U.S. Department of Labor

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

BRB Nos. 21-0022 BLA
and 21-0023 BLA

CATHY L. GAMBLIN (o/b/o and Surviving Spouse of DAROLD N. GAMBLIN)	)	
Claimant-Respondent	)	
v.	)	
ISLAND CREEK KENTUCKY MINING	)	DATE ISSUED: 12/29/2021
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 on Remand Awarding Benefits of Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Ryan Driskell (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for Claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jerry R. DeMaio's Decision and Order on Remand Awarding Benefits (2013-BLA-05981 and 2014-BLA-05609) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1] These claims are before the Benefits Review Board for the second time.

On February 27, 2018, ALJ Colleen A. Geraghty issued a Decision and Order Awarding Benefits in both claims. In consideration of Employer's appeal, the Board agreed the case should be remanded for consideration by a properly appointed ALJ pursuant to *Lucia v. SEC,* 585 U.S. , 138 S. Ct. 2044, 2055 (2018). *Gamblin v. Island Creek Ky Mining,* BRB Nos. 18-0299 BLA and 18-0300 BLA, slip op. at 4-5 (Feb. 28, 2019) (unpub.). On remand, the case was reassigned to Judge DeMaio. The ALJ found Claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, and thus invoked the presumption that the Miner's total disability and death were due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] He further found Employer did not rebut the presumption and awarded benefits on both claims.

On appeal, Employer challenges the constitutionality of amendments to the Act contained in the Affordable Care Act (ACA). Further, Employer argues the ALJ erred in finding it failed to rebut the presumption. The Director, Office of Workers' Compensation Programs, responds, urging the Board to reject Employer's constitutional challenge to the amendments contained in the ACA. Claimant has not filed a response brief.

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[1] The Miner filed a claim on October 15, 2012, but died on January 11, 2014, while his claim was pending. Claimant's Exhibit 5. ·Clamant, the Miner's widow, is pursuing this claim on his behalf and her own survivor's claim, which she filed on February 7, 2014.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability and death were due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b).

The 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).

Constitutionality of the Section 411(c)(4) and 422(*l*) Presumptions

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the ACA, which reinstated the Section 411(c)(4) and 422(*l*) presumptions, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 36-39. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, __ U.S. ___, No. 19-840, 141 S. Ct. 2104, 2120 (2021).

Miner's Claim

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption,[4] the burden shifted to Employer to establish the Miner has neither legal nor clinical pneumoconiosis,[5] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis

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[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand 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 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).

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.[6]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit has held this standard requires Employer to establish the Miner's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020).

Employer relies on Drs. Tuteur's and Selby's opinions that the Miner had chronic obstructive pulmonary disease (COPD)/emphysema due to smoking and unrelated to coal mine dust exposure. Employer's Exhibits 1, 5, 12, 13, 20, 21. Contrary to Employer's contentions, we see no error in the ALJ's findings that their opinions are not well-reasoned and therefore insufficient to satisfy Employer's burden of proof. Decision and Order on Remand at 30-32.

As the ALJ accurately noted, Dr. Tuteur stated both smoking and coal dust exposure may cause COPD; however, "the clinical picture, physical examination, pulmonary function studies, and chest radiographs do not allow for differentiation between these two potential etiologies." Employer's Exhibit 5 at 5. Relying on medical literature indicating "the risk factor of cigarette smoking is 15-20 times more potent than the risk factor of coal mine dust exposure for the development of [COPD]," Dr. Tuteur opined that coal mine dust exposure did not contribute to the Miner's COPD. *Id.*; Employer's Exhibit 21 at 10. The ALJ permissibly found Dr. Tuteur's opinion unpersuasive because he relied on statistical averaging and failed to explain why the Miner was not "one of the statistically rare individuals who develop obstruction as a result of coal mine dust exposure." Decision and Order on Remand at 31; *see* 65 Fed. Reg. at 79,941 (statistical averaging can hide the effect of coal mine dust exposure in individual miners); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

[6] The ALJ found Employer failed to disprove that the Miner has clinical and legal pneumoconiosis. Decision and Order on Remand at 29, 32.

Similarly, Dr. Selby attributed the Miner's obstructive respiratory impairment entirely to smoking because coal dust induced obstructions are "not common at all" and smoking is "vastly" more likely to cause significant obstructive lung disease. Employer's Exhibits 13 at 29; Exhibit 20 at 5-6. Dr. Selby also opined the Miner had a restrictive impairment caused by his heart surgery because he did not experience shortness of breath prior to his surgery and had not worked in coal mine employment for over ten years prior to his pulmonary deterioration.[7] Employer's Exhibits 1 at 11, 13 at 25.

Like Dr. Tuteur, the ALJ permissibly found Dr. Selby's opinion lacked credibility because he relied on statistical generalities in concluding the Miner did not have legal pneumoconiosis. *See Director, OWCP v. Rowe,* 710 F.2d 251, 255 (6th Cir. 1983); *Knizner*, 8 BLR at 1-7; Decision and Order on Remand at 32. The ALJ also permissibly found Dr. Selby's rationale concerning the timing of the Miner's lung deterioration contrary to the regulations which recognize legal pneumoconiosis can be a "latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014) (upholding ALJ's decision to discredit physician whose opinion regarding legal pneumoconiosis conflicted with the recognition that pneumoconiosis can be a latent and progressive disease); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012) (same); Decision and Order on Remand at 31.

Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). We see no error in the ALJ's overall conclusion that neither Dr. Tuteur nor Dr. Selby adequately explained how they completely eliminated the Miner's twenty-seven years of underground coal mine employment as a contributing cause of his respiratory impairment. *See Rowe,* 710 F.2d at 255; Decision and Order on Remand at 31-32.

Because the ALJ's credibility findings are supported by substantial evidence, we affirm his determination that Employer did not disprove legal pneumoconiosis.[8] *See* 20

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[7] Dr. Selby attributed the Miner's restrictive defect to generalized weakness, prior open heart surgery, lung cancer, and radiation treatments. Employer's Exhibit 13 at 23-24.

[8] As the ALJ gave a valid reason for discrediting Drs. Tuteur's and Selby's opinions, we need not address Employer's other arguments regarding the additional reasons he gave for rejecting their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 11-14. Further, because Employer has the burden of proof and we have affirmed the ALJ's rejection of its medical experts, we need not address Employer's contention that the opinions of Drs. Sood, Houser and Chavda that

C.F.R. §718.305(d)(1)(i)(A); *Rowe,* 710 F.2d at 255; Decision and Order on Remand at 32. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[9] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ found Employer did not rebut the presumption by establishing that "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); *see* Decision and Order on Remand at 33. Because Employer raises no specific arguments on disability causation apart from its assertion that the ALJ erred in finding it failed to disprove the existence of legal pneumoconiosis, we affirm the ALJ's determination that Employer did not disprove the Miner's total disability is unrelated to legal pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 33. We therefore affirm the award in the Miner's claim. 30 U.S.C. §921(c)(4) (2018).

Survivor's Claim

The ALJ did not address whether Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*) of the Act. 30 U.S.C. §932(*l*) (2018). Rather, he found Claimant invoked the Section 411(c)(4) rebuttable presumption that the Miner's death was due to pneumoconiosis and that Employer did not rebut it. 20 C.F.R. §718.305(d)(2)(ii); Decision and Order on Remand at 34-35. Although Employer challenges the ALJ's rebuttal findings, we need not address its arguments.

Section 422(*l*) of the Act provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018). To establish entitlement under Section 422(*l*), Claimant must prove that: she filed her claim after January 1, 2005; she is an eligible survivor of the Miner; her claim was pending on or after March 23, 2010; and the Miner was determined to be eligible to receive benefits at the time of his death. *Id.*

Miner had legal pneumoconiosis are not credible. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 11-21.

[9] Because we have affirmed the ALJ's findings on legal pneumoconiosis, we need not address Employer's arguments on clinical pneumoconiosis. *See Larioni,* 6 BLR at 1-1278.

The ALJ found Claimant is the Miner's surviving spouse, who filed this claim for survivor's benefits on February 7, 2014, and Employer does not challenge these findings. *Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 2. As we have affirmed the award in the Miner's claim and Claimant satisfies the prerequisites for automatic entitlement under Section 422(*l*), she is derivatively entitled to benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013). Consequently, we affirm the ALJ's award of benefits in the survivor's claim on this alternate basis.[10]

Accordingly, the ALJ's Decision and Order on Remand Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

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[10] Thus, any error the ALJ may have made in weighing the radiological evidence relevant to whether Employer rebutted the presumption the Miner's death was due to pneumoconiosis at 20 C.F.R. §718.305(d)(2)(ii) is harmless. *See Larioni,* 6 BLR at 1-1278.