U.S. Department of Labor

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

BRB No. 22-0424 BLA

BILLY R. MATICS, JR. Claimant-Respondent v. TALON RESOURCES, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/14/2023 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for Claimant.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Patricia J. Daum's Decision and Order Awarding Benefits (2019-BLA-05705) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim[1] filed on August 29, 2017.

The ALJ credited Claimant with twenty-one years of underground coal mine employment and found he has a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §§718.204(b), 718.305(b)(1)(i). She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[2] and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). Further, she 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.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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[1] Claimant filed one previous claim, which the district director denied on June 2, 2009, because Claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 1.

[2] 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.

[3] Where a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant's prior claim was denied for failure to establish the existence of pneumoconiosis, he had to submit new evidence establishing that element of entitlement in order to obtain review of his current claim on the merits. *See* 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3.

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established twenty-one years of underground coal mine employment and a totally disabling

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.[5] 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).

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[6] 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). The ALJ found Employer failed to establish rebuttal by either method.[7]

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 v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). Employer relies on the opinions of Drs. Zaldivar and Basheda that Claimant does not have legal pneumoconiosis. Director's Exhibit 23; Employer's Exhibits 5, 8, 9. It argues the ALJ improperly substituted her opinion for that of a medical expert and otherwise erred in discrediting their opinions. Employer's Brief at 5-12. We disagree.

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respiratory or pulmonary impairment, and therefore invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.204(b)(2), 718.305(b); Decision and Order at 5, 38.

[5] We will apply the law of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 5, 7.

[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] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 47.

Dr. Zaldivar opined Claimant has a totally disabling respiratory impairment caused by asthma, tobacco smoke exposure, and post-surgical changes, but unrelated to coal dust exposure. Director's Exhibit 23 at 5-6; Employer's Exhibit 8 at 31. He opined that the combination of asthma and tobacco smoke exposure fully explains Claimant's lung disease and in light of the absence of radiographic evidence of pneumoconiosis, there was no need to consider "hypothetical damage" from coal mine dust exposure. Employer's Exhibit 8 at 35.

Dr. Basheda opined Claimant has tobacco smoke-induced chronic obstructive pulmonary disease (COPD) and asthma, and both conditions are unrelated to coal mine dust exposure. Employer's Exhibit 5 at 16-19. He noted that Claimant's impairment showed variability and reversibility which are more consistent with asthma and tobacco smoke-induced COPD. *Id*.; Employer's Exhibit 9 at 14-15, 19-20, 22-23. Further, he opined that he could exclude coal mine dust as a causative factor because his diagnosis of tobacco smoke-induced disease and asthma explained his findings without any reason to implicate coal mine dust exposure as a cause. Employer's Exhibit 9 at 23.

Contrary to Employer's arguments, the ALJ permissibly found the opinions of Drs. Zaldivar and Basheda unpersuasive because they failed to explain why Claimant's impairment is not significantly related to, or substantially aggravated by coal mine dust exposure, even if his impairment is primarily caused by asthma or tobacco smoke exposure.[8] *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74 n.4 (4th Cir. 2017) (ALJ permissibly discredited medical opinions that "solely focused on smoking" as a cause of obstruction and "nowhere addressed why coal dust could not have been an additional cause"); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 45-46.

[8] We further reject Employer's argument that the ALJ applied an incorrect legal standard by requiring Drs. Zaldivar and Basheda to "rule out" legal pneumoconiosis. Employer's Brief at 5-6, 9, 11-12. The ALJ correctly stated that to rebut the presumption of legal pneumoconiosis, Employer must "prov[e] that a miner does not have a lung disease 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment' by a preponderance of the evidence." Decision and Order at 38, *quoting* 20 C.F.R. §718.201(b). Moreover, the ALJ did not discredit the opinions of Drs. Zaldivar and Basheda because they failed to satisfy an erroneous heightened legal standard. Rather, she noted both physicians ruled out coal dust exposure as a cause or contributor to Claimant's impairment, and permissibly found their opinions unpersuasive. Decision and Order at 45-47.

Further, the ALJ acknowledged that Dr. Zaldivar diagnosed asthma because Claimant's pulmonary function testing demonstrated that his obstructive impairment improved with bronchodilators. Decision and Order at 45. The ALJ permissibly found this reasoning unpersuasive because the "post-bronchodilator results in both [pulmonary function] tests designated in the present claim, as well as the results from [Claimant's] treatment records, are all still qualifying"[9] for total disability and Dr. Zaldivar did not address whether coal mine dust exposure aggravated the irreversible impairment. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012); *Consol. Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); Decision and Order at 45.

Because it is supported by substantial evidence, we affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing Claimant does not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

Upon finding Employer did not disprove pneumoconiosis, the ALJ addressed whether Employer established that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The ALJ rationally discredited the opinions of Drs. Zaldivar and Basheda regarding the cause of Claimant's total disability because they failed to diagnose legal pneumoconiosis, contrary to the ALJ's 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); Decision and Order at 48-49. We therefore affirm the ALJ's determination that Employer failed to establish that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii), and the award of benefits.

[9] A "qualifying" pulmonary function study yields results equal to or less than the applicable table values 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).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge