U.S. Department of Labor

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

BRB No. 21-0083 BLA

FLAVA O'NEIL YOUNG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN COAL CORPORATION	)	
	)	
and	)	
	)	
PITTSTON COMPANY	)	DATE ISSUED: 01/31/2022
	)	
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 Jason A. Golden, Administrative Law Judge, United States Department of Labor.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky for Employer.

Olgamaris Fernandez (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, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2019-BLA-05717) rendered on a subsequent claim filed on March 5, 2018,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established at least 15.70 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c), and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

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.[3] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, filed a limited response urging rejection of Employer's constitutional arguments.

The Benefit 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

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[1] This is Claimant's third claim for benefits. Director's Exhibits 1-2. The district director denied his second claim, filed on December 20, 2012, for failure to establish total disability. Decision and Order at 3 n.6; Director's Exhibit 2 at 94 at 10-11.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that Claimant 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 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 16.

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).

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 4-5. 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. *See California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[5] or that "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 did not establish rebuttal by either method.

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

[4] We 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); Hearing Transcript at 12.

[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 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).

(2015). The United States Court of Appeals for the Sixth Circuit, whose law applies to this claim, requires Employer to establish Claimant'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 the medical opinions of Drs. Rosenberg and Tuteur to disprove legal pneumoconiosis. Dr. Rosenberg opined Claimant has a significant restrictive impairment caused by underlying heart disease and unrelated to coal mine dust exposure. Director's Exhibit 27 at 2-3. Dr. Tuteur diagnosed Claimant with a moderate restrictive ventilatory defect due to coronary artery disease, obesity, compression fractures of the spine, and elevated right hemi diaphragm of undetermined etiology. Employers Exhibits 3 at 2-3; 4 at 3-4; 12 at 2. The ALJ found their opinions unpersuasive and insufficient to satisfy Employer's burden of proof. Decision and Order at 21-23.

Employer initially argues the ALJ applied an incorrect legal standard because he required Drs. Rosenberg and Tuteur to effectively "rule out" coal mine dust exposure to disprove legal pneumoconiosis. Employer's Brief at 10-11. We disagree.

As the ALJ correctly observed, to disprove legal pneumoconiosis, Employer must establish Claimant's pulmonary impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 20; *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 667 (6th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013); 20 C.F.R. §718.201(a)(2), (b). Contrary to Employer's argument, the ALJ rejected the opinions of Employer's experts not because he applied an incorrect legal standard but because he found their opinions not well-reasoned or documented. Decision and Order at 21-23.

The ALJ found Dr. Rosenberg, in attributing Claimant's restrictive impairment to obesity and heart disease, failed to convincingly explain why "at least part of Claimant's significant restriction is not attributable to his coal dust exposure." Decision and Order at 21. He similarly found Dr. Tuteur's opinion that Claimant's "restrictive abnormality" was caused by a heart condition, obesity, compression fractures of the spine, elevated right hemi diaphragm of undetermined etiology, and extensive post-inflammatory changes did not convincingly explain why Claimant's coal mine dust exposure did not also contribute to his restrictive impairment. Decision and Order at 22. The ALJ therefore permissibly accorded less weight to their opinions because they did not adequately explain why Claimant's 15.70 years of coal mine dust exposure did not contribute to or aggravate his

restrictive impairment.[6] *See Kennard*, 790 F.3d at 668; *Ogle*, 737 F.3d at 1074; Decision and Order at 21.

Employer contends that, in discrediting Drs. Rosenberg's and Tuteur's opinions because they "did not explain how they excluded coal mine dust exposure as a contributing or aggravating impairment," the ALJ substituted his opinion for those of the medical experts. Employer's Brief at 12. It further maintains Drs. Rosenberg and Tuteur credibly explained how Claimant's cardiac condition and obesity caused his restrictive impairment. *Id.* at 10-12. However, as the trier of fact, it is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012). We consider Employer's arguments to be a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 9-12. Because the ALJ acted within his discretion in rejecting the opinions of Drs. Rosenberg and Tuteur, we affirm his finding that Employer did not disprove legal pneumoconiosis. *See Young*, 947 F.3d at 407; Decision and Order at 23. Therefore, because it is supported by substantial evidence, we affirm the ALJ's finding that Employer failed to disprove Claimant has pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i).[7]

Disability Causation

The ALJ also found Employer failed to establish that "no part" of Claimant's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis. Decision and Order at 23; *see* 20 C.F.R. §718.305(d)(1)(ii). He permissibly discredited the opinions of Drs. Rosenberg and Tuteur because they did not diagnose legal pneumoconiosis,

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[6] The ALJ also found the opinions of Drs. Rosenberg and Tuteur not well-reasoned because, while both physicians reviewed Dr. Ajjarapu's diagnosis of legal pneumoconiosis in the form of chronic bronchitis and Dr. Tuteur reviewed Dr. Nader's similar diagnosis, neither physician explained why they disagreed with the diagnosis of chronic bronchitis. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511 (6th Cir. 2002); Decision and Order at 22; Director's Exhibits 19 at 6, 27 at 2; Claimant's Exhibit 1 at 3; Employer's Exhibit 3 at 4.

[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)(A), (B). Therefore, we need not address its arguments that the ALJ erred in finding it did not disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

contrary to his finding that Employer failed to disprove the disease. *See Ogle*, 737 F.3d at 1074; Decision and Order at 23. Employer alleges no specific error with regard to the ALJ's findings on disability causation, other than its general contention that Claimant does not have legal pneumoconiosis, which we have rejected. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the ALJ's finding that Employer failed to prove that no part of Claimant's total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 24.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge