [twenty-seven] years working at the face of poorly

Exhibit 11. He further opined the Miner's obstructive lung disease "substantially contributed" to his disabling respiratory impairment. *Id.*

The ALJ found "Dr. Forehand did not identify the Miner's obstructive lung disease as a chronic pulmonary impairment." Decision and Order at 8. She also found he "discussed the absence of radiographic evidence of coal workers' pneumoconiosis, [but] did not state an opinion as to legal pneumoconiosis." *Id.* Thus she found Dr. Forehand's opinion "neither supports nor refutes a finding of legal pneumoconiosis." *Id.* Despite an explicit finding that Dr. Forehand's opinion does not "refute" legal pneumoconiosis, the ALJ concluded Employer "demonstrated that the Miner did not suffer from legal pneumoconiosis." *Id.*

Claimant argues the ALJ erred in finding Employer rebutted the presumption of legal pneumoconiosis through Dr. Forehand's opinion. Claimant's Brief at 10-12. The Director agrees, asserting the ALJ's determination that Dr. Forehand's opinion was inconclusive on the issue of legal pneumoconiosis cannot support a finding of rebuttal. Director's Response Letter at 1. The Director therefore urges the Board to reverse the ALJ's denial of benefits as there is no evidence to establish rebuttal of the Section 411(c)(4) presumption. *Id.* at 2. We agree with Claimant and the Director.

As Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish, with *affirmative proof*, that the Miner did not have legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(i)(A); *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) (rebuttal inquiry is "whether the employer has come forward with affirmative proof that the [miner] does not have legal pneumoconiosis, because his impairment is not in fact significantly related to his years of coal mine employment"); *Minich*, 25 BLR at 1-154-56. Dr. Forehand's opinion that coal mine dust exposure substantially contributed to the Miner's obstructive lung disease -- the only evidence on the issue -- does not constitute "affirmative proof that the [Miner did] not

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ventilated underground coal mines as a continuous miner operator, roof bolt operator, scoop operator, shuttle car operator, ram car operator, and belt man[.]" Director's Exhibit 11 at 4. He further opined this exposure caused the Miner "to inhale into his lungs toxic coal mine dust particles triggering an inflammatory reaction in his airways . . . which substantially contributed to his obstructive lung disease." *Id.* He explained the effects of "exposure to coal mine dust and cigarette smoke were additive" in the Miner "because coal mine dust and cigarette smoke are independent causes of significant obstructive lung disease (in the absence of radiographic coal workers' pneumoconiosis) and because cigarette smoke enhances the effects of coal mine dust by slowing down the clearance of dust particles from the lungs." *Id.*

have . . . pneumoconiosis" and thus does not support Employer's burden.[9] *Smith*, 880 F.3d at 699-700 (physician's opinion that is neutral on presence of pneumoconiosis insufficient to rebut the presumption); *see* Decision and Order at 9; Director's Exhibit 11.

Further, the record contains no other medical opinion that could support Employer's burden to disprove legal pneumoconiosis. *Smith*, 880 F.3d at 699-700; 20 C.F.R. §718.305(d)(2)(i)(A). We therefore reverse the ALJ's finding that Employer affirmatively established the Miner did not suffer from legal pneumoconiosis. *See Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187 (4th Cir. 2014) (reversing denial, as no factual issue remained as to cause of death, with directions to award benefits without further administrative proceedings); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989) (same). Consequently, we reverse the ALJ's finding that Employer rebutted the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1)(i).

Further, to establish rebuttal by the second prong, Employer must establish "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)(2)(ii); *Minich*, 25 BLR at 1-156. It cannot from the record in this case. As discussed above, Dr. Forehand opined the Miner's obstructive lung disease which constitutes legal pneumoconiosis "substantially contributed to his respiratory impairment." Director's Exhibit 11. As a matter of law, Dr. Forehand's opinion cannot establish rebuttal at 20 C.F.R. §718.305(d)(2)(ii). *Smith*, 880 F.3d at 699-700; *W. Va. CWP Fund v. Bender*, 782 F.3d 129 (4th Cir. 2015); *Minich*, 25 BLR at 1-156. As there is no other evidence in the record that could support its burden, Employer has failed to establish rebuttal by proving no part of the Miner's total disability was caused by pneumoconiosis. *See Collins*, 751 F.3d at 187; 20 C.F.R. §718.305(d)(2)(ii).

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis and Employer did not rebut it, Claimant is entitled to benefits.

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[9] The ALJ erred in finding Dr. Forehand did not diagnose legal pneumoconiosis. He explicitly opined the Miner had an obstructive lung disease significantly related to, or substantially aggravated by, coal mine dust exposure. 20 C.F.R. §718.201(a)(2), (b); Director's Exhibit 11.

[10] Although the ALJ found Employer disproved clinical pneumoconiosis, Employer's failure to disprove legal pneumoconiosis precludes a finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Accordingly, the ALJ's Decision and Order Denying Benefits is reversed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge