U.S. Department of Labor

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

BRB No. 22-0453 BLA

ANNIS DYE (o/b/o PERRY D. DYE)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 8/30/2023
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 Jodeen M. Hobbs, Administrative Law Judge, United States Department of Labor.

Kendra R. Prince (Penn, Stuart, & Eskridge), Abingdon, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Awarding Benefits (2020-BLA-05832) rendered on a claim filed pursuant to the

Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on April 11, 2019.[1]

The ALJ accepted the parties' stipulation that the Miner had twenty-one years of qualifying coal mine employment and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant[2] invoked the Section 411(c)(4)[3] presumption of total disability due to pneumoconiosis and established a change in an applicable condition of entitlement.[4] 20 C.F.R. §725.309(c). Further, she found Employer did not rebut the presumption and awarded benefits.

[1] The Miner previously filed three other claims. Director's Exhibit 1. The most recent prior claim, filed on September 22, 2011, was denied by the district director on June 26, 2012, for failure to establish the Miner had a totally disabling respiratory or pulmonary impairment. Decision and Order at 2-3; Director's Exhibit 1 at 13, 17.

[2] Claimant is the widow of the Miner, who died on April 27, 2021. Decision and Order at 2; Hearing Transcript at 17. She is pursuing the miner's claim on his behalf. Decision and Order at 2 n.1. Claimant did not file a survivor's claim.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis at the time of death if he had 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.

[4] When 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 she 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 in his prior claim, the Miner did not establish total disability, Claimant had to submit evidence establishing that element to obtain review of the merits of the Miner's current claim. *See White*, 23 BLR at 1-3; Director's Exhibit 1 at 13, 17.

On appeal, Employer argues the ALJ erred in finding the Section 411(c)(4) presumption unrebutted.[5] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief.

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.[6] 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).

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had 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. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015). The ALJ found Employer failed to establish rebuttal by either method.

[5] We affirm, as unchallenged on appeal, the ALJ's determinations that Claimant invoked the Section 411(c)(4) presumption and established a change in the applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14.

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 14, 28.

[7] "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). "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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

We affirm, as unchallenged on appeal, the ALJ's findings that Employer disproved legal pneumoconiosis but did not disprove clinical pneumoconiosis.[8] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 30. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. Thus we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

To disprove disability causation under the second rebuttal method, Employer must establish that "no part of the Miner's respiratory or pulmonary total disability was caused by" pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 30-33.

Employer relies on the opinions of Drs. Fino and Sargent. Dr. Fino examined the Miner on February 19, 2020, reviewed his medical records, and opined the Miner did not have clinical or legal pneumoconiosis. Director's Exhibit 27 at 15-16. He opined the Miner was totally disabled by a severe oxygen transfer impairment and severe hypoxemia, which he related to lung cancer secondary to cigarette smoking and not coal mine dust exposure. *Id*. At his deposition, he initially stated it was a "possibility" that "there [was] a little bit of pneumoconiosis underneath" the Miner's lung cancer, but ultimately reaffirmed his opinion that the Miner did not have clinical pneumoconiosis. Employer's Exhibit 15 at 11, 20-21, 23-27.

Dr. Sargent examined the Miner on March 25, 2021, reviewed his medical records, and similarly opined the Miner was totally disabled by his impaired oxygen exchange due to lung cancer caused by cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibit 13 at 2; *see also* Employer's Exhibit 14 at 21-23, 26-27. At his deposition, Dr. Sargent testified he did not "think" the Miner had clinical pneumoconiosis,

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[8] In discussing clinical pneumoconiosis, the ALJ found the weight of the x-ray evidence was positive for simple pneumoconiosis. Decision and Order at 17. Regarding Employer's medical experts' opinions, the ALJ stated:

> Both Dr. Fino and Dr. Sargent focused their reports on explaining why the large opacities seen on x-ray were not complicated pneumoconiosis but lung cancer or its effects. The biopsy evidence supports that the large opacity in [the] Miner's upper right lung was lung cancer but does not address the smaller opacities noted through . . . the other lung regions. Further, Drs. Fino and Sargent each conceded that [the] Miner may have had simple pneumoconiosis. For this reason, I find that the medical opinion evidence does not support rebuttal of simple clinical pneumoconiosis.

Decision and Order at 24.

stating "there are some readings in the record that disagree with that, but when [one takes] the records as a whole, it is very unlikely that [the Miner] suffered from . . . clinical pneumoconiosis." Employer's Exhibit 14 at 25-26.

The ALJ found the opinions of Drs. Fino and Sargent not well reasoned and insufficient to establish that no part of the Miner's respiratory disability was due to clinical pneumoconiosis. Employer argues the ALJ failed to adequately explain her credibility findings in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[9] Employer's Brief at 3-8 (unpaginated). Employer also generally asserts it faces an "impossible" burden to disprove the Miner's respiratory disability was not related to clinical pneumoconiosis. *Id.* at 6, 8 (unpaginated). Finally, Employer asserts, even if the Miner had clinical pneumoconiosis, it could still rebut the Section 411(c)(4) presumption at disability causation by showing the disabling impairment was not related to coal mine dust exposure.[10] *Id.* at 8 (unpaginated). We are not persuaded.

Contrary to Employer's contention, the ALJ permissibly discredited Drs. Fino's and Sargent's opinions because neither physician diagnosed clinical pneumoconiosis, contrary to her finding that Employer failed to disprove the Miner had that disease. *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); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 32; Director's Exhibit 27 at 15-16; Employer's Exhibits 14 at 25-26; 15 at 23. While the rebuttal standard for disability causation is as a "substantial burden," *see Bender*, 782 F.3d at 143, it is not an impossible one. Employer could have rebutted the presumption if its experts credibly explained why the Miner's clinical pneumoconiosis played "no part" in his total disability. But, as the Fourth Circuit has explained, because Drs. Fino and Sargent errantly failed to diagnose clinical pneumoconiosis, their opinions cannot be credited on the question of whether that disease caused the Miner's disability absent "specific and persuasive reasons" for concluding their views on disability causation were independent of their mistaken beliefs that the Miner did not have clinical pneumoconiosis. *See Epling*, 783 F.3d at 504-506; *see*

[9] The Administrative Procedure Act provides 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).

[10] Employer is conflating legal pneumoconiosis and disability causation with respect to clinical pneumoconiosis, yet they are distinct inquiries. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989).

also Toler v. E. Assoc. Coal Corp., 43 F.3d 109, 116 (4th Cir. 1995). And even then, their opinions would be "not worthy of much, if any, weight." *See Epling*, 783 F.3d at 504, *citing Grigg v. Director, OWCP*, 28 F.3d 416, 419 (4th Cir. 1994).

Here, the ALJ found no "specific and persuasive" reasons for concluding Drs. Fino's and Sargent's views on disability causation did not rest upon their disagreement with her finding of clinical pneumoconiosis. Decision and Order at 32. Employer does not assert any specific error in that finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the ALJ's conclusion that Employer failed to establish no part of the Miner's respiratory or pulmonary disability was caused by clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); *see also Bender*, 782 F.3d at 144-45; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 33. We thus affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and affirm the award of benefits. 30 U.S.C. §921(c)(4) (2018).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge