U.S. Department of Labor

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

BRB No. 21-0056 BLA

RODNEY L. PARKS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOPKINS COUNTY COAL, L.L.C.	)	
	)	
and	)	
	)	
ALLIANCE COAL, L.L.C.	)	DATE ISSUED: 01/24/2022
	)	
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 Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters PLLC), Pikeville, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jerry R. DeMaio's Decision and Order Awarding Benefits (2019-BLA-05905) rendered on a claim filed on October 18, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ accepted the parties' stipulation that Claimant has thirty-four years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, and thus invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.204(b)(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, has 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 filed a prior claim that he withdrew. Director's Exhibit 1. A withdrawn claim is "considered not to have been filed." 20 C.F.R. §725.306(b).

[2] Section 411(c)(4) 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.

[3] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established thirty-four years of underground coal mine employment and total disability, and thus invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11.

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

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,[5] 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); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). The ALJ found Employer did not rebut the presumption by either method.[6]

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*, 25 BLR at 1-155 n.8. The United States Court of Appeals for the Sixth Circuit holds this standard requires Employer to show 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, 403-06 (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, 597-99, 600 (6th Cir. 2014).

Employer relies on the opinions of Drs. Selby and Tuteur. The ALJ found their opinions unpersuasive to satisfy its burden of proof.

Employer initially contends the ALJ applied the wrong legal standard by requiring Dr. Selby to "rule out" and Dr. Tuteur to "exclude" coal mine dust exposure as a factor in

[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 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 disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 13.

Claimant's obstructive pulmonary impairment. Employer's Brief at 5-7. Contrary to Employer's contention, the ALJ stated the correct legal standard when he observed Employer must prove Claimant's impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 13. As discussed below, the ALJ permissibly found neither physician adequately explained why he completely eliminated coal mine dust exposure as a causative factor for Claimant's respiratory condition. *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007). Thus, the ALJ rejected Employer's experts because he found their opinions not well reasoned and not because he applied the wrong legal standard.

As the ALJ correctly observed, Dr. Selby opined Claimant does not have any respiratory impairment caused by his coal mine employment. Dr. Selby diagnosed "uncontrolled," "clear cut," "garden variety asthma" caused by "genetic tendency" and "the right viral infection in a susceptible host." Employer's Exhibit 1 at 6. He also opined Claimant "likely" has emphysema, aggravated by untreated asthma and tobacco smoke exposure. *Id.* at 6-7. We see no error in the ALJ's finding that Dr. Selby did not adequately explain why Claimant's thirty-four years of coal mine employment did not significantly relate to or substantially aggravate his respiratory or pulmonary impairment, along with asthma or smoking. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 14-15; Employer's Exhibit 1 at 6-7.

Dr. Tuteur diagnosed chronic obstructive pulmonary disease (COPD), which he attributed to uncontrolled sinusitis and smoking. Employer's Exhibit 4 at 4. He stated the "clinical picture of COPD, whether caused by inhalation of tobacco smoke or coal mine dust, is generally similar." *Id*. at 5. Citing medical studies supporting the infrequency with which coal mine dust produces COPD, Dr. Tuteur indicated coal miners who never smoked develop the COPD phenotype about one percent of the time or less, while smokers who never mined develop the COPD phenotype about twenty percent of the time. *Id.* Dr. Tuteur concluded Claimant's COPD is "uniquely" due to the chronic inhalation of tobacco smoke and not coal mine dust exposure. *Id*. at 6. The ALJ permissibly found Dr. Tuteur's opinion unpersuasive because he relied on generalities and a "reasoning process of relative risk." Decision and Order at 15. The ALJ noted that even if COPD due to coal mine dust exposure is statistically rare as Dr. Tuteur asserts, he did not adequately explain why Claimant was "not be one of those statistically rare cases." *Id*.; *see Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Employer's Exhibit 4 at 4-6.

Employer's arguments on legal pneumoconiosis are 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). Because the ALJ permissibly discredited Drs. Selby's and

Tuteur's opinions, we affirm his concluding that Employer failed to disprove legal pneumoconiosis.[7] *See* 20 C.F.R. §718.305(d)(1)(i); *Rowe*, 710 F.2d at 255; Decision and Order at 15.

Disability Causation

In order to disprove disability causation, Employer must establish "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). The ALJ found Drs. Selby's and Dr. Tuteur's opinions lacked credibility on the issue of disability causation because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the disease. Decision and Order at 15-16, *citing Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013) and *Skukan v. Consolidated Coal Co*., 993 F.2d 1228 (6th Cir. 1993), *vacated sub nom*., *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co*., 46 F.3d 15 (6th Cir. 1995). Employer raises no specific allegations of error regarding the ALJ's findings other than its assertion that Claimant does not have legal pneumoconiosis, which we rejected. Thus, we affirm the ALJ's determination that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15-16.

[7] 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).

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