U.S. Department of Labor

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

BRB No. 20-0296 BLA

RONALD DAVID ROBINETTE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STURGON COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONUOSIS FUND	)	DATE ISSUED: 08/31/2021
	)	
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 Monica Markley, Administrative Law Judge, United States Department of Labor.

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

Andrea L. Berg (Jackson Kelly, PLLC), Morgantown, West Virginia, for Employer and its Carrier.

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

BUZZARD, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Monica Markley's Decision and Order Awarding Benefits (2015-BLA-05401) rendered on a subsequent claim[1] filed on November 26, 2013, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 19.07 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found he invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] and established a change in an applicable condition of entitlement.[3] 30 U.S.C. §921(c)(4); 20 C.F.R. §725.309(c). She further found Employer did not rebut the presumption and awarded benefits.

[1] Claimant filed eight previous claims, each of which was denied. Director's Exhibits 1-8. The district director denied Claimant's most recent prior claim, filed on January 22, 2009, for failure to establish any element of entitlement. Director's Exhibit 8.

[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 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] If a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the ALJ 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 failed to establish any element of entitlement in his prior claim, he had to establish at least one element of entitlement in order to obtain review of the merits of his current claim. *See White*, 23 BLR at 1-3; Director's Exhibit 8.

On appeal, Employer contends that the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[4, 5] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.

The Benefit 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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965).

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden of proof shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[7] 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.

[4] Employer further contends the ALJ employed an improper method of calculation to find Claimant established 19.07 years of underground coal mine employment. Employer's Brief at 4 n.3. It concedes, however, that Claimant established at least fifteen years of underground coal mine employment necessary to invoke the Section 411(c)(4) presumption. Any such error is therefore harmless. *Id.*; *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[5] We affirm, as unchallenged on appeal, the ALJ's findings 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). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 28, 33.

[6] This case arises within the jurisdiction of the United States Court of Appeals for Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 23.

[7] "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).

§718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.

To disprove legal pneumoconiosis,[8] Employer must demonstrate 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. Fino and Basheda. Dr. Fino initially opined Claimant does not have a respiratory or pulmonary impairment. Director's Exhibit 41 at 13. After reviewing additional evidence, however, he diagnosed Claimant with asthma unrelated to coal mine employment. Employer's Exhibit 13 at 26-27. Dr. Basheda similarly diagnosed asthma unrelated to coal mine dust exposure, and opined Claimant's impairment is due in part to his weight. Employer's Exhibits 1 at 36-37; 14 at 27-28. The ALJ discounted their opinions because she found they did not adequately explain why coal mine dust exposure did not contribute to Claimant's impairment. Decision and Order at 38-39.

Employer contends the ALJ erred in discrediting Drs. Fino's and Basheda's opinions. Employer's Brief at 8-17. We disagree. Both excluded legal pneumoconiosis based, in part, on the partial reversibility of Claimant's impairment in response to bronchodilators on pulmonary function testing. Director's Exhibit 41 at 21-25; Employer's Exhibit 14 at 18-19. The ALJ permissibly found their reasoning unpersuasive because partial reversibility of Claimant's impairment does not preclude the possibility Claimant has legal pneumoconiosis.[9] *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Consol. Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Consol. Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 38-39.

Drs. Fino and Basheda also excluded legal pneumoconiosis because Claimant first developed respiratory symptoms after leaving coal mine employment. Dr. Fino stated that, while "pneumoconiosis can be latent and progressive," Claimant "left the [coal] mining industry with normal lung function," Employer's Exhibit 13 at 23, and the fact that Claimant developed a reversible impairment not present when he left coal mining suggests

[8] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 36.

[9]We note that after administration of bronchodilators Claimant's FEV1 and FVC values, albeit higher, were below predicted levels.

Claimant's impairment is unrelated to coal mine dust exposure. *Id.* at 25. Dr. Basheda opined Claimant's asthma could not be related to coal mine dust exposure because he would not have been able to tolerate exposure to coal mine dust while working without suffering serious health consequences, whereas Claimant did not develop asthma symptoms until "long after he left the coal mines." Employer's Exhibit 14 at 28. Contrary to Employer's contention, we see no error in the ALJ's determination that this aspect of their opinions is unpersuasive in light of the Department of Labor's (DOL) recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (medical opinion not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); Decision and Order at 38-39.

Dr. Fino further opined the preamble's discussion of the latent and progressive nature of legal pneumoconiosis is "really talking about [chronic obstructive pulmonary disease] and emphysema," not asthma. Employer's Exhibit 13 at 26. Contrary to Employer's argument, the ALJ permissibly concluded this aspect of his opinion is inconsistent with the DOL's recognition that "the term 'chronic obstructive pulmonary disease' (COPD) includes . . . asthma", Decision and Order at 38, *quoting* 65 Fed. Reg. at 79,939, and that Dr. Fino did not adequately explain why Claimant's asthma could not have been significantly related to or substantially aggravated by coal mine dust exposure. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012); *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 861 (D.C. Cir. 2002); *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 38.

As the trier-of-fact, the ALJ has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 391, 324 (4th Cir. 2013); *Looney*, 678 F.3d at 314-15. The Board cannot reweigh the evidence or substitute its inferences for those of the ALJ. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the ALJ's finding that the opinions of Drs. Fino and Basheda are "not well-reasoned" and thus do not satisfy Employer's burden to disprove the existence of legal pneumoconiosis. Decision and Order at 39; *see Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441. We thus affirm the ALJ's finding that Employer failed to disprove legal pneumoconiosis.[10]

[10] Because Employer has the burden of proof and we affirm the ALJ's discrediting of its medical experts, we need not address its argument that the ALJ erred in weighing the opinions of Drs. Green and Forehand that Claimant has legal pneumoconiosis or that she

20 C.F.R. §718.305(d)(1)(i); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015).

Disability Causation

The ALJ next considered whether Employer rebutted the Section 411(c)(4) presumption by establishing that "no part of [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). Employer's argument that the ALJ erred in finding it did not disprove disability causation is based on its arguments that Claimant does not have legal pneumoconiosis, which we have rejected.[11] Moreover, she permissibly discredited the opinions of Drs. Fino and Basheda because neither doctor diagnosed legal pneumoconiosis, contrary to her finding that Employer failed to disprove Claimant has the disease. *See Epling*, 783 F.3d at 504-05; *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). We therefore affirm the ALJ's determination that Employer failed to prove that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

---

erred by not reconciling their opinions that Claimant has an obstructive impairment with the opinions of Drs. Fino and Basheda that he does not. *See Larioni*, 6 BLR at 1-1278; Director's Exhibits 22, 39, 41, 48; Claimant's Exhibit 1; Employer's Exhibits 1, 13, 14; Employer's Brief at 5-8, 17-21.

[11] Employer further argues the ALJ erroneously discounted Dr. Basheda's opinion that Claimant's disability is not caused by pneumoconiosis because she inaccurately concluded that he stated Claimant is not disabled. Employer's Brief at 23. Contrary to Employer's argument, the ALJ accurately recounted Dr. Basheda's opinion that Claimant would be able to perform his last coal mine work and that he would only be disabled during periods of uncontrolled asthma. Employer's Exhibit 1 at 37; 14 at 26-27, 29.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

I concur in the result only:

JUDITH S. BOGGS, Chief
Administrative Appeals Judge