U.S. Department of Labor

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

BRB No. 21-0385 BLA

ROCKY D. CRIGGER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OLGA COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 8/29/2022
	)	
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 Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Granting Benefits (2019-BLA-06104)

rendered on a subsequent claim filed on July 27, 2017,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established sixteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she 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 therefore established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.[3] She further found Employer did not 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.

[1] Claimant filed an initial claim on February 9, 2004, which the district director denied on January 27, 2005, because Claimant failed to establish total disability. 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 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); *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 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); *see 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 total disability in his prior claim, he had to submit new evidence establishing this element of entitlement 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 sixteen years of underground coal mine employment, total disability, a change in an applicable condition of entitlement, and invocation of 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), 725.309(c); Decision and Order at 4, 5, 8.

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 Claimant has neither legal nor clinical pneumoconiosis,[6] or that "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]

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),

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because 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 Exhibit 4, 8, 9; Hearing Tr. at 14-15.

[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 that is 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. Decision and Order at 10.

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

The ALJ considered the medical opinions of Drs. Basheda, Spagnolo, and Nader. Decision and Order at 6-8, 10-11; Director's Exhibits 12, 20; Claimant's Exhibits 1, 2; Employer's Exhibits 6, 7, 10, 11. Dr. Basheda diagnosed Claimant with tobacco-smoke-induced chronic obstructive pulmonary disease (COPD) and asthma, but opined there is no evidence of legal pneumoconiosis as Claimant's COPD is not related to coal mine dust exposure. Director's Exhibit 20; Employer's Exhibits 7, 11. Dr. Spagnolo diagnosed Claimant with asthma and chronic heart disease but opined there is no evidence of pneumoconiosis or chronic lung disease arising out of coal mine employment. Employer's Exhibits 6, 10. In contrast, Dr. Nader diagnosed Claimant with legal pneumoconiosis in the form of COPD due to coal mine dust exposure and cigarette smoking. Director's Exhibit 12; Claimant's Exhibit 1.

The ALJ assigned less weight to Drs. Basheda's and Spagnolo's opinions because they did not "address how [Claimant's] coal mine employment and exposure to coal/rock dust would not attribute (sic) to any overall respiratory or pulmonary diagnosis." Decision and Order at 11. She also found Dr. Spagnolo's diagnosis of asthma is not documented because "the overall evidence of record does not support that [Claimant] has an asthmatic condition/asthma." *Id*. She assigned Dr. Nader's opinion "great weight" because he considered "Claimant's histories of coal mine employment and smoking . . . as well as their attribution (sic) thereto." *Id*. at 10-11. Weighing the evidence together, she found Employer failed to rebut the presumption that Claimant has legal pneumoconiosis. *Id*. at 11.

We agree with Employer's argument that the ALJ erred in discrediting the opinions of Drs. Basheda and Spagnolo on the issue of legal pneumoconiosis. Employer's Brief at 3, 6-16. Contrary to the ALJ's finding, both doctors specifically set forth their basis for opining Claimant does not have a lung disease or impairment significantly related to, or substantially aggravated by, coal mine dust exposure.

Dr. Basheda cited aspects of Claimant's objective testing and medical history that he opined are consistent with tobacco smoke-induced COPD with an asthmatic component rather than an obstructive impairment caused by coal mine dust exposure. Director's Exhibit 20. Specifically, he noted Claimant's pulmonary function studies demonstrate an acute bronchodilator response and a partially reversible obstruction, which he explained is consistent with asthma and not a "fixed type of obstruction associated with coal [mine] dust." *Id*. at 10. In addition, he noted Claimant's forced vital capacity results on pulmonary function testing significantly improved from November 2017 to September 2018 and his lung volume measurements initially demonstrated air trapping but subsequently resolved. *Id*. at 10-11. He explained both patterns are not consistent with a fixed obstruction related

to coal mine dust exposure. *Id*. Further, he identified Claimant had symptoms of wheezing and bronchospasms, and experienced "frequent exacerbations of his pulmonary disease marked by increasing shortness of breath, cough. . . and phlegm production" that responded to antibiotic and steroid treatment. *Id*. at 11. He opined the frequent exacerbations "are a manifestation of tobacco induced COPD/asthma" because a "fixed obstruction related to coal [mine] dust would not cause these asthmatic exacerbations outside the coal mine." *Id*.

Additionally, Dr. Basheda explained Claimant "had a positive carboxyhemoglobin level in 2017 reflecting active cigarette smoking." Director's Exhibit 20 at 11. He further noted Claimant was prescribed "medications [that] have been scientifically proven effective in the treatment of tobacco induced COPD/asthma" but are not effective in treating fixed obstructive impairments due to coal mine dust exposure. *Id*. at 12. While acknowledging coal mine dust exposure "can cause asthma," Dr. Basheda explained this "form of asthma would be occupational or work-related asthma" that "occurs in the working environment." *Id*. at 11. Because an individual with this type of asthma would not be able to work in coal mines "for any prolonged period of time," Dr. Basheda opined Claimant's asthma was not "caused by or exacerbated by coal [mine] dust exposure." *Id*. He reiterated his opinion in a supplemental medical report and a deposition. Employer's Exhibits 7, 11.

Similar to Dr. Basheda, Dr. Spagnolo noted Claimant's "carboxyhemoglobin levels are elevated at all but one of [his] examinations and these tests suggest he is still smoking even in 2019." Employer's Exhibit 6 at 9. He recognized Claimant's "long history of cigarette smoking would place him at an increased risk of developing chronic bronchitis, respiratory bronchiolitis, emphysema, interstitial lung fibrosis, lung cancer as well as other cancers and various cardiovascular conditions." *Id*. Further, he listed Claimant's medications, which include "various medical inhalers used in the treatment of asthma and COPD." *Id*.

Moreover, Dr. Spagnolo noted Claimant's resting arterial blood gas test results demonstrate "some variability but are completely normal in November 2017 and September 2018," which he opined is consistent with Claimant's "asthmatic condition." *Id*. at 10. He also opined Claimant's pulmonary function testing demonstrates a "moderately severe obstructive lung defect with no evidence of a restrictive defect." *Id*. Because Claimant's "post-bronchodilator lung tests have demonstrated marked improvement in airflow" in regard to his obstructive impairment, Dr. Spagnolo concluded the impairment is "most consistent with a long-standing chronic asthmatic condition" as buttressed by Claimant's "medical history of asthma." *Id*. He explained this partial bronchoreversibility is not "consistent with pneumoconiosis where lung changes are not reversible." *Id*. Furthermore, he explained:

> Chronic asthma that is untreated or inadequately treated may result in remodeling of the airway and will result in an incomplete airway response to an inhaled bronchodilator. This is the most likely reason that [Claimant's pulmonary function testing] did not show complete [reversibility] of the airway obstruction.

Id. Dr. Spagnolo reiterated his opinion in his subsequent deposition. Employer's Exhibit 10.

As Drs. Basheda and Spagnolo set forth their bases for excluding legal pneumoconiosis, we conclude substantial evidence does not support the ALJ's finding that both doctors did not "address how [Claimant's] coal mine employment and exposure to coal/rock dust would not attribute to any overall respiratory or pulmonary diagnosis." Decision and Order at 11; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013). Because the ALJ failed to weigh their explanations for excluding legal pneumoconiosis, she failed to address relevant evidence and we therefore must vacate her finding assigning their opinions reduced weight. *See* 30 U.S.C. §923(b) (fact finder must address all relevant evidence); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016); *McCune v. Cent. Appalachian Coal Co*., 6 BLR 1-996, 1-998 (1984) (failure to discuss relevant evidence requires remand); Decision and Order at 11.

We also agree with Employer's contention that the ALJ erred in discrediting Dr. Spagnolo's opinion that Claimant's obstructive impairment is due to asthma because she found "the overall evidence of record does not support that [Claimant] has an asthmatic condition/asthma." Decision and Order at 11. As discussed above, both Dr. Basheda and Dr. Spagnolo cited Claimant's medical history which includes prescriptions for medications to treat his asthma. Director's Exhibit 20; Employer's Exhibits 6-7. They both also highlighted partial bronchoreversibility on Claimant's pulmonary function testing as a basis to diagnose the disease. *Id*. To the extent the ALJ interpreted the medical evidence of record to conclude there is no basis for a diagnosis of asthma, she substituted her opinion for that of a medical expert. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987); Decision and Order at 11.

Finally we conclude the ALJ failed to adequately address Claimant's cigarette smoking history when weighing the conflicting opinions on the issue of legal pneumoconiosis. Employer's Brief at 4-6, 9, 11-13.

Dr. Nader indicated Claimant is a former cigarette smoker who started smoking in 1971 and stopped in 1979, for a total of eight years of cigarette smoking. Director's Exhibit 12 at 1-2. He diagnosed Claimant with COPD and opined "it is not possible to distinguish the relative contribution" of cigarette smoking and coal mine dust exposure to Claimant's

pulmonary diagnosis. *Id.* at 3. But he stated that, "given the remote history of smoking" and Claimant's nineteen years of exposure to "coal and rock dust," coal mine dust exposure is a "major contributing and aggravating factor" in the COPD. *Id.* Dr. Nader reiterated his opinion in two supplemental reports, again stating Claimant is a former smoker with an eight-year history of cigarette smoking. Claimant's Exhibits 1 at 3, 2 at 3. In his supplemental reports, however, Dr. Nader stated Claimant started smoking cigarettes in 1993 and stopped in 2001. *Id.*

As discussed above, Drs. Basheda and Spagnolo opined Claimant's elevated carboxyhemoglobin levels indicate he was still an active smoker as late as 2019 and they excluded legal pneumoconiosis, in part, on this basis. Director's Exhibit 20; Employer's Exhibits 6, 7, 10, 11. Thus there is a fundamental disagreement in this case between the medical experts as to the length of Claimant's cigarette smoking history.

Prior to weighing the medical opinion evidence, the ALJ observed there is conflicting information in the record as to Claimant's cigarette smoking history. Decision and Order at 4. She noted Claimant testified he smoked for less than ten years as a teenager and informed Dr. Basheda of the same history, that Dr. Nader recorded a smoking history of eight years, and Dr. Spagnolo stated Claimant smoked from 1976 to 2004. *Id.*; *see* Hearing Tr. at 18; Director's Exhibits 12, 20; Claimant's Exhibits 1, 2; Employer's Exhibits 6, 7. The ALJ found Claimant's "smoking histories span from [ten] to [twenty-eight pack-years]." from 1976 to 2001. Decision and Order at 4.

In calculating Claimant's smoking history length, the ALJ erred by failing to either address Drs. Basheda and Spagnolo's opinions that Claimant's elevated carboxyhemoglobin level indicates he was an active tobacco smoker as late as 2019[8] or adequately explain how she resolved the conflict in the medical opinion evidence on the issue of Claimant's smoking history, including an assessment of his pack-years. Thus, her decision does not comport with the Administrative Procedure Act (APA).[9] 5 U.S.C.

[8] Although Claimant informed Dr. Basheda during his examination that he smoked cigarettes for eight to ten years starting as a teenager, Director's Exhibit 20, Dr. Basheda later testified the "smoking history that [Claimant] gave at the time of [the] examination was inaccurate" because "more recent records have documented greater than ten pack years." Employer's Exhibit 11 at 16-17. He explained Claimant "probably was at least a [thirty to forty pack-year] smoker, smoking anywhere from less than a pack to a pack a day." *Id.* at *18*.

[9] The Administrative Procedure Act requires that every adjudicatory decision include "findings and conclusions, and the reasons or basis therefor, on all the material

§557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Addison*, 831 F.3d at 252-53; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985) (the length and extent of a miner's smoking history is a factual determination for the ALJ). This finding is necessary for the ALJ to evaluate the credibility of Drs. Nader's, Basheda's, and Spagnolo's opinions on the issue of legal pneumoconiosis insofar as they disagree as to the length of Claimant's smoking history and whether Claimant continued to smoke cigarettes until 2019. *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988) (ALJ has discretion in determining the effect of an inaccurate smoking history on the credibility of a medical opinion). Consequently, we vacate the ALJ's decision to assign "great weight" to Dr. Nader's opinion. Decision and Order at 10-11.

In view of the foregoing errors, we vacate the ALJ's finding Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 10-11. Thus, we further vacate the ALJ's finding Employer failed to establish rebuttal at 20 C.F.R. §718.305(d)(1)(i). *Id*.

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), Decision and Order at 11-12. She found the opinions of Drs. Basheda and Spagnolo on the issue of disability causation unpersuasive for the same reasons she discredited their opinions on the issue of legal pneumoconiosis. Decision and Order at 12. She further credited Dr. Nader's opinion that Claimant is totally disabled due to pneumoconiosis for the same reasons she found him credible on the issue of legal pneumoconiosis. *Id*. Employer correctly argues the ALJ's error in analyzing the issue of legal pneumoconiosis "carried into her analysis of disability causation." Employer's Brief at 13-16. Because the ALJ's errors on the issue of legal pneumoconiosis affected her credibility findings on the issue of disability causation, we vacate her finding Employer failed to prove no part of Claimant's respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Thus, we vacate the award of benefits.

issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Remand Instructions

On remand, the ALJ must first consider all relevant evidence, resolve conflicts in the evidence, and provide definitive findings regarding Claimant's smoking history. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 (4th Cir. 1999) ("[T]he 'substantial evidence' standard is tolerant of a wide range of findings on a given record."); *Maypray*, 7 BLR at 1-685.

The ALJ should then reweigh the medical opinion evidence and reconsider whether Employer disproved the existence of legal pneumoconiosis by affirmatively establishing Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment" by a preponderance of the evidence. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) (rebuttal inquiry is "whether the employer has come forward with affirmative proof that the [miner] does not have legal pneumoconiosis, because his impairment is not in fact significantly related to his years of coal mine employment"); *Minich*, 25 BLR at 1-155 n.8. In doing so, she should address whether the medical opinions addressing legal pneumoconiosis are based on an accurate cigarette smoking history. *Bobick*, 13 BLR at 1-54.

Because the ALJ found Employer disproved the existence of clinical pneumoconiosis, if the ALJ finds Employer has disproved the existence of legal pneumoconiosis, Employer has rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i), and she need not reach the issue of disability causation. If, however, the ALJ finds Employer failed to rebut the presumption of legal pneumoconiosis and thus failed to establish rebuttal at 20 C.F.R. §718.305(d)(1)(i), she should then address 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).

In weighing the medical opinions on both prongs of rebuttal, the ALJ should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441. Further, she must consider all the relevant evidence in reaching her determinations. *See McCune*, 6 BLR at

1-998. She must also set forth her findings in detail, including the underlying rationale for her decision as the APA requires. *See Wojtowicz,* 12 BLR at 1-165.

Accordingly, the ALJ's Decision and Order Granting Benefits is affirmed in part, vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge