U.S. Department of Labor

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

BRB No. 23-0005 BLA

CLYDE ABNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FOX KNOB COAL COMPANY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 02/29/2024
	)	
KENTUCKY EMPLOYERS' MUTUAL INSURANCE	)	
	)	
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 of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Thomas L. Ferreri and Matthew J. Zanetti (Ferreri Partners, PLLC), Louisville, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2020-BLA-05442) rendered on a claim filed on November 28, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant had at least thirty years of surface coal mine employment, all of which the ALJ determined was in dust conditions substantially similar to those underground, and that Claimant has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer asserts the ALJ erred in concluding Claimant established at least fifteen years of his coal mine employment qualifies for invoking the Section 411(c)(4) presumption. Alternatively, it contends the ALJ erred in finding it did not rebut the presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a response brief.

[1] 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.

[2] We affirm, as unchallenged on appeal and consistent with the parties' stipulations, the ALJ's findings that Claimant established at least thirty years of surface coal mine employment and a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2); Decision and Order at 3, 5; Hearing Transcript at 35-36.

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.[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, 361-62 (1965).

Invocation of the Section 411(c)(4) Presumption: Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines, or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if [Claimant] demonstrates that [he] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015). The parties stipulated to at least thirty years of surface coal mine employment. Decision and Order on Remand at 10; Hearing Transcript at 6.

The ALJ considered Claimant's employment history forms, coal truck driver questionnaires, and hearing testimony. Decision and Order at 4-5; Director's Exhibits 4-7; Hearing Transcript. Because Claimant testified to having worked in surface coal mine employment, the ALJ considered whether the evidence established he was regularly exposed to coal mine dust in that employment. Decision and Order at 3-5. Based on the evidence presented and "Claimant's uncontradicted testimony," the ALJ found Claimant's surface coal mine employment was performed in "conditions substantially similar to those in underground mines." *Id.* at 5.

Employer argues the ALJ's finding is not supported by substantial evidence because it "relies entirely" on evidence specific to Claimant's five months of employment with KTK Mining. Employer's Brief at 2-4. We disagree.

We initially reject Employer's assertion that Claimant's testimony establishes coal mine dust exposure only during his employment with KTK Mining. Employer's Brief at 3-4. As the ALJ observed, in addition to his work as a dozer operator with KTK, Claimant reported he worked at surface coal mines as a coal truck driver, drill operator, auger operator, loader operator, and dozer operator with his previous employers, and he was exposed to and inhaled coal and rock dust at each of his jobs. Decision and Order at 5; Hearing Transcript at 22-23; Director's Exhibits 4, 6, 7. The ALJ thus permissibly credited

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant 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.

Claimant's uncontradicted testimony to find he established he was exposed to coal mine dust throughout his surface coal mine employment.[4] *See Kennard*, 790 F.3d at 668 (rejecting distinction between coal dust and rock dust for invoking the Section 411(c)(4) presumption); *Pershina v. Consolidation Coal Co.*, 14 BLR 1-55 (1990) (en banc); *George v. Williamson Shaft Contracting Co.*, 8 BLR 1-91, 1-93 n.1 (1985); *Conley v. Roberts and Schaefer Co.*, 7 BLR 1-309, 1-311 (1984); *see also* 65 Fed. Reg. 79,920, 78,958 (Dec. 20, 2000) ("'Coal mine dust' means any dust generated in the course of coal mining operations.").

We further reject Employer's argument that Claimant did not establish "how frequent" his exposure to coal mine dust was with his employers prior to KTK Mining. Employer's Brief at 3-4. Claimant is not required to demonstrate he was exposed to dust comparable to underground mines but rather only that he was "regularly exposure to coal-mine dust" while working at surface mines. 20 C.F.R. §718.305(b)(2); *see Duncan*, 889 F.3d at 304 (rejecting argument that the claimant must provide evidence of "the actual dust conditions" and citing with approval the Department of Labor's (DOL) position that "dust exposure evidence will be inherently anecdotal").

The ALJ permissibly credited Claimant's uncontradicted testimony and documentation that he worked at surface coal mines as a coal truck driver, drill operator, auger operator, loader operator, and dozer operator; that his work at many of these jobs was performed at the tipple; and that he was exposed to and inhaled coal mine dust at each of these jobs. *See Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-344-45 (1984) (ALJ may rely on a miner's testimony, especially if the testimony is not contradicted by any documentation of record); Decision and Order at 4-5. Based on this uncontradicted testimony and evidence, the ALJ permissibly found all of Claimant's surface work involved regular exposure to coal mine dust. *See Director, OWCP v. Rowe*, 710 F.2d 251 (6th Cir. 1983) (ALJ has discretion to draw inferences from the evidence); *see also Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (duty of explanation satisfied as long as the reviewing court can discern what the ALJ did and why he did it); Decision and Order at 5.

[4] Claimant also reported being exposed to dust at all of his surface coal mine jobs, in his responses to Employer's interrogatories. Employer's Exhibit 9 at 7.

Thus, the ALJ permissibly determined Claimant's thirty years of surface coal mine employment qualifies for invoking the Section 411(c)(4) presumption. *See Duncan*, 889 F.3d at 304; *Kennard*, 790 F.3d at 663; Decision and Order at 5.

Therefore, we affirm, as supported by substantial evidence, the ALJ's conclusion that Claimant invoked the presumption. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Elkins v. Sec'y of HHS*, 658 F.2d 437, 439 (6th Cir. 1981); Decision and Order at 5.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis, 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.[5] Decision and Order at 12-13.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant 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 holds an employer can "disprove the existence of legal pneumoconiosis by showing that [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 relied on the opinions of Drs. Dahhan and Jarboe.[6] Dr. Dahhan diagnosed chronic obstructive pulmonary disease and emphysema due solely to smoking and

[5] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 7.

[6] The ALJ also considered Drs. Ajjarapu's, Raj's, and Nader's opinions that Claimant has legal pneumoconiosis and found they do not support Employer's burden on rebuttal. Decision and Order at 11-12; Director's Exhibits 15, 16; Claimant's Exhibits 1, 2.

unrelated to coal mine dust exposure. Director's Exhibits 26 at 5; 28 at 15-16; Employer's Exhibits 5 at 2; 10 at 5. Dr. Jarboe diagnosed reactive airway disease and chronic bronchitis caused by cigarette smoke and unrelated to coal mine dust exposure. Director's Exhibit 29 at 6-7; Employer's Exhibit 7 at 3-4. The ALJ gave both opinions little probative weight and thus found Employer did not rebut the existence of legal pneumoconiosis. Decision and Order at 9-12.

Employer contends the ALJ applied the wrong burden of proof because he stated that "Employer has to rule out coal dust as contributing to Claimant's impairment." Employer's Brief at 4-6 (quoting Decision and Order at 9). We consider the ALJ's word choice to be harmless as he correctly stated that to rebut the Section 411(c)(4) presumption "Employer must establish that Claimant does not have a chronic lung disease or impairment 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment'" and he accurately set forth the Sixth Circuit's "not in part" standard. Decision and Order at 7 (quoting 20 C.F.R. 20 C.F.R. §718.201(b) and *Young*); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *see Young*, 947 F.3d at 405; *Kennard*, 790 F.3d at 667; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013); 20 C.F.R. §718.201(a)(2), (b). Moreover, as explained below, the ALJ discredited Employer's experts because he found their opinions unpersuasive and not because they failed to satisfy a heightened legal standard. Decision and Order at 7-11; *see Ogle*, 737 F.3d at 1073-74.

Specifically, Dr. Jarboe opined Claimant has centriacinar emphysema, which is caused by smoking, rather than focal emphysema, which can be caused by coal mine dust exposure. Director's Exhibits 26 at 5; 28 at 14. The ALJ permissibly discredited Dr. Dahhan's opinion because he found it inconsistent with the DOL's position, set forth in the preamble to the 2001 regulatory revisions, that coal mine dust can cause centriacinar emphysema and that coal dust–induced emphysema and smoke-induced emphysema occur through similar mechanisms. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, (6th Cir. 2012); Decision and Order at 9 (citing 65 Fed. Reg. at 79,939, 79,943 (identifying centriacinar emphysema as a type of emphysema that may be caused by coal dust exposure)). Further, the ALJ permissibly discounted Dr. Dahhan's opinion because he failed to adequately explain why Claimant's "significant coal mine dust exposure" was not additive along with smoking in contributing to or aggravating his obstructive impairment. *See Sterling*, 762 F.3d at 491; *Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007);

65 Fed. Reg. at 79,940; Decision and Order at 9. Thus, substantial evidence supports the ALJ's finding that Dr. Dahhan's opinion is entitled to little probative weight. Decision and Order at 9.

Dr. Jarboe excluded a diagnosis of pneumoconiosis based on his opinion that obstruction caused by coal mine dust exposure is usually associated with normal or small elevations in lung volume, whereas Claimant's lung volume is significantly elevated. Director's Exhibit 29 at 5. The ALJ permissibly discredited his opinion as based on generalities, rather than the specific facts in this case. *See Rowe*, 710 F. 2d at 255; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985) (physician opinion based on generalities rather than specifics may be discredited). Dr. Jarboe also excluded legal pneumoconiosis because Claimant's impairment improved following the administration of bronchodilators. Director's Exhibit 29 at 6-7. The ALJ permissibly discredited his opinion because he did not explain why coal mine dust exposure could not have caused or contributed to the fixed portion of Claimant's impairment that did not respond to bronchodilators. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Barrett*, 478 F.3d at 356; Decision and Order at 10.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Employer failed to establish that Claimant does not have legal pneumoconiosis. *Ogle*, 737 F.3d at 1072-73; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order at 36. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established that "no part of [Claimant'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 12-13. He permissibly discredited the opinions of Drs. Dahhan and Jarboe on the cause of Claimant's respiratory disability because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the disease. *See Ogle*, 737 F.3d at 1074; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 13; Director's Exhibits 26 at 5; 28 at 15-16; 29 at 6-7; Employer's Exhibits 5

at 2; 7 at 3-4; 10 at 5. 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 legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge