U.S. Department of Labor

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

BRB No. 23-0165 BLA

CHRISTOPHER J. HURLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CAMP CREEK SERVICE CENTER, LTD.	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 01/25/2024
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Reissued Decision and Order Awarding Benefits of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

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

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal the Reissued Decision and Order Awarding Benefits (2019-BLA-06333)[1] of Administrative Law Judge (ALJ) Lauren C. Boucher, 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 subsequent claim filed on January 2, 2018.[2]

The ALJ found Claimant established 15.09 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[3] and established a change in an applicable condition of entitlement.[4] 20 C.F.R. §725.309(c). She further found Employer did not rebut the presumption and awarded benefits.

[1] Previously, the Benefits Review Board vacated the ALJ's Order Denying Motion to Set Aside and Reissue Decision and remanded the case for her to reissue her Decision and Order Awarding Benefits in order to provide Employer the appropriate time to file an appeal with the Board. *Hurley v. Camp Creek Serv. Ctr., Ltd.*, BRB No. 22-0170 BLA, slip op. at 6-7 (Jan. 19, 2023) (unpub.).

[2] Claimant filed a prior claim on November 2, 2015, which the district director denied on October 14, 2016, because the evidence did not establish total disability. Director's Exhibit 2.

[3] Section 411(c)(4) 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(b).

[4] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must deny the subsequent claim unless she finds "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(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the district director denied Claimant's prior claim for failure to establish total disability, Claimant needed to submit new evidence establishing total

On appeal, Employer contends the ALJ erred in finding Claimant established more than fifteen years of coal mine employment and invoked the Section 411(c)(4) presumption. It further argues the ALJ erred in finding it failed to rebut the presumption.[5] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), did not file a response brief.

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.[6] 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).

Section 411(c)(4) Presumption: Length of Coal Mine Employment

Claimant bears the burden of establishing the length of coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The ALJ considered information from Claimant's prior claim, Claimant's testimony at the hearing, his CM-911 Claim for Benefits, his CM-911a Employment History Form, and his Social Security Earnings Record (SSER). Decision and Order at 7-11; Director's Exhibits 1, 4, 5, 7; Hearing Transcript at 16. On review of this evidence, the ALJ noted that Claimant's employment was comprised of partial years with many of his employers

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disability to warrant a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 2.

[5] We affirm, as unchallenged on appeal, the ALJ's finding Claimant established a totally disabling respiratory or pulmonary impairment and a change in applicable condition of entitlement. *See* 20 C.F.R. §§ 718.204(b)(2), 725.309; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17-18.

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 19.

and found that it was not possible to establish the specific beginning and ending dates of his coal mine employment with each of his employers.[7] Decision and Order at 8.

The ALJ initially calculated the length of coal mine employment for the employers listed on Claimant's CM-911a form but not included on his SSER. Decision and Order at 8-10. These employers included Jerusalem Coal Company, Blue Eagle Coal Company, Shekanah Mining, Whites Leasing, Mattmanda Coal, Academy Coal Company, and Sturgeon Coal Company.[8] *Id.* at 8-10; Director's Exhibit 5. The ALJ credited Claimant with the "maximum" number of days working for these employers and calculated that Claimant established 2.22 years of coal mine employment with them.[9] Decision and Order at 8-10.

The remainder of Claimant's employers were listed on his SSER. Director's Exhibit 7. Because the ALJ found the specific start and end dates of Claimant's employment were not ascertainable, the ALJ determined the length of his coal mine employment with these employers by using the formula at 20 C.F.R. §725.101(a)(32)(iii) and comparing his yearly SSER earnings with the coal mine industry's average yearly earnings for 125 days of employment as set forth in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*.[10] Decision and Order at 10-11. If

[7] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant's coal mine employment was performed entirely underground. *See Skrack*, 6 BLR at 1-711; Decision and Order at 11.

[8] The ALJ did not give Claimant any credit for his employment with Whites Leasing because she found there was insufficient information in the record to determine whether that job constituted coal mine employment. Decision and Order at 9.

[9] For example, Claimant indicated he worked for Jerusalem Coal Company from September 1997 to October 1997, and the ALJ gave him credit for 61 days of employment as this represents the maximum number of work days from September 1 to October 31. Decision and Order at 8.

[10] Pursuant to 20 C.F.R. §725.101(a)(32)(iii):

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

Claimant's earnings exceeded the annual average for 125 working days, the ALJ credited him with a full year of employment. *Id.* at 10-11. If the earnings fell short, she credited him with a fractional year based on the "ratio of the actual number of days worked to 125 [days]." *Id.* at 10-11. Applying this method, the ALJ found Claimant established 12.87 years of coal mine employment. *Id.* at 11. Combining the 12.87 years with the 2.22 years noted above, the ALJ found Claimant established a total of 15.09 years of coal mine employment. *Id.*

We agree with Employer's argument that the ALJ erred in calculating Claimant's coal mine employment for the employers included on his CM-911a form but not on his SSER. Employer's Brief at 5-7. While Claimant identified the month and year that he started his employment and ended it with each employer, the ALJ credited Claimant with working every single work day for the entirety of the range of months of his employment identified for these employers.[11] Decision and Order at 8-10; Director's Exhibit at 5. As Employer points out, the ALJ presumed Claimant was employed by each company from the first to the last work day of every month listed and that he worked every single work day without any explanation for making these assumptions in Claimant's favor. Employer's Brief at 7. Because the ALJ did not adequately explain how she determined Claimant's length of coal mine employment for these employers, her calculation does not comply with the Administrative Procedure Act (APA).[12] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 8-10. Consequently, we vacate the ALJ's finding that Claimant established 2.22 years of coal mine employment with these employers.

The BLS data is reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual.*

[11] We note that the ALJ took into consideration information from Claimant's prior claims to identify the range of months he worked for certain employers. Decision and Order at 8-10. Additionally, the ALJ credited Claimant with 0.13 years of coal mine employment with Mattmanda Coal in 1987 rather than her calculation of 0.17 years so that Claimant's total employment in 1987 would not exceed one year. *Id.* at 9 n.9.

[12] The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

We also agree with Employer's argument that the ALJ erred in calculating Claimant's coal mine employment for the employers listed in his SSER. Employer's Brief at 7-9. To credit a miner with a year of coal mine employment, the ALJ must first determine whether that miner was engaged in coal mine employment for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). *If the threshold one-year period is met*, the ALJ must then determine whether the miner worked for at least 125 working days within that one-year period.[13] 20 C.F.R. §725.101(a)(32). Proof that a miner worked at least 125 days or that a miner's earnings exceeded the industry average for 125 days of work in a given year, however, does not satisfy the requirement that such employment occurred during a 365-day period and therefore, in itself, does not establish one full year of coal mine employment as defined in the regulations.[14] *See Clark*, 22 BLR at 1-281.

The ALJ determined Claimant engaged in coal mine employment for a period of one calendar year with Employer in 1998, one year with C&S Coal in 1994, and two years with Island Creek Coal in 1978 and 1979 based on his consecutive years of employment with these employers. Decision and Order at 8. She failed, however, to acknowledge and consider the threshold inquiry of whether the record establishes a calendar year of employment prior to determining whether Claimant worked at least 125 days in a year for the other periods of employment with the employers listed on Claimant's SSER. 20 C.F.R. §725.101(a)(32); *see Mitchell*, 479 F.3d at 334-36; *Clark*, 22 BLR at 1-281; *id.* at 10-11. We therefore vacate the ALJ's finding that Claimant established 12.87 years of coal mine employment with the employers listed on his SSER. Decision and Order at 11. Consequently, we vacate her finding that Claimant invoked the Section 411(c)(4) presumption and the award of benefits. 30 U.S.C. §921(c)(4); *id.* at 19.

Rebuttal of the Section 411(c)(4) Presumption

[13] If the threshold one-year period is met, "it must be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment[,]" in which case the miner would be entitled to credit for one full year of employment. 20 C.F.R. §725.101(a)(32)(ii).

[14] The method set forth at 20 C.F.R. §725.101(a)(32)(iii) – "divid[ing] the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year" – results in the number of *days* that a miner worked in a given year, but it does not establish such employment occurred during a 365-day period. 20 C.F.R. §725.101(a)(32)(iii).

In the interest of judicial economy, we address Employer's arguments regarding rebuttal of the Section 411(c)(4) presumption. Because the ALJ found Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[15] 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)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[16] Decision and Order at 25-31.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant did 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 Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on Drs. Zaldivar's and Spagnolo's opinions that Claimant did not suffer from legal pneumoconiosis. Decision and Order at 26-30; Employer's Exhibits 7, 9, 10. Dr. Zaldivar diagnosed Claimant with asthma and opined that it was unrelated to his coal mine dust exposure. Employer's Exhibit 7 at 7, 9-10. During his deposition, Dr. Zaldivar testified that Claimant's variable impairment is suggestive of uncontrolled asthma and is inconsistent with the irreversible impairment caused by pneumoconiosis. Employer's Exhibit 10 at 33, 38, 41-43, 58-62.

Dr. Spagnolo opined that Claimant suffers from poorly treated asthma. Employer's Exhibit 9 at 16. Further, he stated that twelve years after leaving the mines, Claimant's ventilatory study did not reflect an airflow obstruction and that only subsequent testing

[15] "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).

[16] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 25.

revealed a partially reversible obstructive defect. *Id.* He attributed Claimant's respiratory symptoms to asthma, his smoking history, obesity, airway aspiration, underlying heart disease, and a possible sleep disorder, and concluded his impairment was not related to his coal mine employment. *Id.*

The ALJ found Drs. Zaldivar's and Spagnolo's opinions unpersuasive and inadequately explained and, therefore, insufficient to satisfy Employer's burden of proof. Decision and Order at 27-30.

Initially, we reject Employer's contention that the ALJ applied the wrong legal standard in requiring its experts to "rule out" coal mine dust exposure as a contributing factor for Claimant's respiratory impairment. Employer's Brief at 11-13. The ALJ correctly stated Employer can rebut the presumption of legal pneumoconiosis by establishing Claimant did not have a lung disease "significantly related to, or substantially aggravated by, dust exposure." Decision and Order at 25, 28; *see* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich*, 25 BLR at 1-155 n.8. Moreover, as explained below, she discredited their opinions because she found they were not adequately explained, not because they fail to meet a heightened legal standard. Decision and Order at 27-30.

When Dr. Zaldivar discussed Claimant's symptoms, the ALJ noted he opined that Claimant's mother "probably" smoked while she was pregnant,[17] and that Claimant may have forgotten about his childhood asthma. Employer's Exhibit 7 at 7-8; Decision and Order at 29. The ALJ permissibly accorded less probative weight to Dr. Zaldivar's opinion because his "theoretical and speculative" statements were based on "conjecture" and not supported by the record. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (as the trier-of-fact, the ALJ has discretion to assess the credibility of the medical opinions based on the experts' explanations for their diagnoses and assign those opinions appropriate weight); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 389 (4th Cir. 1999) (ALJ may not credit a purely speculative opinion); Decision and Order at 29.

In considering the credibility of Dr. Spagnolo's opinion, the ALJ accurately noted he excluded a diagnosis of legal pneumoconiosis, in part, because of the length of time between the worsening of Claimant's respiratory symptoms and when he left the mines. Decision and Order at 29; Employer's Exhibit 9 at 16. The ALJ permissibly discounted

[17] Dr. Zaldivar reported that Claimant stated his mother was a smoker. Employer's Exhibit 7 at 7, 12.

Dr. Spagnolo's opinion because it is inconsistent with the regulatory definition of pneumoconiosis as a latent and progressive disease that "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); Decision and Order at 28.

Additionally, the ALJ permissibly found that although Drs. Zaldivar and Spagnolo relied on "several factors" to conclude that Claimant's respiratory impairment is inconsistent with pneumoconiosis, they did not adequately explain why, even if Claimant has asthma, his respiratory impairment is not significantly related to, or substantially aggravated by, his history of underground coal mine dust exposure. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Looney*, 678 F.3d at 313-14 (ALJ may accord less weight to a physician who fails to adequately explain why a miner's obstructive disease "was not due at least in part to his coal dust exposure"); Decision and Order at 27-29.

Employer's arguments 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). Because the ALJ acted within her discretion in discrediting the opinions of Drs. Zaldivar and Spagnolo, the only opinions supportive of Employer's burden, we affirm her finding that Employer did not disprove legal pneumoconiosis.[18] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order at 30. Employer's failure to rebut the presumption of legal pneumoconiosis precludes a rebuttal finding that Claimant did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i). Decision and Order at 30.

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 30-31. Contrary to Employer's argument, the ALJ permissibly discredited the opinions of Drs. Zaldivar and Spagnolo on disability causation because they did not diagnose legal

[18] Because the ALJ gave permissible reasons for rejecting Drs. Zaldivar's and Spagnolo's opinions, we need not address Employer's additional challenges to the ALJ's evaluation of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 27-30; Employer's Brief at 11-16.

pneumoconiosis, contrary to her determination.[19] *See Epling*, 783 F.3d at 504-05; Decision and Order at 31; Employer's Brief at 17-18. Thus, we affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory disability is caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption.

Remand Instructions

On remand, the ALJ must determine the length of Claimant's coal mine employment, taking into consideration the relevant evidence and using any reasonable method of calculation. *See Muncy*, 25 BLR at 1-27; *Kephart*, 8 BLR at 1-186. She must determine whether the evidence shows Claimant worked a calendar year or partial periods totaling a calendar year before applying the formula at 20 C.F.R. §725.101(a)(32)(iii). If the ALJ finds Claimant established fifteen or more years of coal mine employment, Claimant will have invoked the Section 411(c)(4) presumption and she may reinstate the award of benefits. If Claimant does not invoke the presumption on remand, the ALJ must consider whether Claimant can establish entitlement to benefits under 20 C.F.R. Part 718. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

In reaching her conclusions on remand, the ALJ must explain the bases for her credibility determinations, findings of fact, and conclusions of law in accordance with the APA. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165.

[19] Drs. Zaldivar and Spagnolo did not offer explanations with respect to whether legal pneumoconiosis caused Claimant's total respiratory disability independent of their conclusions that he does not have the disease.

Accordingly, we affirm in part and vacate in part the ALJ's Reissued Decision and Order Awarding Benefits and remand this case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge