U.S. Department of Labor

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

BRB No. 23-0013 BLA

HAROLD G. HOWELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TOLERS CREEK ENERGY INCORPORATED, Self-Insured Through ARCH RESOURCES	)	
	)	DATE ISSUED: 01/22/2024
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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judge.

GRESH, Chief Administrative Appeals Judge, and BUZZARD, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits (2019-BLA-06292) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a claim filed August 28, 2017.[1]

The ALJ found Claimant established 10.22 years of coal mine employment, and therefore could not invoke 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. §718.305. Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established a totally disabling respiratory or pulmonary impairment, and the existence of legal pneumoconiosis. 20 C.F.R. §§718.202(a)(4), 718.204(b)(2). He further found Claimant established that his pneumoconiosis was a substantially contributing cause of his total disability, 20 C.F.R. §718.204(c), and awarded benefits.

On appeal, Employer argues the ALJ erred in determining Claimant's smoking history and finding he established legal pneumoconiosis.[3] Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, has not filed a response.

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 into the Act by 30

[1] Claimant filed one previous claim, which 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) 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 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 finding Claimant established a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b); Decision and Order at 11

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 7; 37 at 9-10.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

Entitlement to Benefits – 20 C.F.R. Part 718

To be entitled to benefits under the Act, 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. Failure to establish any one of these elements 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 he has 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(b).

The ALJ considered the medical opinions of Dr. Green, who opined Claimant has legal pneumoconiosis, and the contrary opinions of Drs. Dahhan and Jarboe. Director's Exhibits 12, 20, 65; Hearing Transcript at 22-56; Employer's Exhibits 2, 3; Decision and Order at 14-18. The ALJ found Dr. Green's opinion reasoned and documented and entitled to probative weight, and he found the opinions of Drs. Dahhan and Jarboe entitled to little weight. Decision and Order at 14-18. Employer argues the ALJ erred in weighing the opinions. Employer's Brief at 10-20. We disagree.

Dr. Dahhan diagnosed Claimant with an obstructive ventilatory impairment. Director's Exhibit 20 at 2-3; Employer's Exhibit 2 at 3-4. As the ALJ correctly noted, Dr. Dahhan attributed Claimant's impairment to his smoking, and excluded coal dust exposure as a contributor, because he opined the magnitude of FEV_1 loss on Claimant's pulmonary function studies was consistent with his extensive smoking history and far beyond what would be expected from his coal dust exposure history alone. *Id.*; Decision and Order at 15-16. Contrary to Employer's argument, the ALJ permissibly discredited Dr. Dahhan's opinion because he "failed to explain why both coal mine dust and smoking could not have contributed" to Claimant's impairment, even if smoking was the primary cause. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 16.

Dr. Jarboe diagnosed Claimant with an obstructive impairment caused by smoking and asthma, and unrelated to coal dust exposure. Hearing Transcript at 30-31; Employer's Exhibit 3 at 6-8. He noted an improvement in Claimant's December 2017 and September 2018 pulmonary function study results and opined the "significant difference" between the two demonstrates a reversible impairment consistent with asthma but inconsistent with coal dust exposure, which he opined causes a fixed impairment. Hearing Transcript at 32-33. The ALJ noted that contrary to Dr. Jarboe's reasoning, both of Claimant's pulmonary function studies produced qualifying[5] values, suggesting a disabling fixed component to Claimant's impairment. Decision and Order at 17-18; *see* Director's Exhibits 12 at 11, 20 at 6. Thus, the ALJ permissibly discredited Dr. Jarboe's opinion because he failed to address this fixed component of Claimant's impairment or explain how coal dust could not also have caused or contributed to it.[6] *See Crisp*, 866 F.2d at 186; *Rowe*, 710 F.2d at 255; Decision and Order at 18.

Further, contrary to Employer's contention, the ALJ did not apply the preamble to the 2001 revised regulations as a binding regulatory rule or use it to create new agency rules or regulations to discredit the opinions of Drs. Dahhan and Jarboe. Employer's Brief at 4-5. He found their opinions inadequately explained for several reasons and in so doing permissibly consulted the preamble as a statement of medical research findings accepted by the Department of Labor (DOL). *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Crisp*, 866 F.2d at 185; 65 Fed. Reg. 79,920, 79,937-44 (Dec. 20, 2020); Decision and Order at 15-18.

Dr. Green diagnosed Claimant with chronic obstructive pulmonary disease (COPD) based on the obstruction seen on pulmonary function testing, his history of chronic respiratory symptoms, and the length of his coal mine employment. Director's Exhibits 12 at 3; 65 at 1-2. Attributing the COPD to both tobacco smoke and coal dust exposure, Dr. Green opined he could not eliminate either as a factor and "even the lesser contribution" from Claimant's 9.5 years of coal mine dust exposure was "a significant consideration" given the severity of his airflow obstruction. *Id*. Responding to questions from the DOL

[5] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] Because the ALJ provided permissible reasons for discrediting the opinions of Drs. Dahhan and Jarboe, we need not address Employer's remaining arguments concerning the weight the ALJ afforded their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

claims examiner asking him to assume Claimant had 9 years of coal mine dust exposure, rather than 9.5 years, Dr. Green explained that there is not an established threshold level of coal dust exposure below which it can be excluded as a contributor to pulmonary impairment. Director's Exhibit 65 at 2. He reiterated his opinion that Claimant's coal mine dust exposure, "though 9 years, does represent an additional substantial contributing and aggravating factor" to his obstructive impairment. The ALJ permissibly credited Dr. Green's opinion, noting it was consistent with the medical evidence he reviewed and the DOL's recognition that the effects of smoking and coal dust exposure can be additive. *See* 65 Fed. Reg. at 79,940; *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Crisp*, 866 F.2d at 186; *Rowe*, 710 F.2d at 255; Decision and Order at 15.

Because it is supported by substantial evidence, we affirm the ALJ's finding the medical opinion evidence establishes Claimant has legal pneumoconiosis. Decision and Order at 18. As Employer raises no further arguments,[7] we also affirm his unchallenged finding that Claimant is totally disabled by it.[8] 20 C.F.R. §§718.202(a)(4), 718.204(c); Decision and Order at 18-19. We therefore affirm the award of benefits.

[7] Employer contends the ALJ erred in determining the length of Claimant's smoking history. Employer's Brief at 16-20. Aside from generally asserting a more definitive finding is needed to consider the medical opinions, Employer does not further elaborate on this assertion and its significance is unclear given that the ALJ did not specifically base his credibility findings around the length of Claimant's smoking history. Thus, Employer has failed to explain how the error it alleges would make a difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

[8] Employer generally notes disability causation is "a separate element" from legal pneumoconiosis but does not otherwise challenge the ALJ's disability causation finding beyond its arguments on legal pneumoconiosis. Employer's Brief at 16. Further, as we have affirmed the ALJ's finding that Claimant's totally disabling impairment *is legal pneumoconiosis*, we see no error in his finding Claimant established legal pneumoconiosis is a "substantially contributing cause" of that disability. 20 C.F.R. §718.204(c).

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge