U.S. Department of Labor

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

BRB No. 21-0353 BLA

EDWARD A. LIDWELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 8/15/2022
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 Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

Kara L. Jones (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Awarding Benefits (2017-BLA-05906) on a miner's claim filed on August 17, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant established twelve years of surface coal mine employment and further found he is totally disabled by a respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Because Claimant had less than fifteen years of coal mine employment, 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 Claimant's entitlement under 20 C.F.R. Part 718, however, the ALJ found Claimant established that he is totally disabled due to legal pneumoconiosis and awarded benefits. 20 C.F.R. §§718.202, 718.204(b), (c).

On appeal, Employer challenges the ALJ's finding as to the length of Claimant's smoking history and argues he erred in finding Claimant established legal pneumoconiosis and disability causation. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response. Employer filed a reply brief, reiterating its contentions.[2]

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)(4) presumption, 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

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes 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); 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established twelve years of coal mine employment and a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 26; Hearing Transcript at 5-6.

[3] The Board will apply the law of the United States Court of Appeals for the Seventh Circuit because Claimant performed his last coal mine employment in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Director's Exhibit 3; Hearing Transcript at 6.

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).

Smoking History

The ALJ found that Claimant had a thirty-five pack-year smoking history, relying on Claimant's testimony and the reports by Drs. Krefft and Cohen.[4] Decision and Order at 4-7. Employer contends the treatment records are more credible because they were not obtained in the course of litigation and prove Claimant has a longer pack-year smoking history than the ALJ determined. Employer's Brief at 6-7. We disagree.

Contrary to Employer's contention, the treatment records are not inherently more reliable than the other evidence in the record when determining the length of Claimant's smoking habit. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35-36 (1991) (en banc) (no logic in inference that evidence prepared for trial is less reliable than other evidence). The ALJ permissibly gave the treatment records little weight in determining Claimant's smoking history because there is a fifty-eight year variance in the smoking histories reported in them and no explanation as to how the various histories were obtained. *See Tackett v. Cargo Mining Co*., 12 BLR 1-11, 1-14 (1988) (en banc) (the Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable); Decision and Order at 5.

We also see no error in the ALJ's reliance, in part, on Claimant's testimony in reaching his determination. Although Claimant was unsure of the specific dates he may have smoked, or stopped smoking and restarted, the ALJ permissibly found his overall testimony credible that he smoked a total of thirty-five pack-years since it was generally consistent with the more detailed smoking histories recorded by Drs. Cohen and Krefft.[5]

[4] Claimant testified he smoked for thirty-seven years; the treatment records included smoking histories ranging from 50-108 pack-years; Dr. Cohen reported that Claimant had a 25-30 pack-year smoking history; and Dr. Krefft reported a smoking history of 30-35 pack-years. Director's Exhibit 15 at 10-11; Claimant's Exhibit 7 at 2, 4; Employer's Exhibits 9, 10, 12, 18 at 10-11; Hearing Transcript at 23-26, 40-41. In contrast, Dr. Paul reported that Claimant smoked 75 pack-years, while Dr. Fino reported he smoked 100 pack-years – both relying on Claimant's treatment records. Employer's Exhibits 4 at 1-2, 5 at 9-10; 6 at 8-9, 11; 7 at 9-10.

[5] Dr. Cohen gave a more detailed account of Claimant's smoking history, describing that Claimant smoked one-half pack a day from ages 24-36, switched to a pipe until age

Clark v. Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989) (en banc) (ALJ determines witness credibility); *Tackett*, 12 BLR at 1-14; Decision and Order at 6-7; Hearing Transcript at 23-26, 40-41.

To the extent Drs. Paul and Fino relied primarily on the treatment records to support their recorded smoking histories of seventy-five and one hundred pack-years, respectively, we affirm the ALJ's rejection of those histories. *See Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988); Decision and Order at 5, 6; Employer's Exhibits 4 at 1-2; 5 at 9-10; 6 at 8-9, 11; 7 at 9-10; 9, 10, 12. Moreover, the ALJ permissibly found Dr. Fino failed to explain why he "settled on 100 pack[-]years" when there are varying histories reported in the treatment records, ranging from 50 to 108 pack-years. *See Clark*, 12 BLR at 1-155 (ALJ may reject an opinion where the doctor fails to explain it). The ALJ also permissibly found Dr. Paul's opinion equivocal as to the length of Claimant's smoking history.[6] *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988) (ALJ may reject an equivocal medical opinion); Decision and Order at 5, 6; Employer's Exhibits 4 at 1-2; 5 at 9-10; 6 at 8-9, 11; 7 at 9-10.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant smoked thirty-five pack-years. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 669-70 (4th Cir. 2017) (affirming ALJ's smoking history determination based on medical opinions and a claimant's testimony as supported by substantial evidence).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must demonstrate he has 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). The ALJ credited Dr.

40, restarted smoking about fifteen cigarettes a day from ages 40 to 66, up to two packs per day from ages 66-68, and then one-half pack per day from ages 68 to 73. Director's Exhibit 15 at 10-11.

[6] Dr. Paul stated, "It would be fair to state that [Claimant] has a smoking history of approximately 75 pack years *but you can't be sure of this*." Employer's Exhibit 4 at 1 (emphasis added).

Krefft's opinion that Claimant has legal pneumoconiosis over the contrary opinions of Drs. Paul and Fino.[7] Decision and Order at 17-26.

Employer argues the ALJ did not adequately explain his crediting of Dr. Krefft's opinion over those of Drs. Paul and Fino. Employer's Brief at 8-24. We disagree.

Dr. Krefft opined that Claimant has chronic obstructive pulmonary disease (COPD) and diagnosed legal pneumoconiosis, explaining that Claimant's respiratory disease is due to both coal mine dust exposure and smoking. Claimant's Exhibit 7 at 2; Employer's Exhibit 18 at 10-12, 15, 49-50. Employer first asserts Dr. Krefft's opinion is not credible because she admitted it was not possible to quantify the percentage coal mine dust exposure that contributed to Claimant's respiratory impairment. Employer's Brief at 11, *citing* Employer's Exhibit 18 at 39; *see* Claimant's Exhibit 7. But a physician need not specifically apportion the extent to which various causal factors contribute to a respiratory or pulmonary impairment, so long as the physician diagnoses a respiratory condition consistent with the regulatory definition of legal pneumoconiosis. *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003). Dr. Krefft accurately identified legal pneumoconiosis as a chronic lung disease or impairment "significantly related to, or substantially aggravated by" coal mine dust exposure, and opined Claimant suffers from it. Claimant's Exhibit 7 at 2. She further identified coal mine dust exposure and smoking as "the two major exposures . . . that likely account for his disease" and explained his reasons for his conclusion. *Id*. at 2-3. We therefore affirm the ALJ's conclusion that Dr. Krefft's opinion is supportive of a finding of legal pneumoconiosis.

Employer also contends Dr. Krefft misunderstood the nature of Claimant's coal dust exposure because she stated he worked twelve years in *underground* coal mine employment when he actually worked twelve years in *surface* coal mine employment.[8] Employer's Brief at 13-14. But Dr. Krefft was informed that Claimant worked on the surface during her deposition and maintained her opinion that he has legal pneumoconiosis. Employer's Exhibit 18 at 17-18. She noted that "surface mining is . . . associated with coal mine dust lung disease" and testified that the most important factors in determining whether Claimant developed a coal mine dust-related disease is the duration and time periods of his employment, the types of exposures, and his job duties. Employer's Exhibit 18 at 17-18.

[7] The ALJ rejected Dr. Cohen's opinion that Claimant has legal pneumoconiosis as inadequately reasoned. Decision and Order at 21, 26; Director's Exhibit 15.

[8] Having affirmed the ALJ's finding that Claimant smoked 35 pack-years, we reject Employer's argument that Dr. Krefft did not have an accurate understanding of Claimant's smoking history. Decision and Order at 4-7; Claimant's Exhibit 7 at 2, 4; Employer's Exhibit 18 at 33-34.

Thus, the "important part" of her written description of his dust exposure "is really his job duties," such as dragline operator for a "substantial period of time" and "three years doing welding and having [exposure to] some of the particulate matter." *Id*. at 17. Further, her written report specifically describes Claimant's history of coal dust exposure while working as a pumper, dragline oiler and operator, shooter, and in particular as a tipple repairman where he had "float coal dust exposure and also had coal and rock dust exposure directly in his breathing zone while lying down and welding or working on equipment." Claimant's Exhibit 7 at 2, 4.

The ALJ found "Dr. Krefft adequately identified the clinical findings, observations, facts, and other data supporting her legal pneumoconiosis diagnosis." Decision and Order at 20. He noted Dr. Krefft specifically "identified Claimant's symptoms, treatment, smoking history, and length and nature of coal mine employment;" explained the results of objective testing; "described other conditions" that she "ruled-out that could cause Claimant's impairment;"[9] and "identified the medical literature upon which she relied." Decision and Order at 20; Claimant's Exhibit 7 at 4. Given these findings, we affirm the ALJ's permissible determination that Dr. Krefft's opinion is reasoned and documented. *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893 (7th Cir. 1990) (ALJ has discretion to determine whether a physician's conclusion is adequately supported by underlying documentation and therefore reasoned); Decision and Order at 17-21; Claimant's Exhibit 7 at 4-5; Employer's Exhibit 18 at 72-73, 83-90. We also see no error in the ALJ's finding that Dr. Krefft's opinion is consistent with the Department of Labor's recognition in the preamble to the revised 2001 regulations that the risks of smoking and coal mine dust exposure may be additive in causing COPD. 65 Fed. Reg. 79,920, 79,939-41 (Dec. 20, 2000) (recognizing that the risks of smoking and coal mine dust exposure are additive); Decision and Order at 20. We therefore affirm the ALJ's crediting of Dr. Krefft's opinion that Claimant has legal pneumoconiosis.

Regarding Employer's experts, the ALJ accurately noted Dr. Paul excluded a diagnosis of legal pneumoconiosis based, in part, on the lack of radiographic evidence of clinical pneumoconiosis to support a conclusion that Claimant's emphysema was related to coal mine dust exposure. Employer's Exhibits 4, 5, 16. The ALJ permissibly found Dr.

[9] Dr. Krefft explained "there is no evidence of other comorbid conditions such as obstructive coronary artery disease, congestive heart failure, pulmonary hypertension, or venous thromboembolic disease that would explain Mr. Lidwell's chronic hypoxemic respiratory failure, respiratory symptoms of breathlessness and cough or his abnormal diagnostic testing." Claimant's Exhibit 7 at 2. She also opined Claimant's irreversible impairment could not be explained by asthma. *Id*. at 10.

Paul's opinion unpersuasive because it is inconsistent with the Department of Labor's recognition that legal pneumoconiosis may be present in the absence of clinical pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.202(a)(4); *see* 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57 (3d Cir. 2011); Decision and Order at 22; Employer's Exhibits 4 at 3; 5 at 17, 22-24.

Additionally, the ALJ correctly noted that both Dr. Paul and Dr. Fino opined coal mine dust did not cause Claimant's COPD because his pulmonary function studies showed partial reversibility of his obstructive respiratory impairment when a bronchodilator was administered. Employer's Exhibits 4 at 3; 6 at 11. The ALJ permissibly found neither physician adequately explained why coal mine dust exposure did not significantly contribute to the irreversible portion of Claimant's respiratory impairment. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 22, 25-26.

The ALJ's function is to weigh the evidence, draw appropriate inferences, and determine witness credibility. *See Burns*, 855 F.2d at 501. Employer's arguments are a request to reweigh 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.[10] 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); Decision and Order at 26.

Disability Causation

To establish disability causation, Claimant must prove 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 respiratory or pulmonary impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or "[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)(i), (ii).

[10] We reject Employer's contention that the ALJ erred in failing to make a specific finding of disease causation at 20 C.F.R. §718.203, as a determination of legal pneumoconiosis subsumes the inquiry as to whether a miner's disease arose from coal mine employment. *See* 20 C.F.R. §718.203; *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); Decision and Order at 26; Employer's Brief at 24-25; Employer's Reply at 14.

The ALJ found Claimant established disability causation based on Dr. Krefft's opinion.[11] Employer's challenges to the ALJ's crediting of Dr. Krefft's opinion as reasoned and documented on disability causation are the same arguments we found unpersuasive regarding the existence of legal pneumoconiosis. Further, contrary to Employer's contention, the ALJ permissibly discredited the opinions of Drs. Paul and Fino on the cause of Claimant's respiratory disability because they did not diagnose legal pneumoconiosis. Employer's Brief at 26; *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 29; Employer's Exhibits 4-7, 16, 17. Although Dr. Fino indicated his opinion on disability causation would not change even if he were to assume Claimant had legal pneumoconiosis, the ALJ permissibly found this aspect of Dr. Fino's opinion conclusory and unexplained. *See Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988); *Clark*, 12 BLR at 1-155; Decision and Order at 30; Employer's Exhibits 6 at 12; 17.

Moreover, all the doctors agree Claimant is totally disabled by an obstructive respiratory impairment. Decision and Order at 26. Having affirmed ALJ's finding that Claimant's totally disabling impairment *is legal pneumoconiosis*, it follows that legal pneumoconiosis is the cause of Claimant's total disability. *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, 1-255-57 (2019); Decision and Order at 26-30.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established he is totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 26-30.

[11] Dr. Krefft explained that Claimant is totally disabled due to legal pneumoconiosis based on the objective testing, Claimant's histories of smoking and coal mine dust exposure, and the fact he required supplemental oxygen "at rest and during activity." Claimant's Exhibit 7 at 8. Employer argues the ALJ did not consider that Dr. Krefft was unaware Claimant was taken off daytime oxygen in 2013 and therefore only used it at night. Employer's Brief at 13. We see no basis to remand this case for further consideration of Dr. Krefft's opinion. Employer does not dispute Claimant required oxygen and Dr. Krefft's reference to Claimant's oxygen use goes to her overall opinion that Claimant has a disabling oxygenation impairment, consistent with the ALJ's unchallenged finding that Claimant established total disability based on the blood gas studies. Decision and Order at 26. Employer fails to explain why Claimant's nighttime use of oxygen undermines Dr. Krefft's conclusion that his oxygen impairment is due to both smoking and coal mine dust exposure. *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); Claimant's Exhibit 7.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge