U.S. Department of Labor

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

BRB No. 22-0368 BLA

TAUL D. MOORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BRIDGER COAL COMPANY	)	
	)	DATE ISSUED: 04/28/2023
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 Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, for Claimant.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Steven B. Berlin's Decision and Order Awarding Benefits (2019-BLA-05320) rendered on a claim filed on September 29, 2016, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established twenty-nine years of above-ground coal mine employment in conditions substantially similar to those in an underground mine and 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). The ALJ also found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[2] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive response.

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).

Rebuttal of the 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[4] or that "no part of [his] respiratory or pulmonary total disability

[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 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 finding of twenty-nine years of qualifying coal mine employment and that Claimant established a totally disabling respiratory impairment, thus invoking the rebuttable presumption at Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2, 29.

[3] The Board will apply the law of the United States Court of Appeals for the Tenth Circuit because Claimant performed his last coal mine employment in Wyoming. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[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). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e*., the conditions characterized by permanent deposition of substantial

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.[5] Decision and Order at 29.

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); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer argues that the ALJ conflated the issues of disability (whether Claimant has a totally disabling respiratory impairment) and disease (whether Claimant's lung disease or impairment is due to coal mine dust exposure) and applied an improper legal standard. Employer's Brief at 18. To the contrary, although part of the ALJ's analysis of legal pneumoconiosis confusingly focuses on Dr. Farney's opinion as to whether Claimant's objective testing is qualifying for total disability,[6] his remaining analysis demonstrates that he properly considered whether Employer's experts affirmatively established Claimant does not have legal pneumoconiosis, i.e., a "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); Decision and Order at 27-29.

Moreover, the ALJ did not reject Drs. Basheda's and Farney's opinions for failing to satisfy an improper legal standard. Rather, as discussed below, he acted within his discretion in concluding their opinions were not adequately reasoned.

Dr. Basheda conducted a review of medical records and diagnosed Claimant with moderate tobacco-induced chronic obstructive pulmonary disease (COPD) with an

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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).

[5] The ALJ found Employer rebutted the existence of clinical pneumoconiosis based on the x-ray and medical opinion evidence. Decision and Order at 26-27; *see* 20 C.F.R. §718.305(d)(1)(i)(B).

[6] A "qualifying" pulmonary function study yields results equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields results exceeding those values. See 20 C.F.R. §718.204(b)(2)(i).

asthmatic component and air trapping. Employer's Exhibits 6 at 16-17, 8 at 8. He noted Claimant had "a significant improvement in his spirometry after bronchodilators," moving from a severe obstruction to a moderate obstruction, which he found was more consistent with COPD/asthma due to cigarette smoking with no contribution from coal dust exposure. Employer's Exhibit 6 at 17; *see* Employer's Exhibit 8 at 9-14. Dr. Farney evaluated Claimant and reviewed additional records in similarly concluding Claimant's "moderate to severe airflow obstruction with a positive bronchodilator response" is due solely to cigarette smoke exposure. Director's Exhibit 19; *see* Employer's Exhibit 7 at 31-36. He agreed that Claimant still had a moderate impairment after the administration of bronchodilators but indicated it "was a significant improvement." Employer's Exhibit 7 at 19.

Contrary to Employer's assertion, the ALJ considered the entirety of Drs. Basheda's and Farney's opinions and permissibly found they failed to adequately explain why the November 22, 2016 pulmonary function study, which "produced qualifying values after Claimant was treated with a bronchodilator that supposedly reverses in whole or in part tobacco-related COPD demonstrates that 29 years of coal dust exposure had no impact at all."[7] Decision and Order at 28; *Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d

[7] Although Employer correctly notes the ALJ concluded Drs. Farney and Basheda did not credibly explain why coal dust exposure had "no impact" on Claimant's impairment, the ALJ's phrasing does not demonstrate application of an improper, heightened legal standard. Employer's Brief at 18. The ALJ simply found the physicians did not credibly explain how *they* concluded coal mine dust exposure did not impact Claimant's impairment. Decision and Order at 28-29; Director's Exhibit 19; Employer's Exhibits 6-8.

Dr. Basheda reviewed the designated November 22, 2016 pulmonary function study, which had qualifying values before and after the administration of bronchodilators, and the designated April 20, 2017 pulmonary function study, which had qualifying values before the administration of bronchodilators but no post-bronchodilator results due to a miscommunication. Employer's Exhibit 6; *see* Director's Exhibits 17, 19. Prior to his deposition, he considered additional records, including the designated February 17, 2020 pulmonary function study, which had qualifying values before the administration of bronchodilators but non-qualifying values after. Employer's Exhibit 8 at 7; *see* Claimant's Exhibit 2. Dr. Farney reviewed all of the designated pulmonary function studies as well. Director's Exhibit 19; Employer's Exhibit 7 at 8. Despite the more recent February 2020 study showing non-qualifying values after the administration of bronchodilators, both physicians continued to opine that Claimant's impairment was only partially reversible. Employer's Exhibits 7 at 19, 8 at 9-11.

871, 873 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993); Director's Exhibit 19; Employer's Exhibits 6-8; Employer's Brief at 8-18; *see also* Decision and Order at 13-15, 19-2. Further, given the Department of Labor's recognition that the effects of smoking and coal mine dust exposure can be additive, the ALJ permissibly found neither physician adequately explained why coal mine dust exposure did not substantially aggravate Claimant's obstructive lung disease, even if it is due primarily to smoking. 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 831 (10th Cir. 2017); Decision and Order at 14-15, 20-21, 27-28; Director's Exhibit 19 at 14; Employer's Exhibit 6 at 17-19.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Pickup*, 100 F.3d at 873. Employer's arguments amount to a request for the Board to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because the ALJ permissibly discredited the opinions of Drs. Farney and Basheda,[8] we affirm his determination that Employer failed to establish Claimant does not have legal pneumoconiosis.[9] 20 C.F.R. §718.305(d)(1)(i)(1); Decision and Order at 27-29.

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. Basheda and Farney because neither diagnosed legal pneumoconiosis, contrary to his finding that Employer failed to disprove Claimant has the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Toler v. E. Assoc. Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); *Big Branch Res., Inc. v. Ogle*, 737 F.3d

[8] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Basheda and Farney that Claimant does not have legal pneumoconiosis, we need not address Employer's additional arguments concerning the ALJ's weighing of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 8-18, 26.

[9] Because Employer bears the burden of proof on rebuttal and we affirm the ALJ's rejection of its experts' opinions, we need not address Employer's arguments concerning the weighing of Drs. Rose's, Sood's, and Gottschall's opinions that Claimant has legal pneumoconiosis. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); Employer's Brief at 18-26.

1063, 1074 (6th Cir. 2013); Decision and Order at 29. Employer raises no specific allegations of error as to the ALJ's findings other than its assertion that Claimant does not have legal pneumoconiosis, which we have rejected. 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.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge