U.S. Department of Labor

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

BRB No. 22-0042 BLA

EVELYN ELLIOTT (o/b/o JOSEPH L. ELLIOTT)	)	
Claimant-Respondent	)	
v.	)	
MANALAPAN MINING COMPANY, INCORPORATED	)	
and	)	
	)	DATE ISSUED: 12/28/2022
CONNECTICUT INDEMNITY COMPANY	)	
Employer/Carrier-Petitioners	)	
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 Scott R. Morris, Administrative Appeals Judge, United States Department of Labor.

James M. Poerio (Poerio & Walter, Inc.) Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Awarding Benefits (2019-BLA-05043) rendered on a claim filed on September 6, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with twenty-one years of underground coal mine employment and found a totally disabling respiratory or pulmonary impairment based on the parties' stipulation. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant[1] invoked 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] 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 presumption.[3] Neither Claimant nor the Director, Office of Workers' Compensation Programs, 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.[4] 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] Claimant is the widow of the Miner, who died on August 22, 2017. Director's Exhibits 7, 8. She is pursuing the miner's claim on his behalf. Director's Exhibit 10.

[2] 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.

[3] 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); 20 C.F.R. §§718.204(b)(2), 718.305(b), 725.309(c); Decision and Order at 5.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. 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 the Miner suffered from neither legal nor clinical pneumoconiosis,[5] 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.[6] Decision and Order at 20.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner 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). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, 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). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id*. at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relies on the opinions of Drs. Fino and Rosenberg that the Miner did not have legal pneumoconiosis.[7] Director's Exhibit 21; Employer's Exhibit 4. Contrary to

[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).

[6] The ALJ found Employer failed to establish either that the Miner did not have clinical pneumoconiosis or did not have legal pneumoconiosis. Decision and Order at 19-20. We affirm, as unchallenged on appeal, the ALJ's finding that Employer did not rebut the presumption that the Miner had clinical pneumoconiosis. *See Skrack*, 6 BLR at 1-711.

[7] As the ALJ accurately observed the Miner's hospitalization and treatment records do not discuss the presence or absence of pneumoconiosis, we reject Employer's assertion

Employer's assertion, we see no error in the ALJ's finding that the opinions of Drs. Fino and Rosenberg are not well-reasoned and therefore do not establish the Miner did not have legal pneumoconiosis.

Dr. Fino diagnosed the Miner with disabling restriction and hypoxemia which he attributed to the Miner's large pleural effusion caused by smoking-related lung cancer and heart failure secondary to coronary artery disease. Director's Exhibit 21 at 17-19. Specifically, Dr. Fino explained coal mine dust exposure does not cause or contribute to either heart failure or lung cancer. *Id.* at 18. He eliminated it as a contributing cause of the Miner's impairment because "[t]he very significant restrictive lung disease is consistent with [the Miner's] large pleural effusion and his congestive heart failure," and the Miner did not develop significant pulmonary abnormalities until 2015 when he experienced heart failure. *Id*. at 17-18. The ALJ permissibly found Dr. Fino's opinion unpersuasive because he did not adequately address why coal mine dust exposure was not an additive or aggravating cause in the Miner's restrictive respiratory impairment. *See* 20 C.F.R. §718.201(a)(2), (b); *Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 19-20.

Dr. Rosenberg diagnosed disabling respiratory and gas exchange impairments which he attributed to the Miner's "advanced carcinoma superimposed on congestive heart failure." Employer's Exhibit 1 at 9. He attributed the Miner's lung cancer to smoking, explaining the Miner's impairments "bore no relationship to past coal mine dust exposure" because "coal mine dust exposure is not a carcinogen" and "it is unlikely that a miner who has no impairment when he leaves coal mining will suddenly develop obstruction related to coal dust years after the last exposure." *Id.* at 9-11. The ALJ permissibly found Dr. Rosenberg's opinion contrary to the regulations which recognize pneumoconiosis may be a latent and progressive disease. 20 C.F.R. §718.201(c); *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014) (upholding an ALJ's decision to discredit a physician whose opinion regarding legal pneumoconiosis conflicted with the recognition that pneumoconiosis is a latent and progressive disease); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012) (same); Decision and Order at 20.

Employer's arguments amount to a request to reweigh the evidence, which the Board may not do. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, because it is supported by substantial evidence,

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that the ALJ erred in finding they do not support Employer's burden to affirmatively disprove the disease. 20 C.F.R. §§718.201(b), 718.305(d)(1); *see Minich*, 25 BLR at 1-155 n.8; Decision and Order at 12; Employer's Brief at 8.

we affirm the ALJ's finding that Employer failed to disprove the existence of legal pneumoconiosis.[8] 20 C.F.R. §§718.201(a)(2), §718.305(d)((1)(i)(A); *see Young*, 947 F.3d at 407; Decision and Order at 20.

Disability Causation

The ALJ next considered whether Employer rebutted the presumption by establishing "no part" of Claimant's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see* Decision and Order at 20-22. He rationally discredited Drs. Fino's and Rosenberg's opinions because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the disease.[9] *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070 (6th Cir. 2013); Decision and Order at 21-22. We therefore affirm the ALJ's determination that Employer failed to prove no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Thus, we affirm the ALJ's award of benefits.

[8] Dr. Alam conducted the Department of Labor-sponsored complete pulmonary evaluation of the Miner on February 6, 2017. Director' Exhibits 12. He diagnosed both clinical and legal pneumoconiosis. *Id.* at 5; Director's Exhibit 25. As his opinion does not aid Employer on rebuttal, we need not address its arguments that the ALJ erred in finding his opinion reasoned and documented. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 13-17.

[9] Drs. Fino and Rosenberg did not address whether pneumoconiosis caused the Miner's total respiratory disability independent of their conclusions that he did not have the disease.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge