U.S. Department of Labor

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

BRB No. 22-0497 BLA

MICHAEL NEACE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PANBOWL ENERGY COMPANY	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH	)	DATE ISSUED: 01/29/2024
	)	
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 and Order on Reconsideration Modifying Decision and Order of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for Claimant.

Thomas L. Ferreri and Matthew J. Zanetti (Ferreri Partners, PLLC), Louisville, Kentucky, for Employer and its Carrier.

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals),

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Steven B. Berlin's Decision and Order Awarding Benefits and Order on Reconsideration Modifying Decision and Order (2014-BLA-05226) rendered on a claim filed on January 11, 2013, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Employer, Panbowl Energy Company, is the properly named responsible operator.[1] He credited Claimant with eighteen years of qualifying coal mine employment and found Claimant established a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). Thus, he determined Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] The ALJ further found Employer failed to rebut the presumption and awarded benefits.

[1] In his Decision and Order, the ALJ found Claimant worked for Employer at least 125 days. Decision and Order at 5-6. However, because he found the evidence insufficient to establish Claimant worked for Employer for a calendar year, he dismissed Employer as the liable operator and transferred liability to the Black Lung Disability Trust Fund. *Id.* at 6. The Director, Office of Workers' Compensation Programs (the Director) filed a Motion to Reconsider, arguing that under *Shepherd v. Incoal Inc.*, 915 F.3d 392 (6th Cir. 2019), Employer is the correct responsible operator given the ALJ's finding of 125 days of employment. In his July 26, 2022 Order on Reconsideration Modifying Decision and Order, the ALJ agreed with the Director's argument and found Employer is the correct responsible operator.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes 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.

On appeal, Employer challenges the ALJ's findings that it is the responsible operator and did not rebut the Section 411(c)(4) presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a response brief, asserting the ALJ correctly found Employer is the responsible operator.

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).

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed Claimant.[5] 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the designated responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it shows either that it is financially incapable of assuming liability for benefits or that another potentially liable operator that

[3] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established greater than fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment 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 4, 19.

[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); Director's Exhibit 3.

[5] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the Claimant's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the Claimant for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

is financially capable of assuming liability more recently employed Claimant for at least one year. 20 C.F.R. §725.495(c)(2).

Employer asserts it is not the responsible operator because it did not employ Claimant for at least one year.[6] Employer's Brief at 10-14. Specifically, it contends the ALJ failed to explain how he determined the Miner had at least 125 working days with Employer. Employer's Brief at 10-11; 20 C.F.R. §725.101(a)(32). It also argues the ALJ erred in finding 125 days establishes one year of employment, as that portion of the Sixth Circuit's decision in *Shepherd v. Incoal Inc.*, 915 F.3d 392 (6th Cir. 2019), is non-binding dicta. Employer's Brief at 11. Further, it contends *Shepherd* is contrary to the Department of Labor (DOL)'s interpretation of its own regulation and Supreme Court precedent. Employer's Brief at 11-14.

The Director argues that *Shepherd* is controlling law in this case and the Board should affirm the ALJ's determination Claimant's employment with Employer encompasses more than 125 working days and thus establishes one year of coal mine employment. Director's Response at 2-3. We agree with the Director's argument.

Initially, Employer concedes Claimant's employment with it lasted for a period of at least six months but contends the ALJ failed to explain how the evidence supports a finding of 125 working days within that time period.[7] Decision and Order at 5-6; Employer's Exhibit 7; Director's Exhibit 6; Employer's Post Hearing Brief at 13; Employer's Brief at 10-11. Contrary to Employer's argument, the ALJ compared Claimant's earnings from Employer in 1990 and 1991 with the coal mine industry's average earnings for 125 days of work, as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*.[8] Using this method resulted in 0.44 year of employment in 1990 (55 working days/125 work-day

[6] Employer does not contend it is financially incapable of assuming liability. 20 C.F.R. §725.495(c)(2).

[7] The ALJ generally found Claimant's employment relationship with Employer did not last "for a full year." Decision and Order at 6. While Employer asserts Claimant's employment lasted from September 1990 to February 1991, the Director argues that, based on Employer's own assertion, Claimant was employed 181 days, which includes at least 133 working days based on Claimant's testimony he worked five to six days per week. Director's Response at 2.

[8] Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual* provides yearly average earnings for coal miners based on 125 working days.

year), and 0.75 year in 1991 (93.75 working days/125 work-day year), thus exceeding the one-year threshold for a responsible operator finding under *Shepherd*. Decision and Order at 5.

Aside from unpersuasively arguing the ALJ did not explain his findings, Employer has not pointed to any evidence demonstrating error in the ALJ's calculation, provided an alternate calculation, or explained how the ALJ could reasonably conclude Claimant had less than 125 working days.[9] Employer's Brief at 10-11. Thus, we affirm the ALJ's determination that Claimant worked at least 125 days for Employer, thus establishing at least one year of coal mine employment with Employer. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); Decision and Order at 6.

Further, contrary to Employer's assertion, the United States Court of Appeals for the Sixth Circuit's interpretation of 20 C.F.R. §725.101(a)(32) in *Shepherd*, that 125 days may constitute a year of coal mine employment even if the miner did not establish a full calendar year employment relationship, is not dicta. Employer's Brief at 11-13. The court expressly instructed the ALJ to "give effect to all provisions and options set forth in 20 C.F.R. §725.101(a)(32)" when evaluating a miner's length of coal mine employment. *Shepherd*, 915 F.3d at 407. Thus, regardless of Employer's disagreement with the court's interpretation of the regulation, the ALJ was bound by the Sixth Circuit's holding. We thus also reject Employer's additional arguments about the correct interpretation of what constitutes a "year" of coal mine employment.[10] Employer's Brief at 11-14.

We therefore affirm the ALJ's conclusion that Employer is the responsible operator, as it most recently employed Claimant for one year. Order on Reconsideration at 3.

[9] We also note that, in response to the Director's Motion to Reconsider, Employer did not argue that the ALJ's finding that Claimant worked 125 days was incorrect, only that *Shepherd* should not be applied. *See* Employer's Response to Director's Motion to Reconsideration.

[10] Employer contends the definition of a year under 20 C.F.R. §725.101(a)(32) is ambiguous because it departs from the ordinary meaning of the word. Employer's Brief at 11. It argues the *Shepherd* court should have deferred to Department of Labor's interpretation as required by *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and erred in construing the statute to effectuate its "remedial purpose." Employer's Brief at 14, *quoting Shepherd*, 915 F.3d at 402.

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,[11] 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)(2)(i), (ii). The ALJ determined Employer failed to rebut the presumption by either method. Decision and Order at 21, 27-28.

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 Co.*, 25 BLR 1-149, 1-155 n.8 (2015). The Sixth Circuit holds that this standard requires Employer to show 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). The "in part" standard is met if Employer establishes coal mine dust exposure "had at most only a *de minimis* effect on [Claimant's] lung impairment." *Id.* at 407.

Employer relies on the opinions of Drs. Rosenberg and Jarboe, who opined Claimant has chronic obstructive pulmonary disease (COPD) due to tobacco smoke and unrelated to coal mine dust. Employer's Exhibits 1, 4. For a variety of reasons, the ALJ found their opinions unreasoned, inconsistent with the regulations and medical science accepted by the DOL in the preamble to the 2001 regulatory revisions, and thus entitled to little weight. Decision and Order at 26-27. Thus, the ALJ found Employer failed to rebut the presence of legal pneumoconiosis. *Id.* at 27.

Employer argues the ALJ erred in discrediting its physicians' opinions. Employer's Brief at 16. It generally asserts "neither Dr. Rosenberg nor Dr. Jarboe opined that coal dust

[11] "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).

exposure cannot cause obstruction" but rather explained that Claimant's impairment is "characteristic" of the effects of smoking rather than coal dust exposure. *Id.* Employer's argument is not persuasive.

Both physicians excluded coal mine dust as a contributing factor in Claimant's lung disease because his significant reduction of the FEV1/FVC ratio on his pulmonary function study is inconsistent with COPD due to coal mine dust which, they opined, is demonstrated by parallel reductions of the FEV1 and FVC values. Employer's Exhibit 1 at 4-10; Employer's Exhibit 4 at 15-16.

The ALJ permissibly discredited this rationale as inconsistent with the scientific studies that the DOL credited in the preamble that coal dust exposure may cause COPD with associated decrements in the FEV1 value and the FEV1/FVC ratio. *See* 65 Fed. Reg. 79,940, 79,943 (Dec. 20, 2000); *Wilgar Land Co. v. Director, OWCP* [*Adams*], 85 F.4th 828, 840 (6th Cir. 2023) ("a judge may find the preamble more persuasive than an expert's opinion on this FEV1/FVC ratio issue"); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014) (decreased-ratio analysis "plainly contradicts the DOL's position that [legal pneumoconiosis] . . . may be associated with decrements in the FEV1/FVC ratio"); Decision and Order at 23-24, 26.

Thus, the ALJ further permissibly found that, even assuming the results of Claimant's objective studies are uncharacteristic of coal dust-induced COPD, the physicians did not adequately explain why Claimant's history of coal mine dust exposure could not have aggravated his lung disease, even if it was primarily due to smoking. *See* 65 Fed. Reg. at 79,940-41; *Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356 (6th Cir. 2007) (it is within an ALJ's discretion to discredit a physician's opinion that fails to adequately explain why coal mine dust exposure did not aggravate the miner's alleged smoking impairments); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 26-27.

Because it is supported by substantial evidence, we affirm the ALJ's determination that Employer did not disprove legal pneumoconiosis.[12] 20 C.F.R. §718.305(d)(1)(i)(A); *Young*, 947 F.3d at 407; *Rowe*, 710 F.2d at 255; Decision and Order at 27. Employer's

[12] As Drs. Baker's and Green's opinions do not support Employer's burden to rebut legal pneumoconiosis, we need not address its allegations of error as to the ALJ's findings regarding their opinions. 20 C.F.R. §718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[13] 20 C.F.R. §718.305(d)(1)(i).

Finally, as Employer does not challenge the ALJ's determination that it failed to rebut disability causation, we also affirm this finding. 20 C.F.R. §718.305(d)(1)(ii); *see Skrack*, 6 BLR at 1-711; *see also Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (2013) (ALJ may discount disability causation opinions when the physicians did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that the employer failed to disprove legal pneumoconiosis); Decision and Order at 27-28.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[13] Therefore, we decline to address Employer's arguments regarding the ALJ's determination that the evidence failed to rebut clinical pneumoconiosis. Employer's Brief at 14-15.