U.S. Department of Labor

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

BRB No. 22-0134 BLA

RICHARD L. HOOVER, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KEYSTONE COAL MINING CORPORATION, c/o CONSOL ENERGY INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 8/25/2023
CONSOL ENERGY INCORPORATED, c/o SMART CASUALTY CLAIMS	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Deanna Lyn Istik (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Denying Benefits (2020-BLA-05576) rendered on a claim filed on April 22, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation of 21.52 years of qualifying coal mine employment and found Claimant has a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). She thus found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). However, she further found Employer rebutted the presumption and therefore denied benefits.

On appeal, Claimant argues the ALJ erred in finding the presumption rebutted. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.[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).

[1] 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 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] Because Employer does not challenge the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption, we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 6; Director's Exhibit 3.

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,[4] 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 established rebuttal by both methods. Decision and Order at 24-25. Claimant challenges the ALJ's finding that Employer disproved legal pneumoconiosis.[5] Claimant's Brief at 6.

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). Employer relied on the medical opinions of Drs. Basheda and Rosenberg. Employer's Exhibits 5, 6, 6a, 9. Dr. Basheda opined there is no evidence of a chronic obstructive or restrictive impairment related to coal mine dust exposure and attributed any reduction in Claimant's FEV1 and FVC measurements to his residual diaphragmatic paralysis from Claimant's previous diaphragmatic surgery. Employer's Exhibit 8 at 26-27, 31-36. Dr. Rosenberg opined Claimant's restrictive impairment as well as his mild oxygenation abnormality and relative hypoventilation are caused by his past diaphragmatic surgery and the resulting paralysis of his right diaphragm and eventration of the left diaphragm, all of which would cause reduced lung volumes. Employer's Exhibit 9 at 22-

[4] "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).

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Employer disproved clinical pneumoconiosis. *See Skrack*, 7 BLR at 1-711; Decision and Order at 24.

31. The ALJ found Drs. Basheda and Rosenberg sufficiently explained why Claimant's pulmonary impairment was caused by factors unrelated to coal mine dust exposure and thus found both opinions well-reasoned and documented. Decision and Order at 21-22. She therefore found Employer rebutted the presumption that Claimant has legal pneumoconiosis. 20 C.F.R. §718.305(a); Decision and Order at 22, 24.

Claimant contends the ALJ erred in finding Drs. Basheda's and Rosenberg's opinions well-reasoned. Claimant's Brief at 4-7. We agree.

Because Claimant invoked the Section 411(c)(4) presumption, he is presumed to have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Thus, it is Employer's burden to affirmatively demonstrate by a preponderance of the evidence that Claimant's totally disabling respiratory or pulmonary impairment is "not significantly related to, or aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.305(d)(1)(i)(A); 718.201(a)(2), (b); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 1-255 (2019). As Claimant argues, although the ALJ found Dr. Basheda provided sufficient explanation to support his conclusion that Claimant's pulmonary impairment is due to diaphragmatic dysfunction, she erred by not considering whether his opinion adequately addresses whether coal mine dust exposure substantially aggravated Claimant's pulmonary impairment.[6] *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Hawkinberry*, 25 BLR at 1-255; Claimant's Brief at 9.

Claimant further correctly argues the ALJ failed to consider his argument that Dr. Rosenberg's opinion should be discredited because he relied on the absence of clinical pneumoconiosis in opining Claimant does not have legal pneumoconiosis.[7] Claimant's

[6] Claimant asserts the ALJ similarly erred in failing to consider his argument that Dr. Rosenberg did not adequately address whether coal mine dust was an aggravating factor in his impairment. Claimant's Brief at 9. Claimant's sole argument to the ALJ with respect to Dr. Rosenberg, however, was that the physician's opinion should be discredited because he excluded coal dust as a contributor based on the lack of radiographic evidence of pneumoconiosis. *See* Claimant's Post-Hearing Brief at 3. We therefore limit our remand instructions to the respective arguments Claimant actually raised but were not considered by the ALJ regarding Drs. Basheda's and Rosenberg's opinions.

[7] Claimant's brief states the ALJ failed to address his argument that Dr. Basheda's opinion, not Dr. Rosenberg's, should be discredited on this basis. Claimant's Brief at 7. We consider Claimant's reference to Dr. Basheda a scrivener's error, as Claimant made this argument to the ALJ with respect to Dr. Rosenberg. Claimant's Post-Hearing Brief at 3.

Brief at 7; Claimant's Post-Hearing Brief at 3. As Claimant asserts, part of Dr. Rosenberg's rationale for concluding Claimant's impairment is unrelated to coal mine dust exposure was his conclusion that there is "no physiologic mechanism or scientific way that [coal mine dust exposure] can cause restriction absent parenchymal lung disease." Employer's Exhibit 9 at 33; Claimant's Brief at 7. However, the regulatory standard for diagnosing legal pneumoconiosis does not depend on or require the presence of clinical pneumoconiosis. *See* 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000); *J.O.* [Obush] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd*, *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57 (3d Cir. 2011); Claimant's Brief at 7. Thus, we vacate the ALJ's findings that Drs. Basheda's and Rosenberg's opinions are well-reasoned and sufficient to support Employer's burden to disprove legal pneumoconiosis.[8] *Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97 (3d Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

On remand, the ALJ must consider whether Employer has rebutted the presumption of legal pneumoconiosis. In doing so, she must consider Claimant's argument that Dr. Rosenberg's opinion, that legal pneumoconiosis in the form of a restrictive impairment cannot exist without radiographic evidence of clinical pneumoconiosis, is not credible because it runs contrary to the regulations. *See* 20 C.F.R. §§718.201(a)(2), (b), 718.202(a)(4); 65 Fed. Reg. at 79,941; *Obush*, 650 F.3d at 256-57. She must further consider whether Dr Basheda sufficiently explained whether Claimant's lung impairment is significantly related to, or substantially aggravated by, coal mine dust exposure. 20 C.F.R. §§718.201(a)(2), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR 1-155 n.8.

If the ALJ again finds Employer disproved the existence of legal pneumoconiosis, Employer will have rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(2)(i) and the ALJ need not reach the issue of disability causation. However,

[8] Because we vacate the ALJ's credibility findings with respect to the opinions of Drs. Basheda and Rosenberg, the only medical opinions supportive of Employer's burden to disprove legal pneumoconiosis, we need not address Claimant's assertions that the ALJ erred by finding Dr. Rosenberg better qualified than Dr. Cohen. Claimant's Brief at 5-7; Decision and Order at 15. However, should the ALJ again find the opinions of Drs. Basheda and Rosenberg credible, she must weigh their opinions against those of Drs. Zlupko and Cohen, and must set forth her rationale for concluding that any individual physician's qualifications make that physician more or less qualified than another. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97 (3d Cir. 2002).

if Employer fails to establish Claimant does not have legal pneumoconiosis, the ALJ must then determine whether Employer is able to rebut the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii) with credible evidence that "no part of [Claimant's] total disability was caused by pneumoconiosis as defined in [Section] 718.201." 20 C.F.R. §718.305(d)(1)(ii); *see Minich*, 25 BLR at 1-159. If Employer is unable to rebut the Section 411(c)(4) presumption pursuant to either 20 C.F.R. §718.305(d)(1)(i) or (ii), Claimant will have established entitlement to benefits.

In determining whether Employer has rebutted the presumption on remand, the ALJ must consider all relevant evidence and set forth her findings in detail as the Administrative Procedure Act requires.[9] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). In weighing the medical opinion evidence, the ALJ should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *Balsavage*, 295 F.3d at 396-97; *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986).

[9] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits and remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge