U.S. Department of Labor

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

BRB No. 21-0096 BLA

MARY GRAHAM (o/b/o DONALD D. GRAHAM) Claimant-Respondent v. PREMIUM PROCESSING INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/24/2022 DECISION and ORDER

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

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

William M. Bush (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, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer's Carrier (Employer) appeals Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Awarding Benefits (2017-BLA-05853) rendered on a miner's subsequent claim filed October 20, 2015,[1] pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with 24.54 years of qualifying coal mine employment and found Claimant[2] established a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant 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),[3] and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.[4] The ALJ further determined Employer did not rebut the presumption and awarded benefits.

[1] This is the Miner's fourth claim for benefits. The district director denied his most recent claim, filed August 10, 2009, because he did not establish any element of entitlement. Director's Exhibit 3.

[2] Claimant is the widow of the Miner, who died on July 13, 2017. Claimant's Exhibit 8. She is pursuing the Miner's claim on his estate's behalf.

[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] Where a miner files a claim for benefits more than one year after the denial of a previous claim, 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)(1); *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 did not establish any element of entitlement in his prior

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, it argues the ALJ erred in finding it did not rebut the presumption.[5] Claimant has not responded to Employer's appeal. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging rejection of Employer's constitutional challenge.

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, 362 (1965).

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

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 Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 26-28. 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*, 593 U.S. ___, 141 S. Ct. 2104, 2120 (2021).

claim, he had to submit evidence establishing at least one element to obtain review of the merits of his current claim. *Id*.

[5] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established 24.54 years of qualifying coal mine employment, total disability, and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10, 19, 21.

[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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 17, 21.

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 clinical nor legal 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). 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), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015).

Employer relies on the opinions of Drs. Zaldivar and Porterfield, who opined the Miner had chronic obstructive pulmonary disease (COPD) caused by smoking and unrelated to coal mine dust exposure, and Dr. Spagnolo, who opined the Miner's impairments were caused by smoking and progressive cardiac disease and were unrelated to coal mine dust exposure. Director's Exhibits 14, 22; Employer's Exhibits 14, 16, 21. Contrary to Employer's contentions, we see no error in the ALJ's findings that these opinions are not well-reasoned and therefore do not satisfy Employer's burden of proof. Decision and Order at 23-27.

As the ALJ observed, Dr. Zaldivar excluded coal mine dust exposure as a causative factor for the Miner's respiratory condition because, compared to coal mine dust exposure, "smoking is a far more powerful inducer of COPD in coal miners who do not have radiographic pneumoconiosis," Director's Exhibit 22 at 6, and the effects of smoking and

[7] Clinical pneumoconiosis is defined as "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of 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).

[8] The ALJ found Employer disproved the existence of clinical pneumoconiosis. Decision and Order at 22-23.

coal mine dust produce additive, though separate, damages to the lungs. Employer's Exhibit 21 at 44. The ALJ permissibly discredited Dr. Zaldivar's opinion because he did not explain why he determined a greater impact of smoking necessarily eliminates coal mine dust exposure as a contributing or aggravating factor to the Miner's COPD.[9] *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *See 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); Decision and Order at 23. The ALJ further permissibly discredited Dr. Zaldivar's opinion because a diagnosis of legal pneumoconiosis does not require the presence of clinical pneumoconiosis by x-ray. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012); *Hicks*, 138 F.3d at 533; 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000); Decision and Order 24. Moreover, the ALJ permissibly discredited Dr. Zaldivar's opinion for relying on the Miner's "relatively normal" objective testing shortly after leaving the mines, Decision and Order at 24, because the regulation defining pneumoconiosis recognizes it "as a latent and progressive disease which may become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015).

Similarly, Dr. Porterfield initially opined the Miner had legal pneumoconiosis in the form of COPD, estimating smoking accounted for sixty-five percent of the Miner's impairment and coal mine dust exposure the remaining thirty-five percent. Director's Exhibit 14 at 2. After reviewing Dr. Zaldivar's opinion, however, Dr. Porterfield issued a supplemental report opining it was "possible" that cigarettes were responsible for the Miner's disease and agreeing with Dr. Zaldivar's conclusions. Director's Exhibit 21. The ALJ permissibly discredited Dr. Porterfield's opinion because his change in opinion was based exclusively on his reliance on Dr. Zaldivar's opinion. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. Moreover, the ALJ rationally found equivocal Dr. Porterfield's statement that it is "possible" the Miner's impairment is entirely related to smoking. Decision and Order at 25, *quoting* Director's Exhibit 21; *see U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 389 (4th Cir. 1999); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Finally, Dr. Spagnolo excluded coal mine dust exposure as a cause of the Miner's impairments because the Miner's examinations and objective testing were most consistent with his cardiac condition and smoking and the pace of his decline in lung function was atypical for an impairment caused by coal mine dust exposure. Employer's Exhibits 16 at 17-18; 22 at 35-37. The ALJ permissibly discredited Dr. Spagnolo's opinion because he did not adequately explain why it was his opinion that coal mine dust exposure did not

contribute to the Miner's impairment in addition to his cardiac condition and smoking. *Owens*, 724 F.3d at 558; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 26.

In challenging the ALJ's findings, Employer quotes the ALJ's analysis of the opinions of Drs. Zaldivar, Porterfield, and Spagnolo at length, and generally asserts he did not explain his conclusion that their opinions do not rebut the presumption of legal pneumoconiosis. Employer's Brief at 5-25. Employer's arguments are requests to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ permissibly discounted the opinions of Drs. Zaldivar, Porterfield, and Spagnolo, we affirm his determination that Employer did not disprove the Miner had legal pneumoconiosis.[10] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order at 27. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established 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); Decision and Order at 27-29. Contrary to Employer's argument, the ALJ permissibly discredited the disability causation opinions of Drs. Zaldivar, Porterfield, and Spagnolo because they failed to diagnose legal pneumoconiosis, contrary to his finding Employer did not disprove the existence of the disease. *See Epling*, 783 F.3d at 504-05; Decision and Order at 28-29. We therefore affirm the ALJ's finding that Employer failed to establish no part of the Miner's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

[10] Because the ALJ provided valid reasons for discrediting Drs. Zaldivar's and Spagnolo's opinions, we need not address Employer's additional arguments regarding the weight that the ALJ assigned their opinions. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 5-18.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge