U.S. Department of Labor

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

BRB No. 22-0439 BLA

CHARLES THOMPSON Claimant-Respondent v. CONSOL OF KENTUCKY, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/25/2023 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits in a Subsequent Claim (2020-BLA-05374) 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 miner's subsequent claim.[1]

The ALJ found Claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined 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),[2] and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §§718.305, 725.309. Further, he found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it failed to 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 substantive response.

[1] Claimant filed a previous claim on December 14, 2010, which the district director denied because the evidence did not establish any element of entitlement. Director's Exhibit 1.

[2] Section 411(c)(4) 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.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must deny the subsequent claim unless he 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 the district director denied Claimant's prior claim for failure to establish any element of entitlement, he had to submit new evidence establishing at least one element to warrant a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

[4] Employer also generally states that the "medical report upon which the finding of total disability rests is flawed in that it considers an inaccurate coal mine employment history and an inaccurate smoking history." Employer's Brief at 8. But Employer does

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).

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,[6] or that "no part of

---

not identify which medical report it is referring to – Dr. Harris and Dr. Rajbhandari each opined Claimant is totally disabled – or explain how, even if accurate, this affected the ALJ's weighing of the medical opinion evidence on total disability. *See* Director's Exhibit 11 at 4; Claimant's Exhibits 1 at 6 (unpaginated), 2 at 5 (unpaginated). Because Employer's contention is inadequately briefed, we decline to address it. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Moreover, Employer does not otherwise argue the ALJ erred in finding total disability established or challenge the ALJ's finding that the blood gas studies support a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii). Consequently, we affirm the ALJ's determination that Claimant established total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 18. We also affirm, as unchallenged on appeal, the ALJ's finding that Claimant established fifteen years of qualifying employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7, 10, 18-19. Thus, we further affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). Decision and Order at 24.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 27-28; 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

[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 rebutted the presumption that Claimant suffers from clinical pneumoconiosis but did not rebut the presumption that he has legal pneumoconiosis or that no part of his total disability was caused by it. Decision and Order at 19-24.

Employer contends the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption. Employer's Brief at 8-10. It contends the ALJ erred in rejecting Dr. Rasmussen's opinion on rebuttal because it asserts he had a better understanding of Claimant's smoking and coal mine employment histories and was the only physician to "thoroughly address the issue of causation in light of [Claimant's] complex medical history." *Id.* at 9-10. We disagree.

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); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The Sixth Circuit holds an employer can "disprove the existence of legal pneumoconiosis by showing that [the miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal-dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id*. at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relies on Dr. Rasmussen's opinion to disprove legal pneumoconiosis.[7] Decision and Order at 22-23. Dr. Rasmussen conducted the Department of Labor's complete pulmonary evaluation of Claimant on May 27, 2011, in conjunction with his prior claim. Director's Exhibit 1 at 36. He opined Claimant's pulmonary function and blood

---

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 also considered the opinions of Drs. Harris and Rajbhandari, who both diagnosed legal pneumoconiosis. Decision and Order at 23; Director's Exhibit 11; Claimant's Exhibits 1, 2. As their opinions do not aid Employer on rebuttal, we need not address Employer's assertion that Dr. Harris's opinion is not credible because he relied on inaccurate coal mine employment and smoking histories. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *see* Employer's Brief at 8-10.

gas study results were "normal." *Id.* at 39, 42. In addition, he opined that "[n]either the [Claimant's] cigarette smoking nor his coal mine dust exposure has caused measurable loss of resting lung function" and that there was "insufficient evidence to justify a diagnosis of either legal or clinical pneumoconiosis." *Id.* at 42.

The ALJ found Dr. Rasmussen's opinion was consistent with the objective testing results available to him in 2011 but was not consistent with the more recent medical evidence, developed at least seven years later. Decision and Order at 14, 18, 22-23. The ALJ permissibly found the medical evidence developed between 2018 and 2020 to be more probative of Claimant's current pulmonary condition due to the progressive nature of pneumoconiosis and thus accorded no weight to Dr. Rasmussen's opinion.[8] *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993) (given the progressive nature of pneumoconiosis, when a miner's condition deteriorates, a later test or exam can be "a more reliable indicator of the miner's condition than an earlier one") (citation omitted); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (ALJs must do a qualitative analysis of conflicting disability evidence); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc) (more recent medical evidence may be accorded greater probative value than medical evidence submitted with a prior claim because of the progressive nature of pneumoconiosis); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (when recent tests or exams show a miner's condition has deteriorated, "[a]ll other considerations aside, the later evidence is more likely to show the miner's condition")); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993) ("[A] comparison of medical reports and tests over a long period may conceivably provide a physician with a better perspective than the pioneer examiner."); Decision and Order at 13-14, 18, 22-23.

To the extent Employer generally asserts Claimant failed to establish he "suffer[s] from pneumoconiosis" based on the negative x-ray evidence, it misstates the relevant legal standards. *See* Employer's Brief at 8-9. As we have previously affirmed the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption, it is Employer's burden to rebut the presumption of legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). Moreover, the regulations recognize that legal pneumoconiosis can be present in the absence of a positive x-ray. *See* 20 C.F.R. §§718.201(a)(2), (b), 718.202(a)(4) (physician can render a credible diagnosis of pneumoconiosis notwithstanding a negative x-ray reading); *Harman Mining Co. v. Director, OWCP*

[8] Because the ALJ gave permissible reasons for rejecting Dr. Rasmussen's opinion on legal pneumoconiosis, we need not address Employer's additional challenges to the ALJ's evaluation of his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 22-23; Employer's Brief at 8-10.

[*Looney*], 678 F.3d 305, 313 (4th Cir. 2012) (regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that no claim for benefits shall be denied solely on the basis of a negative chest x-ray") (internal quotations omitted).

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ acted within his discretion in rejecting Dr. Rasmussen's opinion, we affirm his determination that Employer did not disprove legal pneumoconiosis. *See Young*, 947 F.3d at 407-08; Decision and Order at 22-23. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of the [Claimant'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); Decision and Order at 24. Contrary to Employer's contention, the ALJ permissibly discredited Dr. Rasmussen's opinion on the cause of Claimant's disability because he did not diagnose legal pneumoconiosis, contrary to the ALJ's determination.[9] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 24; Employer's Brief at 9-10. We therefore affirm the ALJ's finding that Employer failed to establish that no part of Claimant's pulmonary disability is caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

[9] Dr. Rasmussen did not address whether legal pneumoconiosis caused Claimant's total respiratory disability independent of his conclusion that Claimant does not have the disease.

Accordingly, the ALJ's Decision and Order Awarding Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge