U.S. Department of Labor

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

BRB No. 23-0240 BLA

LONNIE TACKETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTH AKERS MINING COMPANY, LLC	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE/AIG	)	DATE ISSUED: 02/07/2024
	)	
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 Willow Eden Fort, Administrative Law Judge, United States Department of Labor.

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

Timothy J. Walker and Daniel G. Murdock (Fogle Keller Walker, PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Willow Eden Fort's Decision and Order Awarding Benefits (2021-BLA-05963) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on December 4, 2019.[1]

The ALJ found Claimant established at least twenty-four years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she concluded Claimant invoked the presumption that his total disability was due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[2] and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits.

[1] Claimant filed four prior claims but withdrew three of them, including the most recent claim. Director's Exhibits 1-4. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306(b). The district director denied Claimant's third claim, filed on April 12, 2016, because although he established the existence of pneumoconiosis arising out of coal mine employment, he failed to establish total disability. Director's Exhibit 3. Claimant did not take any further action on that claim.

[2] 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. §92l(c)(4) (2018); 20 C.F.R. §718.305(b).

[3] 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 she 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(d); *see 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 Claimant failed to establish total disability in his prior claim, he had to submit new evidence establishing this element to obtain a review of this subsequent claim on the merits. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c); Director's Exhibit 3.

The Director, Office of Workers' Compensation Programs, did not file a substantive response.

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).

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

Because Claimant invoked the Section 411(c)(4) presumption,[5] the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[6] 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.[7]

---

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 28.

[5] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant has at least twenty-four years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, invoked the Section 411(c)(4) presumption, and established a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 5.

[6] "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).

[7] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 11.

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." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see also Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, 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 relies on Drs. Dahhan's and Tuteur's opinions that Claimant does not have legal pneumoconiosis. Employer's Exhibits 1-3. The ALJ found their opinions insufficient to satisfy Employer's burden of proof as they did not sufficiently explain why coal dust did not contribute to Claimant's respiratory or pulmonary impairment. Decision and Order at 12-13. Employer argues the ALJ misinterpreted their opinions and erred in discrediting them. Employer's Brief at 9-12. We disagree.

Dr. Dahhan opined that Claimant has resting and exercise hypoxemia that is totally disabling but concluded it did not result from the inhalation of coal dust or coal workers' pneumoconiosis. Employer's Exhibits 1, 3 at 14. He stated that Claimant "continues to demonstrate normal respiratory mechanics [as evidenced by pulmonary function testing] which is a finding that is inconsistent with coal dust induced lung disease that causes significant alteration in the respiratory mechanics with resulting hypoxemia." Employer's Exhibit 1 at 4. Dr. Dahhan initially attributed Claimant's impairment to his "morbid obesity and "the insult he suffered to his respiratory system when he was hospitaliz[ed] for pneumonia in 2019." *Id*. At his deposition, Dr. Dahhan agreed that Claimant's coal mine employment history was sufficient to cause disabling pneumoconiosis in a susceptible host. Employer's Exhibit 3 at 11-12. However, he explained that after reviewing additional information, Claimant's "pneumonia was really abnormality secondary to a lung cancer [that had spread from the pancreas]." Employer's Exhibit 3 at 8-9.

Dr. Tuteur opined that Claimant's impairment of oxygen gas exchange is "of uncertain etiology." Employer's Exhibit 2 at 4. Nevertheless, he expressed that it is "likely

due to cardiac dysfunction"[8] and that Claimant has no impairment "due to the inhalation of coal mine dust or the development of coal workers' pneumoconiosis." *Id.*

The ALJ permissibly found that even assuming the alternative etiologies discussed by Drs. Dahhan and Tuteur contributed to Claimant's impairment, the physicians failed to adequately explain why Claimant's exposure to coal and rock dust did not also contribute to his gas exchange impairment. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 12-13. Employer's arguments amount to a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 9-12. Because the ALJ permissibly discredited Drs. Dahhan's and Tuteur's opinions,[9] we affirm her determination that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(2)(i) by disproving legal pneumoconiosis. Decision and Order at 14.

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 14-15. She permissibly discounted the opinions of Drs. Dahhan and Tuteur regarding the cause of the Claimant's respiratory impairment because they did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove the existence of the disease.[10] *See Kennard*, 790 F.3d at 668-69; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 15.

---

[8] Dr. Tuteur acknowledged that "[w]ithout review of the echocardiograms performed at [Appalachian Regional Healthcare] Whitesburg, confirmation of [the diagnosis of mitral valvular insufficiency and aortic stenosis, associated with rheumatic heart disease] is not available." Employer's Exhibit 2 at 4. He also indicated that chronic left ventricular dysfunction must also be considered "as a likely etiology." *Id.*

[9] Because the ALJ provided a valid reason for discrediting Drs. Dahhan's and Tuteur's opinions on legal pneumoconiosis, we need not address Employer's remaining arguments concerning the weight accorded their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 9-12.

[10] Drs. Dahhan's and Tuteur's opinions as to whether Claimant's respiratory impairment is related to legal pneumoconiosis rested on their assumption that Claimant does not have legal pneumoconiosis.

We therefore affirm the ALJ's determination that Employer failed to establish no part of Claimant's total disability is due to legal pneumoconiosis, 20 C.F.R. §718.305(d)(1)(ii), and the award of benefits.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge