U.S. Department of Labor

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

BRB Nos. 21-0126 BLA
and 21-0127 BLA

ANITA K. CORDELL (Widow of and o/b/o JACKIE LEE CORDELL)	)	
Claimant-Respondent	)	
v.	)	
SHAMROCK COAL COMPANY, INCORPORATED, c/o SUNCOKE ENERGY, INCORPORATED	)	DATE ISSUED: 01/24/2022
Self-Insured 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 Dana Rosen, Administrative Law Judge, Department of Labor.

James M. Kennedy (Baird and Baird, PSC), Pikeville, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Dana Rosen's Decision and Order Awarding Benefits (2016-BLA-05591; 2019-BLA-05726) rendered on claims filed

pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on November 10, 2014,[1] and a survivor's claim filed on June 15, 2018. Director's Exhibit 3; Survivor's Claim Director's Exhibit 1. This case is before the Benefits Review Board for the second time.[2]

The ALJ accepted the parties' stipulation that the Miner had thirteen years and five months of coal mine employment, and thus found Claimant[3] could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Considering entitlement under 20 C.F.R. Part 718, the ALJ found the new evidence established the Miner had legal pneumoconiosis, and therefore demonstrated a change in an applicable condition of entitlement.[5] 20 C.F.R. §§718.202(a)(4), 725.309(c). The ALJ further found the Miner suffered from a totally disabling respiratory or pulmonary impairment due to legal pneumoconiosis. 20 C.F.R. §718.204(b)(2), (c). Consequently, the ALJ awarded benefits

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[1] The Miner's initial claim was filed on September 16, 2002, and dismissed as abandoned on June 12, 2003. Director's Exhibit 1 at 265-266. A denial by reason of abandonment is "deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

[2] The Board remanded this case after it found Employer entitled to a new hearing before a properly appointed ALJ pursuant to *Lucia v. Securities and Exchange Comm'n*¸ 585 U.S. , 138 S. Ct. 2044, 2055 (2018). *Cordell v. Shamrock Coal Co.*, BRB No. 18-0239 BLA, slip op. at 4 (Oct. 30, 2018) (unpub.).

[3] Claimant is the widow of the Miner, who died on June 8, 2018. Director's Exhibit 4. In addition to her survivor's claim, she is pursuing the Miner's claim on his behalf.

[4] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability was due to pneumoconiosis if he had 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.

[5] Where a claimant files a claim for benefits more than one year after the denial of a previous claim becomes final, the subsequent claim must also be denied unless the ALJ finds that "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). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Because the Miner's prior claim was abandoned, Claimant had to establish any element of entitlement to obtain review of the merits of the Miner's claim. Director's Exhibit 1 at 265-266

in the miner's claim. Based on the award of benefits in the miner's claim, the ALJ found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act. 30 U.S.C. §932(*l*) (2018).

On appeal, Employer argues the ALJ erred in finding that the Miner had legal pneumoconiosis and that his total disability was caused by coal dust exposure.[6] Claimant and the Director, Office of Workers' Compensation Programs, have not filed a response.

The 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.[7] 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).

The Miner's Claim

To be entitled to benefits under the Act, a 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 may assist a claimant in establishing these elements of entitlement if certain conditions are met, but failure to establish any of them 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 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove the Miner had a "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(a)(2), (b). The United States Court of Appeals for the Sixth Circuit has held that a claimant can satisfy this burden by showing that the disease was caused "in part" by coal

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[6] We affirm, as unchallenged, the ALJ's finding that the Miner was totally disabled. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Employer's Brief at 5. Consequently, Claimant has established a change in an applicable condition of entitlement since the Miner's last claim was denied. 20 C.F.R. §725.309(d).

[7] We will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner 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.

dust exposure. *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99, 600 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The ALJ considered the medical opinions of Drs. Forehand, Kelly, Coffey, Vuskovich, and Dahhan. 20 C.F.R. §718.202(a)(4). Dr. Forehand diagnosed the Miner with legal pneumoconiosis in the form of a mixed restrictive-obstructive lung disease due to his coal mine employment. Director's Exhibit 1 at 176. Dr. Kelly diagnosed the Miner with coal workers' pneumoconiosis, granulomatous disease, and asthma. *Id.* at 416. Dr. Coffey, the Miner's treating physician, diagnosed the Miner with chronic obstructive pulmonary disease (COPD), chronic respiratory problems, and pneumoconiosis due to coal mine dust exposure. *Id.* at 139. Dr. Vuskovich opined the Miner did not have legal pneumoconiosis, but instead diagnosed chronic alveolar hypoventilation and a deterioration in his ventilatory capacity due to significant trauma to his body, peripheral neuropathy, weight, and congestive heart failure. Employer's Exhibits 5, 7. Dr. Dahhan opined the Miner did not have legal pneumoconiosis, but instead had a restrictive ventilatory impairment due to a fractured thoracic and lumbar spine, obesity, and chest wall abnormalities. Employer's Exhibits 4, 7.

The ALJ credited Dr. Forehand's opinion as well-documented and well-reasoned. Decision and Order at 28-29. The ALJ also credited the opinions of Drs. Kelly and Coffey to a "lesser extent," and discredited the opinions of Drs. Vuskovich and Dahhan. *Id.* at 27-31. Consequently, the ALJ found the medical opinion evidence established the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 30.

Employer contends the ALJ erred in weighing the medical opinion evidence. Employer's Brief at 4-14. We disagree.

The ALJ accurately found that Dr. Forehand based his diagnosis on a physical examination of the Miner, his reported symptoms, employment and exposure history, and the objective testing from his examination. Decision and Order at 28; Director's Exhibit 1 at 176. She further accurately noted Dr. Forehand opined the Miner was at "extremely high risk for developing a mixed restrictive-obstructive lung disease" during his twelve years of exposure to "hard rock dust (silica) working as a driller in an open cab at a surface coal mine," that the mixed restrictive-obstructive lung disease he developed is most consistent with this exposure, and his chest wall trauma did not significantly contribute to this lung disease. *Id.* at 15-16, *citing* Director's Exhibit 1 at 176. The ALJ found his opinion consistent with the preamble's recognition that coal mine dust exposure can cause obstructive lung disease. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Decision and Order at 28, *citing* 65 Fed. Reg. at 79923, 79937-45 (Dec. 20, 2000).

She further permissibly accorded it significant weight because he "considered an accurate employment history, [the] objective clinical testing, and other potential causes when forming his opinions." *See Jericol Mining, Inc. v. Napi*er, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 34. Contrary to Employer's arguments, the ALJ did not create a presumption that all obstructive lung disease is legal pneumoconiosis, but instead performed a qualitative analysis of Dr. Forehand's opinion and reasonably found it well-documented and well-reasoned.[8] *See Napi*er, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185.

We further reject Employer's arguments that the ALJ erred in her weighing of its medical experts.[9] Employer's Brief at 8-11. Dr. Dahhan opined the Miner did not have legal pneumoconiosis because he did not have obstructive lung disease and his restrictive lung impairment was not characterized by interstitial lung disease. Employer's Exhibit 4. He attributed the Miner's lung disease to obesity, a fractured spine, and chest wall abnormalities and the Miner's decline in lung function after 2017 to his fractured spine. *Id*.

The ALJ accurately noted Dr. Dahhan is the only physician to opine the Miner did not have an obstructive component to his lung disease. Decision and Order at 30; Employer's Exhibit 4. She further found that, while Dr. Dahhan attributed the deterioration in the Miner's lungs to his 2017 fall resulting in a fractured spine, he did not address the Miner's condition prior to it -- despite reviewing medical opinions diagnosing a totally disabling respiratory impairment in 2015 and a chronic lung disease in 2014. Decision and Order at 30. The ALJ has discretion to weigh the evidence, draw appropriate inferences,

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[8] Nor is there any merit to Employer's argument that the ALJ should have discredited Dr. Forehand's opinion that the Miner had legal pneumoconiosis because he found the Miner had clinical pneumoconiosis, contrary to the ALJ's findings. Employer's Brief at 6-7. Dr. Forehand diagnosed clinical pneumoconiosis based on the x-ray evidence, and legal pneumoconiosis based upon the pulmonary function study evidence. Director's Exhibit 1 at 176; 20 C.F.R. §718.201(a)(1), (2). Employer has failed to explain how an erroneous diagnosis of clinical pneumoconiosis impacted Dr. Forehand's diagnosis of legal pneumoconiosis. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

[9] Employer accurately notes the ALJ erred in considering Dr. Broudy's medical opinion, which was not designated by the parties and is not admissible. Employer's Brief at 8; Employer's Evidence Summary. However, as the physician's opinion was not credited and he opined the Miner did not have legal pneumoconiosis, any error in considering this evidence is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Director's Exhibit 13; Employer's Exhibit 2 at 4.

and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012); *Napier*, 301 F.3d at 713-14. The ALJ permissibly found Dr. Dahhan's opinion was conclusory and he failed to adequately explain why he believed the Miner's lung disease was unrelated to his coal mine dust exposure. *Banks*, 690 F.3d at 482-84; *Napier*, 301 F.3d at 713-14; Decision and Order at 30.

Dr. Vuskovich opined the cause of the Miner's loss of ventilatory capacity was unclear but likely due to trauma, peripheral neuropathy, weight, and congestive heart failure, unrelated to coal mine dust exposure. Employer's Exhibit 5. The ALJ reasonably discredited Dr. Vuskovich's opinion as equivocal and unpersuasive, based on his statements that coal mine dust "was not likely" to have contributed to the Miner's impairment "despite acknowledging that it 'was not clear' why this loss occurred."[10] *See Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356 (6th Cir. 2007); *Island Creek Coal Co. v. Holdman,* 202 F.3d 873, 882 (6th Cir. 2000); *Griffith v. Director, OWCP,* 49 F.3d 184, 1868-7 (6th Cir. 1995); Decision and Order at 31.

Contrary to Employer's argument, the ALJ did not impermissibly treat coal mine dust exposure as *always* associated with a severe respiratory impairment. Employer's Brief at 7. Rather, the ALJ simply acknowledged the preamble's recognition "that exposure to coal mine dust *may* cause chronic obstructive pulmonary disease." Decision and Order at 28-29, citing 65 Fed. Reg. at 79923 (emphasis added). As discussed above, the ALJ performed a qualitative review of the medical opinion evidence, and permissibly credited Dr. Forehand's opinion because he adequately explained why the Miner's lung disease was due to coal mine dust exposure. *Id.* Similarly, the ALJ reasonably discredited the opinions of Drs. Dahhan and Vuskovich, because they failed to adequately explain their opinions that the Miner's exposure to coal mine dust did not contribute to his pulmonary disease. *Groves*, 761 F.3d at 601; *Adams*, 694 F.3d at 801-02; Decision and Order at 30-31.

[10] Dr. Vuskovich authored a one-page November 22, 2015 validation of the January 20, 2015 blood gas study and a more detailed May 7, 2017 medical report addressing the elements of entitlement. Director's Exhibit 13; Employer's Exhibit 5. Because Dr. Vuskovich described his May 7, 2017 report as a "supplement" to his November 22, 2015 "report," the ALJ assumed the one-page blood gas study validation was intended to be a more detailed medical report and, therefore, was incomplete. Decision and Order at 20 n.12. Any error in concluding the November 22, 2015 submission was incomplete is harmless, as the ALJ nevertheless considered the entirety of Dr. Vuskovich's opinion and provided a valid reason for discrediting it unrelated to the confusion Dr. Vuskovich created by referring to the May 7, 2017 report as a "supplement" to the earlier, more limited blood gas study validation. *See Larioni*, 6 BLR at 1-1278.

Because it is supported by substantial evidence, we affirm the ALJ's determination that the medical opinion evidence establishes legal pneumoconiosis.[11] 20 C.F.R. §§718.302(a)(2), 718.203(a)(4).

Disability Causation

To establish the Miner was totally disabled due to pneumoconiosis, Claimant must prove pneumoconiosis was "a substantially contributing cause of his totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990). Pneumoconiosis was a "substantially contributing cause" if it had a "material adverse effect" on the Miner's respiratory or pulmonary condition or "[m]aterially worsen[ed]" a totally disabling respiratory or pulmonary impairment caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1); *Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003).

Employer argues the ALJ erred in finding the Miner's total disability was due to legal pneumoconiosis. Employer's Brief at 6. We disagree.

Having affirmed the ALJ's permissible determination that Dr. Forehand's reasoned opinion is sufficient to prove the Miner's totally disabling mixed obstructive and restrictive lung disease was legal pneumoconiosis, there is no error in finding Dr. Forehand's opinion also establishes the Miner was totally disabled due to the disease; it is the only logical conclusion from those facts. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Hawkinberry v. Monongalia County Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); Decision and Order at 30. Because Drs. Dahhan and Vuskovich did not diagnose legal pneumoconiosis, the ALJ also permissibly found their opinions not credible on the issue of disability causation. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507 (6th Cir. 1997); *Adams*, 886 F.2d at 826 (ALJ may discount a physician's opinion as to disability causation because he erroneously failed to diagnose

[11] We further reject Employer's argument that the ALJ irrationally relied on the opinions of Drs. Kelly and Coffey after according them little probative weight. Employer's Brief at 12. The ALJ fully credited Dr. Forehand's opinion and credited Dr. Kelly's and Dr. Coffey's opinions only to a "lesser extent." Decision and Order at 32. Regardless, any error in affording some weight to Drs. Kelly and Coffey is harmless as the ALJ permissibly gave greatest weight to Dr. Forehand's opinion as well-documented and well-reasoned while discrediting the remaining contrary opinions. *See Larioni*, 6 BLR at 1-1278; Decision and Order at 32.

pneumoconiosis); *see also Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995) (an ALJ who has found the disease and disability elements established may not credit an opinion denying causation without providing "specific and persuasive" reasons for concluding it does not rest upon a disagreement with those elements); Decision and Order at 34.

We therefore affirm the ALJ's finding that Claimant established the Miner was totally disabled due to legal pneumoconiosis. We therefore affirm the award of benefits in the miner's claim.

The Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. § 932(*l*); *see Thorne v. Eastover Mining Co*., 25 BLR 1-121, 1-126 (2013).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits in the miner's and survivor's claims.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge