U.S. Department of Labor

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

BRB No. 23-0061 BLA

DON R. HAWKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PARAMONT COAL CORPORATION	)	
	)	DATE ISSUED: 02/15/2024
Employer-Petitioner	)	
	)	
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 Evan H. Nordby, Administrative Law Judge, United States Department of Labor.

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

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Evan H. Nordby's Decision and Order Awarding Benefits (2019-BLA-05737) rendered on a claim filed on November 13,

2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 14.068 years of coal mine employment and thus found he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant did not establish clinical pneumoconiosis, but established legal pneumoconiosis.[2] 20 C.F.R. §718.202(a). He further found Claimant established a totally disabling respiratory or pulmonary impairment due to legal pneumoconiosis. 20 C.F.R. §718.204(b)(2), (c). Thus he awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis and total disability due to pneumoconiosis.[3] 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

[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] "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). "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).

[3] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established 14.068 years of coal mine employment and total disability. 20 C.F.R. §718.204(b); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9, 11-21.

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).

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. Statutory presumptions[5] may assist a claimant in establishing these elements when certain conditions are met, but failure to establish any element precludes an award of benefits. *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, 1-2 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has a chronic lung disease or an 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 weighed the opinions of Drs. Ajjarapu and Green that Claimant has legal pneumoconiosis and the opinions of Drs. Fino and McSharry that he does not. Decision and Order at 24-28. He found the opinions of Drs. Ajjarapu and Green are reasoned and documented and the contrary opinions of Drs. Fino and McSharry are not credible. *Id.*

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[5] The ALJ determined the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) is not available in this case because the evidence does not establish Claimant has complicated pneumoconiosis. Decision and Order at 31, *citing* 20 C.F.R. §718.304.

Thus he found Claimant established legal pneumoconiosis based on the preponderance of the evidence. *Id.*

Employer argues the ALJ did not adequately explain his basis for crediting Dr. Green's opinion in accordance with the Administrative Procedure Act (APA).[6] We disagree.

Dr. Green summarized the results of Claimant's pulmonary function and arterial blood gas testing. Claimant's Exhibit 1. He opined pulmonary function testing demonstrates Claimant has a mild to moderate restrictive lung impairment along with "small airways disease." *Id.* at 3. In addition, he noted resting arterial blood gas testing demonstrates Claimant suffers from hypercarbia and hypoxemia at rest. *Id.* Further, he stated "[b]lood gases drawn during peak exercise show[] . . . chronic respiratory failure and hypoxemia" along with "concomitant metabolic acidosis." *Id.* Based on the results of the objective testing, he opined Claimant is totally disabled. *Id.* He further explained that Claimant's fifteen or sixteen years "of occupational exposure to respirable coal and rock dust" is a "significant contributing and aggravating factor" in his lung impairment. *Id.* at 4.

In crediting Dr. Green's opinion, the ALJ found the doctor "solicited a detailed work, family, medical [], [and] smoking history," along with a "set of complaints and symptoms from [] Claimant." Decision and Order at 28. He also found the doctor "reported [] the testing results . . . in light of Claimant's work and smoking history" and how those results "led him to conclude [] Claimant's hypoxemia and exercise intolerance were 'multifactorial' and not solely due to obesity." *Id.* While acknowledging the doctor overestimated Claimant's coal mine employment by one or two years, the ALJ found this discrepancy does not undermine the probative value of Dr. Green's opinion.[7] *Id.* In

[6] The Administrative Procedure Act, 5 U.S.C. §§500-591, requires that every adjudicatory decision include a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[7] The effect of an inaccurate coal mine dust exposure history on the credibility of a medical opinion is a determination for the ALJ to make. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1994); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988). The ALJ acknowledged Dr. Green reported a fifteen to sixteen-year history, contrary to his determination that Claimant worked for fourteen years. Decision and Order at 28; Director's Exhibit 12; Claimant's Exhibit 1. But the ALJ permissibly found a one to two-year difference was not

addition, the ALJ explained the doctor "connected" Claimant's "occupational history of exposure to respirable coal and rock dust to his impaired gas exchange with respiratory failure and hypoxemia and his total pulmonary disability." *Id.* (internal quotations omitted). Based on the foregoing, the ALJ permissibly found Dr. Green's opinion is reasoned and documented.[8] *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); Decision and Order at 28.

The ALJ sufficiently explained his credibility determination as the APA requires. *See Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (explaining that the duty of explanation under the APA is satisfied if the reviewing court can discern what the ALJ did and why he did it). Thus we affirm the ALJ's finding that Dr. Green's opinion is reasoned and documented. Decision and Order at 28.

Employer next argues the ALJ also failed to adequately explain why he discredited the opinions of Drs. Fino and McSharry in accordance with the APA. Employer's Brief at 9-10 (unpaginated). We disagree.

Dr. Fino opined Claimant has a mild respiratory impairment evidenced by reductions in the FEV1 and FVC values on pulmonary function testing. Director's Exhibit 39. He also diagnosed hypoxemia based on arterial blood gas testing, but opined these impairments can all be explained by Claimant's obesity. *Id.* at 7. In addition, he stated "[t]here is insufficient objective evidence to justify" a diagnosis of legal pneumoconiosis. *Id.*

The ALJ permissibly discredited Dr. Fino's opinion because the doctor failed to adequately address Claimant's diagnosis of chronic bronchitis and whether it was

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"significant" such that it undermines the overall reliability of the physician's opinion on legal pneumoconiosis. Decision and Order at 28; *see Trumbo*, 17 BLR at 1-89; *Sellards*, 17 BLR at 1-81; *Bobick*, 13 BLR at 1-54.

[8] Employer argues the ALJ should have discredited Dr. Green's opinion because the doctor did not review Claimant's entire medical record. Employer's Brief at 10-12 (unpaginated). We disagree. An ALJ is not required to discredit a physician who did not review all of the medical evidence when the opinion is otherwise well-reasoned, documented, and based on the physician's own examination of the miner and objective test results. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996).

significantly related to, or substantially aggravated by, coal mine dust exposure.[9] *Mays*, 176 F.3d at 756; *Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40; Decision and Order at 26. In addition, the ALJ permissibly found Dr. Fino summarily discounted the effects of Claimant's coal mine dust exposure on his lung impairments, including hypoxemia, without any explanation. *Id*. Thus, contrary to Employer's argument, the ALJ explained his basis for discrediting Dr. Fino's opinion as the APA requires, *Owens*, 724 F.3d at 557, and Employer identifies no specific error in these findings. Thus we affirm the ALJ's discrediting of Dr. Fino's opinion.

We also find Employer's argument that the ALJ did not explain his basis for discrediting Dr. McSharry's opinion unpersuasive. Employer's Brief at 9-10 (unpaginated).

Dr. McSharry diagnosed Claimant with asthma but excluded coal mine dust exposure as a cause or aggravating factor because Claimant has not worked in coal mining for thirty years. Employer's Exhibit 2 at 2-3. The ALJ permissibly found this rationale inconsistent with the regulations which recognize that legal pneumoconiosis is a "latent and progressive disease which may first 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) (medical opinion not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); Decision and Order at 26-27. In addition, the ALJ permissibly found Dr. McSharry summarily stated coal mine dust exposure does not aggravate asthma but did not explain his basis for this opinion. *See Mays*, 176 F.3d at 756; *Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40; Decision and Order at 26-27.

Moreover, Dr. McSharry opined that Claimant's hypoxemia is unrelated to coal mine dust exposure because there is no radiographic evidence of pneumoconiosis on computed tomography (CT) scan testing. Employer's Exhibit 2 at 3. The ALJ noted that in the preamble to the 2001 revised regulations, the Department of Labor explained that CT scan testing may be a reliable diagnostic tool to exclude clinical pneumoconiosis, but there is no evidence that the test is able to "rule out the existence of all diseases arising out of coal mine employment." 65 Fed. Reg. 79,940, 79,945 (Dec. 20, 2000) (internal quotations omitted); *see also Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000). In light of the preamble, the ALJ rationally found Dr. McSharry's explanation

[9] The ALJ noted Dr. Ajjarapu, whose opinion Dr. Fino reviewed, diagnosed chronic bronchitis; Dr. Fino also acknowledged a medical history that included a 2017 hospitalization for bronchitis. Decision and Order at 26; Director's Exhibit 39 at 2.

unpersuasive. *See Mays*, 176 F.3d at 756; *Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40; Decision and Order at 27.

Employer generally argues the ALJ should have found the opinions of Drs. Fino and McSharry well-reasoned, and discredited Dr. Green's opinion. Employer's Brief at 6, 10 (unpaginated). However, it is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012). Employer's arguments regarding the physicians' opinions are a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Thus, we affirm the ALJ's finding that Claimant established legal pneumoconiosis through Dr. Green's opinion.[10] 20 C.F.R. §718.202(a)(4); Decision and Order at 29-30.

Disability Causation

To establish disability causation, Claimant must prove 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 "[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); *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 37-38 (4th Cir. 1990).

The ALJ credited Dr. Green's opinion, that Claimant's totally disabling respiratory impairment is due to legal pneumoconiosis, over the contrary opinions of Drs. Fino and McSharry. 20 C.F.R. §718.204(c); Decision and Order at 30-31. We disagree with

[10] We reject Employer's contention that the ALJ shifted the burden of proof to Employer to disprove legal pneumoconiosis. Employer's Brief at 3-4, 6-7 (unpaginated). Maintaining the burden of proof on Claimant, the ALJ found he established legal pneumoconiosis by a preponderance of the evidence because Dr. Green's opinion outweighs the contrary opinions of Drs. Fino and McSharry. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 272-76 (1994); *Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 820 F.3d 833, 843 (6th Cir. 2016); Decision and Order at 28. Further, because Claimant established legal pneumoconiosis through Dr. Green's opinion, we need not address whether the ALJ erred in finding Dr. Ajjarapu's opinion is reasoned and documented, as any error would be harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer's argument that the ALJ erred in making this finding. Employer's Brief at 12-16 (unpaginated).

The ALJ correctly found Dr. Green's opinion establishes total disability due to legal pneumoconiosis. Decision and Order at 30-31. As discussed above, Dr. Green opined Claimant's coal mine dust exposure "is an additional significant contributing factor to the findings of impaired gas exchange in [Claimant's] total pulmonary disability." Claimant's Exhibit 1 at 4. Thus he opined that Claimant's totally disabling lung impairment constitutes legal pneumoconiosis and is *the* cause of his total disability. *Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 186-87 (4th Cir. 2014) (death causation satisfied where the court found the miner's chronic obstructive pulmonary disease (COPD) constituted legal pneumoconiosis and all of the medical experts agreed COPD contributed to the miner's death); *see Energy West Mining Co. v. Dir., OWCP*, 49 F.4th 1362, 1369 (10th Cir. 2022); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013) (where all the medical experts agreed COPD caused the miner's total disability, the legal pneumoconiosis inquiry "completed the causation chain from coal mine employment to legal pneumoconiosis which caused [the miner's] pulmonary impairment that led to his disability"); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 255-56 (2019); 20 C.F.R. §718.204(c).

In addition, the ALJ rationally discredited the disability causation opinions of Drs. Fino and McSharry because they did not diagnose legal pneumoconiosis, contrary to his finding that Claimant has the disease. *See Epling*, 783 F.3d at 504-05; Decision and Order at 30-31. Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability due to legal pneumoconiosis.[11] 20 C.F.R. §718.204(c). Consequently, we affirm the ALJ's finding that Claimant established entitlement under 20 C.F.R. Part 718 and affirm the award of benefits.

[11] Because we affirm the ALJ's finding that Claimant established total disability causation through Dr. Green's opinion, we need not address the ALJ's consideration of Dr. Ajjarapu's opinion on this issue. *Larioni*, 6 BLR at 1-1278.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge