U.S. Department of Labor

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

BRB Nos. 22-0132 BLA
and 22-0132 BLA-A

WILLIAM J. SECKMAN	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
CONSOL OF PA COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 8/25/2023
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Leonard J. Stayton, Inez, Kentucky, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal,[1] and Claimant cross-appeals, Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2020-BLA-05176) rendered on a claim filed on July 26, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with at least sixteen years of underground coal mine employment based on the parties' stipulation, and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He 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.[3] Claimant responds in support of the award of benefits. On cross-appeal, Claimant challenges the ALJ's weighing of the medical opinions regarding disability causation. The Director, Office of Workers' Compensation Programs, has not filed a response in either appeal.

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

[1] On September 19, 2022, the Benefits Review Board ordered Employer to show cause, within ten days of receipt, why its appeal should not be dismissed for failure to file its Petition for Review and brief. *Seckman v. Consol of Pa. Coal Co.*, BRB Nos. 22-0132 BLA and 22-0132 BLA-A (Sept. 19, 2022) (Order)(unpub.). On October 3, 2022, Employer filed its Petition for Review and brief and responded that due to a clerical error the case was not docketed correctly and requesting that its brief be accepted as part of the record. As no party has objected to Employer's request, the Board accepts Employer's brief as part of the record. 20 C.F.R. §802.217(e).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability is 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] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 25.

accordance with applicable law.[4] 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,[5] 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.

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 ALJ considered the opinions of Drs. Zaldivar and Basheda that Claimant does not have legal pneumoconiosis.[6] Decision and Order at 16. Dr. Zaldivar opined Claimant's severe obstructive pulmonary impairment is due to smoking. Director's Exhibit 22;

[4] 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); Hearing Transcript at 25-26.

[5] "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).

[6] The ALJ also considered the opinions of Drs. Gaziano, Go, and Cohen but accurately found they do not assist Employer as each diagnosed legal pneumoconiosis. Decision and Order at 16; Director's Exhibits 15, 25; Claimant's Exhibits 1-3.

Employer's Exhibit 6. Dr. Basheda opined Claimant has tobacco-induced chronic obstructive pulmonary disease (COPD) with an asthmatic component, also unrelated to coal mine dust exposure. Employer's Exhibits 1, 5. The ALJ found their opinions unpersuasive and thus insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 16-17.

Employer argues the ALJ erred in discrediting the opinions of Drs. Zaldivar and Basheda. Employer's Brief at 10-17. We disagree.

We initially reject Employer's argument that the ALJ applied the wrong standard when addressing rebuttal.[7] Employer's Brief at 14. The ALJ properly required Employer to establish Claimant does not have a chronic pulmonary disease or respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 8, 15; 20 C.F.R. §718.201(b).

Dr. Zaldivar opined Claimant does not have legal pneumoconiosis based, in part, on studies indicating the average losses in FEV1 from cigarette smoking are greater than those from coal mine dust exposure. Decision and Order at 16; Director's Exhibit 22; Employer's Exhibit 6. Relying on those studies, he opined Claimant "lost an estimated FEV1 per year of a smoker" and thus smoking, and not coal mine dust exposure, is responsible for his pulmonary impairment. Director's Exhibit 22 at 5. The ALJ permissibly found Dr. Zaldivar's opinion unpersuasive because he relied on statistical generalities, rather than Claimant's specific condition, to discount the effects of his coal mine dust exposure. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012) (substantial evidence supported ALJ's discrediting of medical opinion

[7] We reject Employer's argument that the ALJ erred in failing to apply the legal standard enunciated in *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). Employer's Brief at 22-23. In *Young*, the United States Court of Appeals for the Sixth Circuit held an employer can "disprove the existence of legal pneumoconiosis by showing that [a miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Young*, 947 F.3d at 405. "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)). As this case is governed by the law of the Fourth Circuit, the holding in *Young* is not binding on the ALJ. Nor does Employer explain how application of the standard in *Young* would have made a difference in this case. Neither Dr. Zaldivar nor Dr. Basheda opined that coal mine dust had only a de minimis impact on the miner's lung impairment; both completely excluded coal mine dust as a cause and the ALJ found their rationales unpersuasive.

where doctor relied "heavily on general statistics rather than particularized facts about" the miner); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 16; Director's Exhibit 22. Further, to the extent Dr. Zaldivar's opinion relied on the absence of clinical pneumoconiosis on x-rays to find Claimant does not have legal pneumoconiosis, the ALJ permissibly found Dr. Zaldivar's opinion inconsistent with the regulations that provide legal pneumoconiosis may be present even in the absence of clinical pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4), (b); *see also* 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000); *Looney*, 678 F.3d at 313; Decision and Order at 29; Employer's Exhibit 6 at 31; Director's Exhibit 22 at 5.

Similarly, Dr. Basheda opined Claimant's COPD is unrelated to coal mine dust exposure and instead is consistent with tobacco induced COPD and asthma. Employer's Exhibits 1, 5. He explained that Claimant's COPD has several features that are consistent with cigarette smoking and not coal mine dust exposure, including an acute response to bronchodilators, variability in objective testing, variability in hyperinflation and air trapping in the lungs, variability in oxygenation, and a rapid decline in Claimant's condition in a short period of time. *Id.* The ALJ permissibly found Dr. Basheda's opinion that Claimant's COPD was unrelated to coal mine dust exposure unpersuasive, because he did not provide citation to medical literature to support his position that the factors he relied on were not consistent with coal mine dust induced COPD or explain how he determined these factors eliminated coal mine dust exposure as a contributor to Claimant's allegedly smoking-induced COPD.[8] *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74 n.4 (4th Cir. 2017); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 16-17.

As the trier-of-fact, the ALJ has discretion to assess the credibility of the medical opinions based on the experts' explanations for their diagnoses and to assign those opinions appropriate weight. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557-58 (4th Cir. 2013); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Looney*, 678 F.3d at 313-14. Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ acted within his discretion in discrediting Drs. Zaldivar's and Basheda's opinions, we affirm his finding that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order

[8] Because the ALJ gave a permissible reason for discrediting Dr. Basheda's opinion that Claimant's COPD is due to cigarette smoking, we need not address Employer's other arguments regarding the weight accorded his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 11-13.

at 16. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ also found Employer did not rebut the presumption by establishing "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); Decision and Order at 26. The ALJ permissibly discredited the disability causation opinions of Drs. Zaldivar and Basheda because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 29-30. 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),[9] and the award of benefits. Decision and Order at 30.

[9] Because we affirm the ALJ's finding that Employer failed to disprove disability causation, we need not address Claimant's arguments on cross-appeal that the ALJ erred in discrediting the medical opinions of Drs. Cohen, Go, and Gaziano on disability causation. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1986); Claimant's Cross Appeal Brief at 8-13.

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