U.S. Department of Labor

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

BRB No. 23-0045 BLA

DOUGLAS HURLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TWIN STAR MINING, INCORPORATED	)	
	)	DATE ISSUED: 01/05/2024
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 Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Awarding Benefits (2020-BLA-05406) rendered on a claim filed on September

5, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ accepted the parties' stipulation that Claimant has 34.74 years of qualifying coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the Section 411(c)(4)[2] presumption of total disability due to pneumoconiosis. Further, he found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding the Section 411(c)(4) presumption unrebutted.[3] Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief.

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).

[1] Claimant filed a prior claim but withdrew it. Decision and Order at 2 n.2; Claimant's Response Brief at 2 n.1. As the ALJ correctly noted, a withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306(b); Decision and Order at 2 n.2.

[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 determinations that Claimant 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 9; Employer's Brief at 4 (unpaginated).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Hearing Transcript at 20.

Rebuttal of the 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,[5] 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); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015). The ALJ found Employer failed to establish rebuttal by either method.[6] Decision and Order at 10-17.

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*, 25 BLR at 1-155 n.8.

Employer relies on Dr. McSharry's medical opinion. Employer's Exhibits 1, 5. Dr. McSharry examined Claimant on June 25, 2020, and reviewed his medical records. *Id*. He diagnosed Claimant with "some chronic bronchitic symptoms and severe emphysematous changes," but "found no compelling evidence that legal pneumoconiosis is present." Employer's Exhibit 1 at 2; *see also* Employer's Exhibit 5 at 11-16. Noting Claimant's extensive smoking history,[7] Dr. McSharry opined that "[c]igarette smoking causes obstructive lung disease at a much higher frequency than does coal dust exposure . . . ." Employer's Exhibits 1 at 2; 5 at 12-13. In addition, he stated that the "pattern of lung

[5] "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). "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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[6] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 10-12; *see* 20 C.F.R. §718.305(d)(1)(i)(B).

[7] The ALJ found Claimant has at most an 18.33 pack-year smoking history. Decision and Order at 4.

disease caused by coal dust exposure is significantly different than that caused by cigarette smoking," describing smoking as causing an irreversible obstructive lung disease, which is "unusual" in coal dust exposure, whereas it is "much more common" for coal workers' pneumoconiosis to cause a restrictive disease with some irreversible obstruction. *Id.* Further, he noted that "when lung disease is seen objectively as a result of coal workers' pneumoconiosis, there is generally readily apparent radiographic evidence of lung injury . . . ." Employer's Exhibits 1 at 3; 5 at 12-13. He concluded that "the pulmonary impairment seen in this claimant is the result of his cigarette smoking history." *Id.* At his deposition, Dr. McSharry reiterated his opinion. Employer's Exhibit 5.

The ALJ gave no weight to Dr. McSharry's opinion, finding it not well-reasoned. Decision and Order at 14-15. Employer argues the ALJ erred by applying the wrong legal standard and did not provide a sufficient explanation for discrediting Dr. McSharry's opinion. Employer's Brief at 5-12 (unpaginated). We disagree.

Initially, we reject Employer's argument that the ALJ applied the wrong legal standard in evaluating Dr. McSharry's opinion. Employer's Brief at 5-6, 11-12 (unpaginated). The ALJ stated the correct legal standard when he observed Employer must establish Claimant does not have legal pneumoconiosis, defined as a "respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 12 & nn.48-49 (citing the above regulations). Moreover, as we explain below, the ALJ rejected Dr. McSharry's opinion because he found it not well-reasoned and not because it failed to satisfy an incorrect legal standard. *See* Decision and Order at 12-16.

Contrary to Employer's remaining argument, the ALJ provided an adequate explanation for giving no weight to Dr. McSharry's opinion. He permissibly found Dr. McSharry failed to adequately explain why Claimant's 34.74 years of coal mine dust exposure did not aggravate Claimant's pulmonary impairment, taking into account the Department of Labor's (DOL's) acknowledgment that the risks of smoking and coal mine dust exposure are additive. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000) ("Even in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis. The risk is additive with cigarette smoking."); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74 n.4 (4th Cir. 2017) (ALJ permissibly discounted doctors' opinions because they did not address why coal dust could not have been an additional cause, or a contributing or aggravating factor, in the claimant's respiratory impairment); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013) (ALJ permissibly discredited two physicians' opinions because the doctors failed to adequately explain their opinions); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc) (ALJ may reject a medical opinion where he finds the doctor

failed to adequately explain his diagnosis); Decision and Order at 14; Employer's Exhibit 1 at 2-3.

In addition, the ALJ permissibly found Dr. McSharry's reasoning that Claimant's pattern of impairment was different from one caused by coal mine dust exposure conflicted with the medical science accepted by the DOL that "dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms." 65 Fed. Reg. at 79,943; *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013); Decision and Order at 14; Employer's Exhibit 1 at 2-3.

The ALJ also permissibly found Dr. McSharry's reliance on the absence of x-ray evidence of clinical pneumoconiosis in concluding Claimant does not have legal pneumoconiosis is contrary to the regulations which differentiate between the two diseases. 20 C.F.R. §718.201(a)(1), (2); *Cochran*, 718 F.3d at 324 (regulations make clear that the absence of clinical pneumoconiosis cannot be used to rule out legal pneumoconiosis); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210 (4th Cir. 2000) (evidence that does not establish clinical pneumoconiosis should not necessarily be treated as evidence weighing against a finding of legal pneumoconiosis); *see also Lewis Coal Co. v. Director, OWCP*, 373 F.3d 570, 580 (4th Cir. 2004) ("[L]ittle weight can be given to medical findings that conflict with the [Act's] implementing regulations."); Decision and Order at 14-15; Employer's Exhibit 1 at 3.

Finally, the ALJ acted within his discretion in finding Dr. McSharry's opinion, that Claimant's irreversible obstructive lung disease is entirely due to smoking, because it is much more common for coal mine dust exposure to cause a restrictive disease with some irreversible obstruction, was based on generalities and not Claimant's specific condition. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012) (substantial evidence supported the ALJ's discrediting of a medical opinion where the doctor "relied heavily on general statistics rather than particularized facts about" the miner); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985) (ALJ may reject medical opinions that rely on generalities); Decision and Order at 15; Employer's Exhibit 1 at 2-3.

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption by establishing Claimant does not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Owens*, 724 F.3d at 557 (duty of explanation under the Administrative Procedure Act is satisfied if the reviewing court can discern what the ALJ did and why he did it); Decision and Order at 12-16.

Disability Causation

The ALJ next considered whether Employer established "no part of [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); Decision and Order at 16-17. Contrary to Employer's argument, the ALJ permissibly discounted Dr. McSharry's disability causation opinion because he failed to diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove Claimant has the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (such an opinion "may not be credited at all" on disability causation absent "specific and persuasive reasons" for concluding the physician's view on disability causation is independent of his or her erroneous opinion on pneumoconiosis); Decision and Order at 16; Employer's Brief at 13-14 (unpaginated). We reject Employer's specific contention that an ALJ may not discredit a disability causation opinion that excludes a diagnosis of legal pneumoconiosis in claims where legal pneumoconiosis is presumed, rather than affirmatively proven, as the Fourth Circuit's holding in *Epling* addressed rebuttal of the Section 411(c)(4) presumption. *Epling*, 783 F.3d at 506; *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013). We therefore affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis and thus failed to rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 16-17.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge