U.S. Department of Labor

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

BRB No. 21-0240 BLA

CALVIN E. JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
	)	DATE ISSUED: 01/24/2022
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 in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

Ann Marie Scarpino (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: ROLFE, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits in a Subsequent Claim (2018-BLA-06160) rendered on a subsequent claim filed on February 28, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ credited Claimant with 24.15 years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined Claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309, and 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). 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 contends the ALJ erred in finding it did not rebut the presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response urging rejection of Employer's constitutional argument.

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 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 Associates, Inc.*, 380 U.S. 359 (1965).

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[1] Claimant filed an initial claim on March 31, 1999, which the district director denied on June 8, 1999 because Claimant failed to establish any element of entitlement. Director's Exhibit 1.

[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 coal mine employment 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 24.15 years of underground coal mine employment, total disability, and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

[4] We will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 8.

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 cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. 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.[5] *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 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]

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),

[5] In light of this holding, we also reject Employer's arguments that Claimant was required to affirmatively prove legal pneumoconiosis and the ALJ erred by failing to consider whether the opinions of Drs. Green and Raj affirmatively establish the disease. *See* Employer's Brief at 6.

[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 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. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 7, 18.

718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ first considered Dr. McSharry's medical opinion. Employer's Exhibit 1. He diagnosed Claimant with emphysema due to cigarette smoking, but excluded legal pneumoconiosis. *Id.* He opined "[t]he fact that chest radiographs are negative for pneumoconiosis is strongly suggestive evidence that pneumoconiosis is not causing this lung disease." *Id.* The ALJ permissibly discredited Dr. McSharry's opinion because the regulations provide that a claim for benefits must not be denied solely on the basis of a negative chest x-ray and legal pneumoconiosis can exist in the absence of clinical pneumoconiosis. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012) (explaining that the regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that '[n]o claim for benefits shall be denied solely on the basis of a negative chest x-ray'"); 20 C.F.R. §§718.201, 718.202(a)(4), (b); Decision and Order at 23.

Employer generally argues the ALJ should have found Dr. McSharry's opinion reasoned and documented. Employer's Brief at 6-8. We consider Employer's argument to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

The ALJ next considered the medical report and deposition testimony of Dr. Sargent. Director's Exhibit 14; Employer's Exhibit 4. The ALJ noted that, in his initial report, Dr. Sargent excluded a diagnosis of legal pneumoconiosis.[8] Decision and Order at 22; *see* Director's Exhibit 14. The ALJ further determined, however, that Dr. Sargent changed his opinion in a subsequent deposition, testifying "that based on medical studies he would agree that it was at least possible that a portion of [] Claimant's obstructive impairment was related in some way to coal dust exposure." *Id.*, *citing* Employer's Exhibit 4 at 19-20.

Finding his deposition testimony credible and entitled to more weight than his initial medical report, the ALJ concluded "Dr. Sargent's opinion does not rebut the presumed presence of legal pneumoconiosis because it supports the conclusion that the Claimant's pulmonary condition could be legal pneumoconiosis." Decision and Order at 22. Employer argues the ALJ should have found Dr. Sargent's opinion well-reasoned and documented, but does not specifically challenge the ALJ's finding the opinion supports the

[8] Dr. Sargent specifically opined "Claimant ha[s] centrilobular emphysema due to [cigarette] smoking, [but] coal mine dust exposure [did] not 'substantially contribute' to [] Claimant's condition." Director's Exhibit 14.

conclusion Claimant has legal pneumoconiosis; we therefore affirm this finding.[9] *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §802.211(b); Employer's Brief at 7-8.

Because the ALJ permissibly discredited Dr. McSharry's opinion, the only opinion supportive of Employer's burden on rebuttal, we affirm his finding Employer did not disprove legal pneumoconiosis. 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).

Upon finding Employer did not disprove pneumoconiosis, the ALJ addressed whether Employer established "no part of the [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 rationally discounted Dr. McSharry's opinion regarding the cause of Claimant's disability because he failed to diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove Claimant has the disease.[10] *See Hobet*

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[9] Even if Employer had raised an argument, we would not remand this case. Dr. Sargent diagnosed a lung impairment based on arterial blood gas testing. Director's Exhibit 14. He opined it "is unusual for exercise induced arterial oxygen desaturation to occur in legal pneumoconiosis absent the presence of significant fibrotic changes on chest x-ray, which were not present in this case." *Id*. Thus Dr. Sargent's opinion suffers from the same defect the ALJ found with Dr. McSharry's opinion insofar as both doctors relied on a negative chest x-ray of clinical pneumoconiosis to exclude legal pneumoconiosis. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012) (the regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that '[n]o claim for benefits shall be denied solely on the basis of a negative chest x-ray'"); 20 C.F.R. §§718.201, 718.202(a)(4), (b). Thus we would decline to remand this case even if Employer had argued the ALJ mischaracterized Dr. Sargent's opinion. *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 249 (6th Cir. 1995) ("If the outcome of a remand is foreordained, we need not order one."); *Sahara Coal Co. v. Director, OWCP* [*McNew*], 946 F.2d 554, 558 (7th Cir. 1991).

[10] Similar to the issue of legal pneumoconiosis, Employer does not specifically challenge the ALJ's finding that Dr. Sargent's opinion does not support its burden to rebut disability causation. This finding is therefore affirmed. *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Skrack*, 6 BLR at 1-711; 20 C.F.R. §802.211(b); 20 C.F.R. §718.305(d)(1)(ii). Further, even if Employer had raised such an argument, we again would decline to remand for reconsideration of the issue of disability causation because Dr. Sargent's opinion would suffer from the same defect the ALJ identified with respect to Dr. McSharry. Both doctors

Mining, LLC v. Epling, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 24-25. We therefore affirm the ALJ's finding 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).

Accordingly, the ALJ's Decision and Order Awarding Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

failed to diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to rebut the presumed existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Webb*, 49 F.3d at 249; *McNew*, 946 F.2d at 558.