U.S. Department of Labor

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

BRB No. 21-0591 BLA

ROBERT M. PLAVI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HELEN MINING COMPANY	)	
	)	
and	)	
	)	
VALLEY CAMP COAL COMPANY	)	DATE ISSUED: 04/13/2023
	)	
Employer/Carrier-Petitioners	)	
	)	
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 on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Carl M. Brashear (Hoskins Law Offices PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits on Remand (2018-BLA-05706) rendered on a claim filed October 21, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for a second time.

In his initial Decision and Order Denying Benefits, the ALJ credited Claimant with eighteen years of underground coal mine employment, as stipulated by the parties, and found Claimant established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). Finally, the ALJ found Employer rebutted the presumption and thus denied benefits.

In consideration of Claimant's appeal, the Board affirmed the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption but vacated his finding that Employer rebutted the presumption. *Plavi v. Helen Mining Co.*, BRB No. 20-0052 BLA, slip op. at 2 n.3, 4, 6 (Sept. 29, 2020) (unpub.). The Board held the ALJ did not adequately explain his consideration of the medical opinions regarding legal pneumoconiosis and misapplied the burden of proof or standard for when a miner is presumed to have legal pneumoconiosis. *Id*. at 4. Thus, the Board instructed the ALJ to reconsider the medical opinions on remand to determine if Employer disproved legal pneumoconiosis. *Id.* at 5.

On remand, the ALJ found Employer failed to rebut the presumption and awarded benefits.

In the current appeal, Employer argues the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

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] Section 411(c)(4) of the Act provides a rebuttable presumption that the miner's total disability is due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

with applicable law.[2] 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,[3] 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)(1)(i), (ii); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The ALJ found Employer failed to establish rebuttal by either method.[4] Decision and Order on Remand at 14, 21.

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).

The ALJ considered the medical opinions of Drs. Bajwa and Fino that Claimant does not have legal pneumoconiosis. Decision and Order on Remand at 13-14; Director's Exhibit 18; Employer's Exhibit 1. Dr. Bajwa concluded Claimant's objective test results

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 10, 12.

[3] "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).

[4] The Board previously affirmed as unchallenged the ALJ's finding that Employer rebutted clinical pneumoconiosis. *Plavi v. Helen Mining Co.*, BRB No. 20-0052 BLA, slip op. at 3 n.5 (Sept. 29, 2020) (unpub.).

demonstrated no impairment and thus found no basis to diagnose pneumoconiosis. Director's Exhibit 18. Dr. Fino opined Claimant's impairment is the result of elevation of the right diaphragm, possibly due to a recurrence of lung cancer, and unrelated to his coal mine dust exposure. Employer's Exhibit 1. The ALJ found neither opinion well-documented or well-reasoned. Decision and Order on Remand at 13. Specifically, the ALJ found Dr. Bajwa's opinion as to legal pneumoconiosis was unsupported by the record because his conclusion that Claimant has no impairment was inconsistent with the ALJ's finding that Claimant has a totally disabling respiratory or pulmonary impairment. Decision and Order on Remand at 13. The ALJ further found that "Dr. Bajwa [thus] did not even reach the question of whether Claimant's impairment arose out of his coal mine employment." *Id.* Additionally, he found Dr. Fino's opinion that Claimant's impairment is unrelated to coal mine dust exposure to be conclusory. *Id.* at 13-14. He thus assigned "little weight" to their opinions and found Employer failed to rebut the presumption of legal pneumoconiosis. *Id.*

Employer argues that because the ALJ assigned "little" weight to Drs. Bajwa's and Fino's opinions,[5] as opposed to "no" weight, and there are no contrary opinions, the ALJ erred in finding Employer failed to meet its burden to rebut the presumption by a preponderance of the evidence. Employer's Brief at 3-5. We disagree.

Because Claimant invoked the Section 411(c)(4) presumption, he is presumed to have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Thus, Employer must affirmatively demonstrate by a preponderance of the evidence that Claimant's totally disabling respiratory impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.305(d)(1)(i)(A), 718.201(a)(2), (b); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 1-255 (2019). The burden to rebut the presumption of legal pneumoconiosis thus requires credible evidence to tip the scales. *See* 20 C.F.R. §718.202(a)(4) (finding excluding legal pneumoconiosis "must be supported by a *reasoned* medical opinion") (emphasis added).

Notwithstanding whether the ALJ accorded Drs. Bajwa's and Fino's opinions "little" or "no" weight, he discredited their opinions as not well-reasoned or well-documented. Decision and Order on Remand at 13-14. Thus, he permissibly found their opinions insufficient to meet Employer's burden to rebut the presumption of legal pneumoconiosis by a preponderance of the evidence. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Hawkinberry*, 25 BLR at 1-254-55 (rebuttal precluded where

[5] We affirm, as unchallenged on appeal, the ALJ's credibility determinations regarding Drs. Bajwa's and Fino's opinions. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 13-14.

ALJ accorded "less weight" to physicians' opinions that the claimant's impairment was due solely to smoking).

We therefore affirm the ALJ's finding that Employer failed to disprove the presumed existence of legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); Decision and Order on Remand at 16. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

To disprove disability causation, Employer must establish "no part of [Claimant's] respiratory or pulmonary disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii). The ALJ found neither Dr. Bajwa's nor Dr. Fino's opinion was sufficiently credible to meet Employer's burden. Decision and Order on Remand at 21. Employer raises no contention of error in the ALJ's finding that it failed to rebut disability causation beyond its arguments addressed above; thus, we further affirm his finding that Employer failed to rebut the presumption at 20 C.F.R. §718.305(d)(1)(ii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 21.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge