U.S. Department of Labor

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

BRB No. 23-0271 BLA

DOUGLAS W. WHITT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMAPNY	)	
	)	DATE ISSUED: 01/26/2024
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 and Order Denying Motion for Reconsideration of Jodeen M. Hobbs, Administrative Law Judge, United States Department of Labor.

Jason A. Mullins (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration (2021-BLA-05590) rendered on a claim filed on December 26, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 13.87 years of coal mine employment. Thus, she found he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2018).[1] Considering entitlement under 20 C.F.R. Part 718, she found the evidence establishes clinical and legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b)(2), (c). She therefore awarded benefits.

On appeal, Employer argues the ALJ erred in determining the length of Claimant's smoking history and in finding Claimant established clinical pneumoconiosis, legal pneumoconiosis, and disability causation.[2] Neither Claimant nor the Director, Office of Workers' Compensation Programs, filed a substantive response.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order and Order Denying Reconsideration if they are rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

Entitlement - 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 element precludes an award of benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989);

[1] 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); 20 C.F.R. §718.305.

[2] We affirm as unchallenged on appeal the ALJ's finding that Claimant established a totally disabling pulmonary or respiratory impairment at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 23.

[3] 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 Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 2 n.2; Director's Exhibit 3; Hearing Transcript at 21, 39-40.

Trent v. Director, OWCP, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Smoking History

Employer first contends the ALJ erred in finding Claimant has a twenty-six-pack-year smoking history when Claimant's various treatment records, including those from the U.S. Department of Veterans Affairs (VA), describe a much greater smoking history up to approximately one hundred pack-years. Employer's Brief at 5-6 (unpaginated). We disagree.

The ALJ noted Claimant testified to twenty-six pack-years. Decision and Order at 3, *citing* Hearing Transcript at 28, 34. She also observed Dr. Forehand reported a twenty-four-pack-year history, Dr. Sargent reported Claimant smoked a pack of cigarettes per day for most of his life starting in his early twenties and currently smoked one-third of a pack per day, and Dr. McSharry reported an ongoing twenty-seven-pack-year history. Decision and Order at 3, *citing* Director's Exhibits 15 at 3, 27 at 5; Employer's Exhibit 1 at 4. The ALJ concluded that the record, overall, established that Claimant is an ongoing smoker with a twenty-six-pack-year smoking history. Decision and Order at 3.

In her Order Denying Motion for Reconsideration, the ALJ considered Employer's argument that Claimant had a greater smoking history. She detailed the smoking histories set forth in Claimant's treatment records from Clinch Valley Urology and Clinch Valley Vascular Surgery. Order Denying Motion for Reconsideration at 2-3. In regard to the Clinch Valley records noting a smoking history of between twenty-one and thirty cigarettes per day and between a pack to a pack and half per day in 2020, she determined that they "do not provide support for changing my assessment of a twenty-six pack-year smoking history." *Id*. at 3. In addition, she considered Claimant's VA records, which she found included various references to his having smoked a pack per day for thirty-five years, daily for thirty-years, and for thirty plus years; a pack per day since he was twelve years old; twenty to thirty-nine cigarettes per day; and classification as a heavy smoker, and thirty or more years of smoking. *Id*. at 3, *citing* Employer's Exhibit 11 at 1, 5, 21, 33, 41, 44, 56, 83. The ALJ also noted that there was a single mention of five packs per day for nine years, but she considered it "an outlier not worthy of probative weight." Order Denying Motion for Reconsideration at 3, *citing* Employer's Exhibit 11 at 38. She therefore disagreed with Employer's assertion that the treatment records support a smoking history of one hundred pack-years because, although the records mentioned smoking one to two packs per day, they did not specify how long Claimant's smoking increased above a pack a day, and she determined the record does not support Claimant continuously smoking two packs of cigarettes a day. Order Denying Motion for Reconsideration at 3. Moreover, she found Employer did not persuasively explain why the VA records were entitled to more

weight than Claimant's testimony and the smoking histories recorded in the medical reports. *Id*.

The length and extent of Claimant's smoking history is a factual determination for the ALJ. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985). Here the ALJ's determination is supported by substantial evidence, including Claimant's testimony and the smoking histories the physicians relied on in rendering their opinions. Decision and Order at 3; *see Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993); *Bobick*, 13 BLR at 1-54; *Maypray*, 7 BLR at 1-686. The ALJ also adequately explained, as the Administrative Procedure Act (APA) requires,[4] why she disagreed with Employer's contention that the treatment records support a greater smoking history. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756, (4th Cir. 1999); *Wojtowicz*, 12 BLR at 1-165; Order Denying Motion for Reconsideration at 2. We therefore affirm the ALJ's finding that Claimant has a smoking history of twenty-six pack-years.

Legal Pneumoconiosis

Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis.[5] Employer's Brief at 6-11 (unpaginated). To establish the disease, Claimant must demonstrate he suffers from 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).

The ALJ considered the medical opinions of Drs. Forehand, Sargent, and McSharry. Decision and Order at 25-30. All of the physicians diagnosed Claimant with an obstructive respiratory impairment based on Claimant's pulmonary function study testing and

[4] The Administrative Procedure Act, 5 U.S.C. §§500-591, requires that every adjudicatory decision include a statement of "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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[5] "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).

hypoxemia based on his blood gas study testing. Dr. Forehand attributed Claimant's respiratory impairment to his occupational coal dust exposure and cigarette smoking history. Director's Exhibits 15, 19; Employer's Exhibit 12 at 12-14. Drs. Sargent and McSharry opined that Claimant's respiratory impairment was due solely to cigarette smoking. Director's Exhibit 27; Employer's Exhibits 1, 12-14.

The ALJ gave probative weight to Dr. Forehand's medical opinion because she found it was well-reasoned and well-documented, as it was based on Claimant's chronic obstructive lung disease, the physician's understanding of Claimant's smoking and occupational dust exposure, and his acknowledgement that the effects of coal dust and cigarette smoking are not possible to differentiate. Decision and Order at 25. She gave reduced probative value to Drs. Sargent and McSharry, as she found that neither opinion was well reasoned and they were inconsistent with the regulations. *Id.* at 27, 29. Thus she found Claimant established legal pneumoconiosis based on Dr. Forehand's opinion at 20 C.F.R. §718.202(a)(4). *Id.* at 29.

We reject Employer's argument that the ALJ erred in crediting Dr. Forehand's opinion. Employer's Brief at 8-11 (unpaginated). In his initial report, Dr. Forehand diagnosed Claimant with obstructive lung disease due to coal mine dust exposure and cigarette smoking. Director's Exhibit 15. In his subsequent deposition, he explained the combined effects of Claimant's occupational exposure to coal mine dust and cigarette smoke "are additive because . . . they are both independent triggers of inflammation." Employer's Exhibit 12 at 22. He also indicated that his initial diagnosis remained unchanged. *Id*.

The ALJ summarized Claimant's objective testing and symptoms that Dr. Forehand relied on to diagnose legal pneumoconiosis. Decision and Order at 25. As Dr. Forehand's opinion was supported by the objective testing he administered and based on his consideration of additional medical evidence, the ALJ permissibly found Dr. Forehand's opinion reasoned and documented. *Looney*, 678 F.3d at 310; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 25, 29. She also permissibly found Dr. Forehand's opinion consistent with the Department of Labor's recognition that the effects of smoking and coal dust exposure can be additive. *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 674 (4th Cir. 2017); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Decision and Order at 25.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Underwood*, 105 F.3d at 949; *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988); *see also Mays*, 176 F.3d at 756 (The Board must uphold decisions that rest within the realm of rationality; a reviewing court has

no license "to set aside an inference merely because it finds the opposite conclusion more reasonable or because it questions the factual basis."). Because it is supported by substantial evidence, we affirm the ALJ's determination that Dr. Forehand's opinion is well-reasoned and documented, and sufficient to establish the existence of legal pneumoconiosis.[6] *See Consol. Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006) (ALJ needs only to be persuaded, on the basis of all available evidence, that the miner's lung disease was "significantly related to, or substantially aggravated by," coal mine dust exposure); Decision and Order at 22.

Employer's argument that the ALJ erred in finding Dr. Forehand's opinion reasoned and documented, while finding Drs. Sargent's and McSharry's opinions not well-reasoned or documented, is a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113; *see* Employer's Brief at 9, 11 (unpaginated). Because the ALJ explained her findings and acted within her discretion in crediting Dr. Forehand's opinion over Drs. Sargent's and McSharry's,[7] her decision comports with the APA. *Wojtowicz*, 12 BLR at 1-165. We thus affirm her finding that Claimant established the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 29-31.

Disability Causation

To establish disability causation, Claimant must prove pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause if it has "a material adverse effect on the miner's respiratory or pulmonary condition"

[6] We note that Dr. Forehand found Claimant had particularly high exposure to coal dust because he worked without a mask and his work as a roof bolter and continuous miner operator required him to blast rock. Employer's Exhibit 12 at 31.

[7] Employer generally stated that the ALJ erred in crediting Dr. Forehand's opinion over the opinions of Drs. Sargent and McSharry, and it asserted she applied differing standards to Drs. Forehand and McSharry. Employer's Brief at 9, 11 (unpaginated). However, it did not specifically challenge, and we therefore affirm, the ALJ's determination that neither Dr. Sargent nor Dr. McSharry adequately explained why, even if smoking was the primary cause of Claimant's respiratory impairment, coal dust did not also contribute to or substantially aggravate it, especially given that the Department of Labor has credited scientific evidence that the risk of coal dust and smoking may be additive. *Skrack*, 6 BLR at 1-711; *Looney*, 678 F.3d at 313; 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Decision and Order 26-30.

or "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 37-38 (4th Cir. 1990).

The ALJ again considered the opinions of Drs. Forehand, Sargent, and McSharry. Decision and Order at 31-32. She permissibly discredited the opinions of Drs. Sargent and McSharry regarding the cause of Claimant's disability because they failed to diagnose legal pneumoconiosis, contrary to her finding Claimant established the presence of the disease. *See Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 185 (4th Cir. 2014) (physician's opinion that "did not properly diagnose pneumoconiosis can carry, at most, little weight" on disability causation); *Scott v. Mason Coal Co.*, 289 F.3d 263, 270 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 31-32. Further, Employer does not challenge the ALJ's crediting of Dr. Forehand's opinion to find that Claimant's totally disabling respiratory impairment is due to legal pneumoconiosis, independent of its assertions in regard to legal pneumoconiosis, which we have rejected. *See supra* at 5-6; Employer's Brief at 8-11 (unpaginated). Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability due to legal pneumoconiosis and is entitled to benefits.[8] 20 C.F.R. §718.204(c); Decision and Order at 32.

[8] As we have affirmed the ALJ's determination that Claimant is totally disabled due to legal pneumoconiosis, we need not address Employer's challenge to the ALJ's finding that Claimant also established he has clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 6-7 (unpaginated).

Accordingly, the ALJ's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge