U.S. Department of Labor

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

BRB Nos. 21-0310 BLA
and 21-0311 BLA

BETTY MAE OSBORNE (Widow of and o/b/o SAMUEL OSBORNE) Claimant-Respondent v. CONSOLIDATION COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 7/29/2022 DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Monica Markley, Administrative Law Judge, Department of Labor.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Monica Markley's Decision and Order Awarding Benefits (2018-BLA-06030 and 2018-BLA-06120) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944

(2018) (Act). This case involves a subsequent miner's claim[1] filed on March 18, 2016, and a survivor's claim filed on August 30, 2016.[2]

The ALJ credited the Miner with sixteen years and two months of underground coal mine employment and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant[3] invoked the presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[4] in the miner's claim and thus demonstrated a change in an applicable condition of entitlement.[5] 20 C.F.R. §§718.305, 725.309. The ALJ further found Employer did not rebut the presumption and awarded benefits in both

[1] The Miner filed two prior claims. Miner's Claim (MC) Director's Exhibits 1, 2. The district director denied the Miner's more recent prior claim for failure to establish total disability. MC Director's Exhibits 2, 35.

[2] We have consolidated for purposes of this decision Employer's appeals of the awards in the miner's and the survivor's claims.

[3] Claimant is the widow of the Miner, who died on August 12, 2016. MC Director's Exhibit 12. She is pursuing the miner's claim on his behalf, along with her own survivor's claim. Survivor's Claim Director's Exhibit 3.

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

[5] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "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). The district director denied the Miner's prior claim because he did not establish total disability; therefore, Claimant had to submit new evidence establishing that element in order to have the miner's claim reviewed on the merits. 20 C.F.R. §725.309(c).

claims, determining Claimant was entitled to survivor's benefits derivatively pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[6]

On appeal, Employer argues the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption. Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[7]

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.[8] 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).

Miner's Claim - Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[9] or "no part

[6] Under Section 422(*l*) of the Act, the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[7] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established sixteen years and two months of underground coal mine employment, invoked the Section 411(c)(4) presumption, and established a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 18, 27-28.

[8] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Tennessee and Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 23-24.

[9] "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

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 rebut the presumption by either method.[10]

Legal Pneumoconiosis

To prove the Miner did not have legal pneumoconiosis, Employer must establish he 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). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, requires Employer establish the Miner'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). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id*. at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relies on Dr. Fino's opinion to disprove legal pneumoconiosis. Employer contends the ALJ misconstrued his opinion as inconsistent with the preamble to the revised 2001 regulations, and therefore improperly substituted her opinion for that of a medical expert in finding it not adequately reasoned. We disagree.

In his written report, Dr. Fino concluded the Miner's totally disabling chronic obstructive pulmonary disease (COPD)/emphysema was caused by his smoking. Miner's Claim (MC) Director's Exhibit 21 at 2. He noted that "numerous articles have shown that smoking is the leading cause of pulmonary emphysema" but that "coal mine dust exposure can cause significant emphysema." *Id*. He indicated that articles by Dr. James Leigh cited in the preamble help to "determine the degree of emphysema and impairment caused by coal mine dust exposure" because they show that miners with "pneumoconiosis pathologically with x-rays" classified as 1/0 or less (such as in this case) had only "an additional 7% loss in FEV1 [on pulmonary function testing] due to coal dust." *Id*. Relying on Dr. Leigh's articles, Dr. Fino explained that "[i]f we gave [the Miner] back this 7% [loss] of his FEV1, he would still be disabled;" thus, he concluded that "clearly smoking

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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).

[10] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 25.

was the cause" of the Miner's disability and coal dust played "no role in his impairment or his death." *Id*.

At his deposition, Dr. Fino testified that he did not expect the Miner to have had "above-average" loss of FEV1 from coal dust since he worked sixteen years in coal mine employment after dust regulations were implemented and had negative x-rays or low profusion (1/0) readings for clinical pneumoconiosis. MC Employer's Exhibit 1 at 12-14. Dr. Fino also testified that while it is possible the Miner had a loss in FEV1 due to coal mine dust exposure, it did not make a difference in the degree of his impairment. *Id.* at 12-16. He concluded smoking was the significant cause of the Miner's respiratory disability and "rule[d] out" coal mine dust exposure as contributing to his impairment. *Id*. at 15-16.

The preamble sets forth how the Department of Labor (DOL) has resolved questions of scientific fact. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). An ALJ has discretion to evaluate medical expert opinions in conjunction with the DOL's discussion of sound medical science in the preamble. *A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012).

Contrary to Employer's contentions, the ALJ accurately found that although Dr. Fino suggested he agrees with the DOL that coal dust can cause significant obstructive lung disease even in the absence of positive x-ray evidence, he nevertheless relied on the absence, or only minimal findings, of radiographic evidence of pneumoconiosis to opine that the Miner's COPD is unrelated to coal mine dust exposure. Decision and Order at 24; MC Director's Exhibit 21 at 2; MC Employer's Exhibit 1 at 8, 12-16. Thus, we see no error in the ALJ's finding that Dr. Fino's rationale is inconsistent with DOL's recognition that "[d]ecrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not [clinical] pneumoconiosis is also present." Decision and Order at 24, *quoting* 65 Fed. Reg. 79,920, 79,939-41, 79,943 (Dec. 20, 2000); *see* 20 C.F.R. §718.202(a)(4); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488-89 (6th Cir. 2012) (opinion that emphysema could not have been caused by coal mine dust exposure because insufficient dust retention was shown on the miner's x-rays permissibly discounted as counter to the studies underlying the preamble to the revised 2001 regulations).

Further, the ALJ correctly found Dr. Fino did not identify additional scientific evidence that would reasonably question the DOL's "scientific position" set out in the preamble. Decision and Order at 24; Director's Exhibit 21; Employer's Exhibit 1. As the ALJ provided valid reasons for discrediting Fino's opinion, we reject Employer's assertion that she erred in substituting her opinion for that of a medical expert. *See Jericol Mining*,

Inc. v. Napier, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989);

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ acted within her discretion in finding Dr. Fino's opinion not well-reasoned and unpersuasive to satisfy Employer's burden of proof,[11] we affirm her finding that Employer failed to establish the Miner did not have legal pneumoconiosis.[12] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

To disprove disability causation, Employer must establish "no part of the [m]iner's respiratory or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R. §718.305(d)(1)(ii). The ALJ rationally found Dr. Fino's opinion on the cause of the Miner's respiratory disability unpersuasive because he did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 26-27; MC Director's Exhibit 21 at 2; MC Employer's Exhibit 1 at 12-16. Thus, we affirm the ALJ's finding that Employer failed to establish no part of the Miner's total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 26-27. Consequently, we affirm the ALJ's conclusion that Employer did not rebut the Section 411(c)(4) presumption and affirm the award of benefits in the Miner's claim.

Survivor's Claim – Derivative Entitlement

The ALJ found Claimant entitled to survivor's benefits based on the award in the Miner's claim pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018). Decision and Order at 28. Employer raises no specific error with regard to this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Having affirmed the ALJ's award of benefits in the miner's claim, we affirm her determination that Claimant is derivatively

[11] As Employer has the burden of proof on rebuttal and we have affirmed the ALJ's rejection of Dr. Fino's opinion, we need not address Employer's contentions regarding the ALJ's weighing of Dr. Forehand's opinion that the Miner had legal pneumoconiosis.

[12] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A), (B).

entitled to survivor's benefits. 30 U.S.C. §932(*l*) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 28.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge