U.S. Department of Labor

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

BRB No. 21-0561 BLA

OSCAR A. McKENDRICK Claimant-Respondent v. SWISHER CONTRACTING COMPANY, INCORPORATED and ROCKWOOD CASUALTY INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/21/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Richard M. Clark, Administrative Law judge, United States Department of Labor.

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

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal the Decision and Order Awarding Benefits (2019-BLA-05260) of Administrative Law Judge (ALJ) Richard M. Clark rendered on a subsequent claim[1] filed on January 18, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with "at most" twelve and one-half years of coal mine employment and therefore found he could not invoke 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] Considering entitlement under 20 C.F.R. Part 718, he found Claimant did not establish clinical pneumoconiosis but did establish legal pneumoconiosis[3] and a totally disabling respiratory or pulmonary impairment due to legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b)(2), (c). He therefore found Claimant also established a change in an applicable condition of entitlement.[4] 20 C.F.R. §725.309(c). Thus, he awarded benefits.

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[1] Claimant filed a prior claim on February 9, 2012, which the district director denied on December 20, 2012, for failure to establish any element of entitlement. 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 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); *see* 20 C.F.R. §718.305.

[3] "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). 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).

[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 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); *White v.*

On appeal, Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis and total disability due to legal pneumoconiosis.[5] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a 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).

Entitlement Under 20 C.F.R. Part 718

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP,* 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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 the district director denied Claimant's prior claim for failure to establish any element of entitlement, Claimant had to submit new evidence establishing at least one element to warrant review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

[5] We affirm as unchallenged on appeal the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2) and therefore established a change in applicable condition of entitlement at 20 C.F.R. §725.309. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15.

[6] The Board will apply the law of United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 4.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has 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).

The ALJ considered the opinions of Drs. Zlupko and Basheda. Dr. Zlupko diagnosed Claimant with legal pneumoconiosis in the form of "severe [chronic obstructive pulmonary disease (COPD)]" due to coal mine dust exposure.[7] Director's Exhibits 17 at 4; 20 at 1-2. Dr. Basheda diagnosed Claimant with a disabling and partially reversible obstruction due solely to asthma unrelated to coal mine dust exposure.[8] Employer's Exhibits 3 at 12-14; 5 at 17-18, 24. The ALJ found Dr. Zlupko's opinion reasoned, documented, and consistent with the preamble to the revised 2001 regulations. Decision and Order at 12-13. By contrast, he rejected Dr. Basheda's opinion as not well-reasoned and inconsistent with the preamble. *Id.* at 13-14.

Employer asserts the ALJ erred in finding Dr. Zlupko's opinion well-documented because he did not review as much objective evidence as Dr. Basheda. Employer's Brief at 10-11. We disagree. An ALJ has discretion to credit a physician's opinion that is based on his own examination findings and objective test results. *See Kertesz v. Crescent Hills*

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[7] Dr. Zlupko performed the Department of Labor-sponsored complete pulmonary evaluation of Claimant on March 28, 2018. Director's Exhibit 17 at 1. He initially diagnosed Claimant with a disabling obstruction, which he attributed to a thirty-five-year history of coal mine dust exposure. *Id.* at 4. In response to a letter from the district director advising that Claimant had only 5.43 years of coal mine employment, Dr. Zlupko maintained that "even though [Claimant's] coal mine exposure was relatively short, it is the only real cause that I can determine for his serious and irreversible pulmonary function impairment." Director's Exhibit 20 at 2. Dr. Zlupko explained "it is impossible for me to say [Claimant's] functional impairment is related to his smoking habit" as he reported smoking only one-to-two cigarettes per day for about three years. *Id.* at 1.

[8] Dr. Basheda examined Claimant on August 31, 2018, and conducted a medical records review. Employer's Exhibit 3 at 1. He concluded Claimant's disabling obstruction is consistent with airways remodeling due to inadequately treated asthma. Employer's Exhibits 3 at 19-20; 5 at 24. Further, he excluded coal dust exposure as a contributing cause of Claimant's impairment because Claimant had "a minimal amount of time in the coal mines" and developed progressive obstructive lung disease "long after leaving the coal mines [in the early 1980s]," which is "not consistent with an occupational form of asthma." Employer's Exhibit 5 at 18-19.

Coal Co., 788 F.2d 158, 163 (3d Cir. 1986). Dr. Zlupko's diagnosis of legal pneumoconiosis is based on his physical examination, clinical findings, objective test results, accurate understanding of Claimant's smoking history, and explanation why he attributed Claimant's obstructive impairment to coal mine dust exposure. Director's Exhibits 17, 19. As Employer raises no other arguments with respect to Dr. Zlupko, we affirm the ALJ's permissible finding that his opinion is reasoned and documented and sufficient to establish Claimant has legal pneumoconiosis. Decision and Order at 12-13; *see Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); *Kertesz*, 788 F.2d at 163; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Further, we disagree that the ALJ erred in discrediting Dr. Basheda's opinion. Dr. Basheda excluded a diagnosis of legal pneumoconiosis based on Claimant's relatively short coal mine employment history and the fact that his obstructive impairment progressed after he left the mines. Employer's Exhibits 3 and 5. The ALJ permissibly found Dr. Basheda's opinion inconsistent with the regulations which recognize pneumoconiosis is a latent and progressive disease that can first become detectable after cessation of a miner's coal mine employment. *See* 20 C.F.R. §718.201; *Helen Mining Co. v. Elliott,* 859 F.3d 226, 239-40 (3d. Cir. 2017) (upholding ALJ's decision to discredit physician whose opinion that prior coal dust exposure would not aggravate asthma once a worker left the mine conflicted with the recognition that pneumoconiosis is a latent and progressive disease); *Obush*, 650 F.3d at 257; Decision and Order at 14.

Having found Dr. Basheda's opinion not sufficiently reasoned, we reject Employer's assertion that it is entitled to greater weight than Dr. Zlupko's opinion based on his "superior" qualifications.[9] *See Balsavage* v. *Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz*, 788 F.2d at 163; Employer's Brief at 12.

Employer's arguments on legal pneumoconiosis are a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson*, 12 BLR at 1-113. Because the ALJ's conclusion that Claimant established the existence of legal pneumoconiosis is supported by substantial evidence, we affirm it. 20 C.F.R. §718.202(a)(4).

[9] We also disagree that the ALJ failed to properly consider the physicians' qualifications. Employer's Brief at 12. He noted accurately that Dr. Zlupko is Board-certified in internal medicine while Dr. Basheda is Board-certified in "internal, pulmonary, critical care, and sleep medicine." Decision and Order at 8-9; Director's Exhibit 19 at 4; Employer's Exhibit 4 at 2.

Disability Causation

To establish disability causation, Claimant must prove his legal pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); *Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003).

Where, as here, all of the medical experts agree that Claimant has disabling COPD, the ALJ's finding that it constitutes legal pneumoconiosis subsumes and resolves the disability causation question. *See Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); *see also Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013). The ALJ credited Dr. Zlupko's opinion that Claimant's legal pneumoconiosis is a substantially contributing cause of Claimant's total disability for the same reasons he credited the physician's opinion with respect to the existence of the disease at 20 C.F.R. §718.202(a)(2). Decision and Order at 15-16. Similarly, the ALJ rejected Dr. Basheda's opinion on disability causation for the same reasons he discredited the physician's opinion regarding whether Claimant's disabling asthma constituted legal pneumoconiosis. *Id.* This was rational. *Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004) (ALJ may permissibly reject a physician's causation opinion because its underlying premise, that the miner does not have pneumoconiosis, is inaccurate). We therefore affirm the ALJ's finding that Claimant's total disability is due to legal pneumoconiosis at 20 C.F.R. §718.204(c).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge