U.S. Department of Labor

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

BRB No. 21-0574 BLA

GLORIA S. HALE (o/b/o the Estate of JAMES L. SHEPPARD) Claimant-Respondent v. BEATRICE POCAHONTAS COMPANY Self-Insured Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/23/2022 DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

Catherine A. Karczmarczyk and John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Awarding Benefits (2018-BLA-05707) rendered on a claim filed pursuant to the

Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1] This case involves a subsequent miner's claim filed on January 11, 2016.[2]

The ALJ credited the Miner with at least fifteen years of underground or substantially similar surface coal mine employment and accepted Employer's concession that the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018), and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).[4] 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 by disproving legal pneumoconiosis.[5] Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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[1] Claimant is the daughter of the Miner, who died on July 6, 2018. Claimant's Exhibit 5. She is pursuing the miner's claim on his estate's behalf. February 20, 2019 Order.

[2] On January 11, 2011, the district director denied the Miner's prior claim, filed on June 19, 2010, for failure to establish any element of entitlement. Director's Exhibit 1.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled 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. 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 he finds "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 the Miner's prior claim was denied for failure to establish any element of entitlement, Claimant had to submit new evidence establishing at least one element of entitlement to obtain review of the merits of the Miner's current claim. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

[5] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established at least fifteen years of qualifying coal mine employment, total disability, a change in an applicable condition of entitlement, and invocation of the Section 411(c)(4)

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 Assoc., 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 the Miner had neither legal nor clinical pneumoconiosis,[7] 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.[8]

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." 20 C.F.R. §§718.201(a)(2), (b),

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presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.204(b)(2), 718.305(b), 725.309(c); Decision and Order at 4, 6-7.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in Virginia and West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 4, 6, 41 at 11-12, 16-17, 20.

[7] "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).

[8] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 10.

718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer submitted Drs. Sargent's and Rosenberg's opinions that the Miner did not have legal pneumoconiosis. Director's Exhibits 28 at 1-2, 30 at 4; Employer's Exhibits 2 at 3, 20 at 17. The ALJ found their opinions not well-reasoned, and thus do not rebut the presumption.[9] Decision and Order at 13-15, 17.

Employer does not challenge the ALJ's weighing of Dr. Sargent's opinion. Thus we affirm the ALJ's rejection of his opinion. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12-13.

With respect to Dr. Rosenberg, Employer argues the ALJ erred in discrediting his opinion. Employer's Brief at 18-29. We disagree.

Dr. Rosenberg reviewed medical reports and the Miner's treatment records.[10] He noted Drs. Mettu and Forehand documented the Miner's lengthy coal mine employment history[11] and Drs. Mettu, Jawad, and Piriz indicated he had either chronic bronchitis or chronic obstructive pulmonary disease (COPD)[12] as recently as 2016. Director's Exhibit 30 at 1-3; Employer's Exhibit 2 at 1-2. Relying on a pulmonary function test from 2010, however, Dr. Rosenberg opined the Miner's "normal FEV1" value of "2.73 liters (87%

[9] The ALJ also considered Dr. Mettu's opinion that the Miner had legal pneumoconiosis and found it well-documented and well-reasoned. Decision and Order at 15-16; Director's Exhibits 20, 25. He concluded Dr. Mettu's opinion "does not assist Employer." Decision and Order at 15. Further, he stated "Employer would still fail to meet its burden" to disprove legal pneumoconiosis even assuming he "gave no weight to Dr. Mettu's opinion" because he discredited Drs. Sargent's and Rosenberg's contrary opinions. *Id.* at 15-16.

[10] The ALJ stated the Miner's treatment records "do not assist Employer in rebutting the presence of legal pneumoconiosis" because they do not "indicate that the Miner's respiratory or pulmonary issues were not significantly related to, or substantially aggravated by, coal dust exposure." Decision and Order at 16.

[11] Employer stipulated the Miner had 26.23 years of coal mine employment. Decision and Order at 3, 6.

[12] As the ALJ noted, chronic bronchitis, along with asthma and emphysema, are the three disease processes included in the term chronic obstructive pulmonary disease (COPD). Decision and Order at 12 n.58, *citing* 65 Fed. Reg. 79,920, 79,939 (2000).

predicted)" is "inconsistent with the diagnosis of [COPD] and legal [pneumoconiosis]." Employer's Exhibit 2 at 1-3; Director's Exhibit 30 at 4. He also opined the Miner had "severe disabling gas exchange abnormalities related to obesity-hypoventilation … [and] chronic congestive heart failure . . . unrelated to [his] past coal mine dust exposure." *Id*.; Employer's Exhibit 2 at 3.

The ALJ noted that "despite reviewing and summarizing [the Miner's medical] records, Dr. Rosenberg relied solely on one FEV1 value from a 2010 pulmonary function test to summarily conclude that [the Miner] did not have COPD/legal pneumoconiosis." Decision and Order at 15. Further, he found Dr. Rosenberg did not adequately explain "why [the Miner] did not have COPD or chronic bronchitis in light of those conditions being extensively documented over several years." *Id*. He thus permissibly found Dr. Rosenberg's opinion "conclusory and inadequately explained" because he failed to "acknowledge the treatment record diagnoses when attempting to explain the rationale for his opinion."[13] *Id*.; *see* 20 C.F.R. §718.201(b); *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); *Clark v. Karst-Robins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 14-15.

Because the ALJ acted within his discretion in discrediting Dr. Rosenberg's opinion, 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 at 17. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 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 [the Miner's] respiratory or pulmonary total disability was caused by

[13] Employer generally asserts Dr. Rosenberg's opinion is well-reasoned and well-documented. Employer's Brief at 6. It does not, however, address the ALJ's finding, which we have affirmed, that Dr. Rosenberg's opinion the Miner did not have COPD due to coal dust exposure is conclusory and inadequately explained. Decision and Order at 16. Because the ALJ provided a valid reason for discrediting Dr. Rosenberg's opinion on the issue of legal pneumoconiosis, we need not address Employer's remaining argument that the ALJ erred in finding Dr. Rosenberg "conflate[d] legal pneumoconiosis with disability and disability causation," rendering his opinion "not entirely clear." *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 15-16.

pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 17-18. Because Employer raises no specific arguments on disability causation, we affirm the ALJ's finding that Employer failed to establish no part of the Miner's total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Skrack*, 6 BLR at 1-711; Decision and Order at 17-18. We therefore affirm his finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits.

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