U.S. Department of Labor

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

BRB No. 22-0248 BLA

GLEN K. LAWSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EXTRA ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
NEW HAMPSHIRE INSURANCE COMPANY C/O AIG	)	DATE ISSUED: 04/26/2023
	)	
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 of Noran J. Camp, Administrative Law Judge, United States Department of Labor.

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

Mark J. Grigoraci (Robinson & McElwee PLLC), Charleston, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Noran J. Camp's Decision and Order Awarding Benefits (2019-BLA-05048) rendered on a claim filed on June 22, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with twelve years of coal mine employment and thus found he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] Considering whether Claimant established entitlement to benefits without the presumption, the ALJ accepted the parties' joint stipulation that Claimant has a totally disabling respiratory or pulmonary impairment. He further found Claimant established legal pneumoconiosis, but not clinical pneumoconiosis, and determined Claimant is totally disabled due to legal pneumoconiosis.[2] 20 C.F.R. §§718.202(a), 718.204(b), (c). Accordingly, the ALJ awarded benefits.

On appeal, Employer challenges the ALJ's findings on legal pneumoconiosis, disease causation, and disability causation. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has 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. The parties stipulated Claimant has less than the required fifteen years of coal mine employment. Joint Prehearing Statement at 1.

[2] "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).

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 & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Entitlement Under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions,[4] Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must establish that he suffers from 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). A miner need not establish that coal mine dust exposure was the sole cause of his respiratory impairment. *Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013).

The ALJ considered five medical opinions as to the existence of legal pneumoconiosis. Decision and Order at 12-20. He credited the opinions of Drs. Forehand, Green, and Raj that Claimant has legal pneumoconiosis over the contrary opinions of Drs. McSharry and Rosenberg. Employer contends the ALJ erred in finding the opinions of Drs. Forehand, Green, and Raj well-reasoned and that he did not give proper reasons for discrediting Drs. McSharry and Rosenberg. We disagree.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 7 n.13; Hearing Transcript at 12-13.

[4] The ALJ found Claimant did not establish complicated pneumoconiosis by a preponderance of the evidence. Decision and Order at 8-9. Thus, Claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304.

Opinions of Drs. Forehand, Green, and Raj

Dr. Forehand performed the Department of Labor complete pulmonary evaluation of Claimant on October 4, 2017, and diagnosed a chronic obstructive lung disease. Director's Exhibit 14. He specifically opined Claimant's "parallel exposure to cigarette smoke for 27 years and occupational exposure to coal mine dust as a heavy equipment operator and truck driver on a strip job combined to significantly contribute to his [obstructive lung disease]." *Id*. at 8. Noting that pneumoconiosis is a fixed impairment, Dr. Forehand also pointed to Claimant's lack of a response to bronchodilation as support for his opinion that Claimant's coal mine dust exposure played a significant role in his obstructive respiratory impairment. *Id*.

Dr. Green examined Claimant on November 17, 2018. Claimant's Exhibit 1. He diagnosed Claimant with chronic obstructive pulmonary disease (COPD) and hypoxemia. *Id*. at 6. He opined Claimant's thirty-nine-year smoking history played a role in his COPD and hypoxemia, but also concluded that Claimant's "12-year occupational history of exposure to respirable coal and rock dust is an additional significant contributing and aggravating factor for the diagnosis of coal workers' pneumoconiosis and [COPD]." *Id*.

Dr. Raj examined Claimant on February 21, 2019, and diagnosed him with COPD due to coal mine dust exposure and smoking. Claimant's Exhibit 3 at 5. He specifically stated "[g]iven the combined history [of exposures], individual contribution cannot be stated but 12 year history of exposure to respirable coal/rock dust has substantial and significant role in patient's pulmonary impairment." *Id*.

The ALJ found the opinions of Drs. Forehand, Green, and Raj reasoned and documented, and consistent with the DOL's position in the preamble to the 2001 revised regulations that the effects of smoking and coal mine dust exposure may be additive. Decision and Order at 14-15, 18. Employer contends the opinions of Drs. Forehand, Green, and Raj are not reasoned because, according to Employer, they merely posit that because Claimant has a history of smoking and coal mine employment, both causes contributed to his pulmonary impairment. Employer's Brief at 21. We disagree.

An ALJ may find a medical opinion reasoned if it is based on an examination, exposure histories, and objective testing. 20 C.F.R. §718.202(a)(4); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987) (reasoned opinion is one in which the ALJ finds the underlying documentation adequate to support the physician's conclusion). Drs. Forehand's, Green's, and Raj's opinions are based on a physical examination, coal mine employment and smoking histories, and objective testing. Director's Exhibit 14; Claimant's Exhibits 1, 3. Thus, contrary to Employer's argument, the ALJ acted within

his discretion in finding them reasoned. *See Compton*, 211 F.3d at 212; *Fields*, 10 BLR at 1-21-22; Decision and Order at 14, 15, 18; Director's Exhibit 14; Claimant's Exhibits 1, 3.

Employer also generally contends the opinions of Drs. Forehand, Green, and Raj are not reasoned because "they cannot determine the individual contribution to the claimant's pulmonary impairment due to smoking versus coal dust exposure." Employer's Brief at 21. But a physician need not apportion the causes of a miner's lung disease to establish the existence of legal pneumoconiosis. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17 (2003). Rather, a physician need only credibly diagnose a chronic respiratory or pulmonary impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Thus, because Drs. Forehand, Green, and Raj specifically opined that Claimant's coal mine dust exposure was a substantial contributing factor in his COPD, we reject Employer's contention of error.

Employer also asserts the ALJ erred in crediting Dr. Forehand's opinion because he did not review Claimant's more recent pulmonary function testing that showed a bronchodilator response. Employer's Brief at 21. However, the ALJ specifically considered that Dr. Forehand did not review the more recent evidence. Decision and Order at 14. He nevertheless permissibly found Dr. Forehand's opinion reasoned and documented based on the objective testing he obtained and evidence he reviewed for his examination. *See Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); Decision and Order at 14.

Because Employer does not identify any other errors in the ALJ's crediting of Drs. Forehand's, Green's, and Raj's opinions as adequately reasoned based on their respective examinations, we affirm the ALJ's credibility findings. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). We further affirm the ALJ's permissible conclusion that their opinions on legal pneumoconiosis are consistent with the scientific evidence, found credible by the DOL in the preamble, that the risks of smoking and coal mine dust exposure can be additive. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); Decision and Order at 14, 15, 18; Director's Exhibit 14 at 8-9; Claimant's Exhibits 1 at 6, 3 at 5. Thus, we affirm the ALJ's determination that the opinions of Drs Forehand, Green, and Raj are sufficient to establish that Claimant has legal pneumoconiosis. 20 C.F.R. §718.202(a)(4).

Opinions of Drs. McSharry and Rosenberg

Employer next contends the ALJ failed to provide valid reasons for discrediting the opinions of Drs. McSharry and Rosenberg that Claimant does not have legal pneumoconiosis. Employer's Brief at 10-13. We disagree.

Dr. McSharry diagnosed emphysema due entirely to smoking, reasoning that smoking-related emphysema is more "common" than coal mine dust-related disease. Employer's Exhibit 4 at 3. The ALJ permissibly found Dr. McSharry's "reliance on the commonality of COPD/emphysema in smokers as compared with nonsmoking miners fails to take into account that there can be an additive effect between smoking and occupational exposure . . . ." Decision and Order at 16; *see* 65 Fed. Reg. at 79,940, 79,943.

The ALJ also correctly noted Dr. McSharry excluded coal mine dust exposure as a causative factor for Claimant's respiratory impairment because the x-rays are negative for clinical pneumoconiosis.[5] Employer's Exhibit 4 at 3. Contrary to Employer's contention, the ALJ permissibly found Dr. McSharry's reasoning inconsistent with the regulations that recognize legal pneumoconiosis can exist in the absence of positive x-ray evidence. 20 C.F.R. §§718.202(a)(4), 718.202(b); *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012) (regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that '[n]o claim for benefits shall be denied solely on the basis of a negative chest [x]-ray'") (internal quotations omitted); Decision and Order at 16; Employer's Exhibit 4 at 3; Employer's Brief at 10-13. Thus, we affirm the ALJ's discrediting of Dr. McSharry's opinion that Claimant does not have legal pneumoconiosis.

Turning to Dr. Rosenberg's opinion, the ALJ accurately noted he conducted a records review and opined Claimant has COPD/emphysema due entirely to smoking. Employer's Exhibit 11 at 9-16. Dr. Rosenberg reasoned that coal dust exposure did not contribute to Claimant's obstructive impairment based, in part, on the markedly disproportionate reduction in the FEV1 value compared to the FVC in Claimant's pulmonary function testing. *Id*. at 9-10. The ALJ permissibly found Dr. Rosenberg's rationale inconsistent with the medical science, found credible by the DOL in the preamble,

[5] Dr. McSharry stated "[w]hen pulmonary function test abnormalities or arterial blood gas measurement abnormalities are present due to coal workers' pneumoconiosis, there is generally evidence of radiographic pneumoconiosis, usually high profusion pneumoconiosis or (more often) progressive massive fibrosis. These are not seen in this case." Employer's Exhibit 4 at 3.

concluding coal mine dust exposure can cause significant obstructive disease shown by a reduction in FEV1 and FEV1/FVC ratio. 65 Fed. Reg. at 79,943; *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Cochran*, 718 F.3d at 323; Decision and Order at 19; Employer's Exhibit 11 at 9-10.

The ALJ also accurately noted that Dr. Rosenberg reasoned Claimant did not have legal pneumoconiosis because he suffers from a diffuse form of emphysema not caused by coal mine dust exposure. Employer's Exhibit 11 at 12-13. The ALJ permissibly found Dr. Rosenberg's opinion inadequately explained given the DOL's recognition of scientific evidence that coal mine dust can cause emphysema, without distinguishing among its types, and that coal dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms. 65 Fed. Reg. at 79,941, 79,943; *see Stallard*, 876 F.3d at 672; Decision and Order at 19 n.46.

As the ALJ provided valid reasons for discrediting Dr. Rosenberg's opinion, we affirm his finding it is entitled to no weight.[6] *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Employer's arguments on legal pneumoconiosis are a request to re-weigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and that he satisfied his overall burden to prove he has pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[7] Decision and Order at 20-21.

[6] Thus, we need not address Employer's remaining arguments that the ALJ erred in rejecting Dr. Rosenberg's opinion based on his reliance on Claimant's bronchodilator response and because he did not account for the fact that both smoking and coal mine dust exposure could cause Claimant's pulmonary impairment. *See* Employer's Brief at 13.

[7] Having rejected Employer's contention that Claimant did not establish legal pneumoconiosis, we also reject its assertion that the ALJ erred in finding Claimant's pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203(b). Employer's Brief at 21. The ALJ properly found he was not required to separately determine the cause of the legal pneumoconiosis at 20 C.F.R. §718.203, as his finding at 20 C.F.R. §718.202(a)(4) necessarily subsumed that inquiry. *See Kiser v. L & J Equipment Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co., Inc.*, 21 BLR 1-147, 1-151 (1999); 20 C.F.R. §718.203(b); Decision and Order at 21.

Disability Causation

To establish disability causation, Claimant must prove his legal pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

Employer argues that because the ALJ erred in finding Claimant has legal pneumoconiosis, he necessarily erred in finding Claimant's total disability is due to legal pneumoconiosis. Employer's Brief at 22-23. Since we disagree that he erred in finding legal pneumoconiosis, we reject this argument. Moreover, because the physicians agree that Claimant has disabling COPD, the ALJ's determination that Claimant's disabling COPD constitutes legal pneumoconiosis necessarily encompassed a finding that Claimant is totally disabled due to legal pneumoconiosis. *Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 186-87 (4th Cir. 2014) (death causation satisfied where the court found the miner's COPD constituted legal pneumoconiosis and all medical experts agreed COPD contributed to the miner's death); *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 255-56 (2019); Decision and Order at 21-22. Further, the ALJ properly rejected the opinions of Drs. McSharry and Rosenberg on the issue of disability causation because they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that Claimant has the disease, which we have affirmed. *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504 (4th Cir. 2015); Decision and Order at 22; Employer's Exhibits 4 at 3, 11 at 9-15.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established he is totally disabled due to legal pneumoconiosis based on Drs. Forehand's, Raj's, and Green's opinions. 20 C.F.R. §718.204(c); Decision and Order at 22. Consequently, we affirm the ALJ's finding that Claimant established entitlement to benefits under 20 C.F.R. Part 718. Decision and Order at 22.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge