U.S. Department of Labor

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

BRB No. 21-0493 BLA

BILLY R. CLINE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GENESIS COAL CORPORATION	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE/CHARTIS	)	DATE ISSUED: 7/29/2022
	)	
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.

Timothy J. Walker and Andrew L. Kenney (Fogle Keller Walker, PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits (2018-BLA-05077) rendered on a subsequent claim filed on April 22, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

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

On appeal, Employer contends the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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[1] Claimant filed one previous claim. Director's Exhibit 1. The district director denied it on March 2, 2010 because he failed to establish a totally disabling respiratory or pulmonary impairment. *Id*.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes 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] 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 he 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). Because Claimant did not establish total disability in his first claim, he had to submit new evidence establishing this element of entitlement in order to obtain review of his current claim on the merits. 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3.

[4] We affirm, as unchallenged on appeal, the ALJ's findings Claimant established at least fifteen years of underground coal mine employment and total disability, and thus

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Rebuttal of the Section 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,[6] 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). The ALJ found Employer failed to establish rebuttal by either method.[7]

Employer argues the ALJ erred in finding it failed to rebut the presumed existence of legal pneumoconiosis. Employer's Brief at 10-14. 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 v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, holds Employer

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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); 20 C.F.R. §§718.305(b)(1), 725.309(c); Decision and Order at 16-17.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

[6] 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 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).

[7] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 24.

can "disprove the existence of legal pneumoconiosis by showing that [Claimant's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 403-06 (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 408, citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 597-99, 600 (6th Cir. 2014).

The ALJ considered the opinions of Drs. Jarboe and Rosenberg. Decision and Order at 22-23. Dr. Jarboe diagnosed Claimant with hypoxemia due to a cardiac condition and unrelated to coal mine dust exposure. Director's Exhibit 22. Dr. Rosenberg also diagnosed hypoxemia, but opined it is due to either congestive heart failure or emphysema caused by cigarette smoking. Employer's Exhibit 9. He opined the hypoxemia is unrelated to coal mine dust exposure. *Id*. The ALJ found Dr. Jarboe's opinion inadequately reasoned and contrary to the regulations. Decision and Order at 22-23. He found Dr. Rosenberg's opinion inadequately reasoned, inconsistent with the studies relied upon by the Department of Labor in the preamble to the 2001 revised regulations, and equivocal. *Id*. Thus he assigned both opinions reduced weight.[8] *Id*.

Employer argues the ALJ erred in discrediting the opinions of Drs. Jarboe and Rosenberg. Employer's Brief at 11-14. We disagree.

Dr. Jarboe acknowledged Claimant's August 10, 2016 blood gas study demonstrates exercise-induced hypoxemia, but opined Claimant showed no signs of an obstructive or restrictive lung impairment. Director's Exhibit 22 at 6 (unpaginated); Employer's Exhibit 12 at 8-10. He concluded Claimant's cardiovascular issues caused his hypoxemia. *Id*. He stated he was able to exclude coal mine dust exposure as a causal factor for the hypoxemia because there is no evidence of significant dust deposition in Claimant's clinical picture that could cause this impairment, and Claimant's "ventilatory function does not show restriction or obstruction which has resulted from the inhalation of coal mine dust." Director's Exhibit 22 at 7-8 (unpaginated).

[8] The ALJ also considered the opinions of Drs. Shamma-Othman, Green, and Nader that Claimant has legal pneumoconiosis. Decision and Order at 22-24; Director's Exhibits 12, 20; Claimant's Exhibits 3, 4. He found Dr. Shamma-Othman's opinion well-reasoned and documented, but the opinions of Drs. Green and Nader entitled to less weight as they failed to explain their conclusions. *Id*. Employer does not challenge the ALJ's finding that Dr. Shamma-Othman's opinion is well-reasoned and documented. Thus we affirm this finding. *Skrack*, 6 BLR at 1-711.

The ALJ found Dr. Jarboe's opinion that a lack of dust deposition in Claimant's lungs indicates coal mine dust is not a causative factor for hypoxemia contrary to the regulations, which recognize that legal pneumoconiosis can exist in the absence of an x-ray positive for clinical pneumoconiosis. *A&E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000); 20 C.F.R. §§718.202(a)(4), 718.202(b); Decision and Order at 22. The ALJ also found Dr. Jarboe did not explain why coal mine dust did not contribute to, or aggravate, Claimant's hypoxemia, even assuming his impairment is primarily cardiac in origin. *Young*, 947 F.3d 399 at 407; Decision and Order at 23. Employer does not challenge these specific credibility findings.[9] We therefore affirm them. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Dr. Rosenberg acknowledged Claimant's objective testing is consistent with exercise-induced hypoxemia and a reduced diffusing capacity. Employer's Exhibit 9 at 5. He "suspect[ed]" the impairments were caused by Claimant's "chronic congestive heart failure or potentially underlying emphysema related to [Claimant's] long and continued smoking history." *Id*. During his deposition, however, Dr. Rosenberg testified he did not see any evidence of chronic congestive heart failure in Claimant's clinical picture. Employer's Exhibit 13 at 12. He also conceded he could not make a "definitive diagnosis of emphysema."[10] *Id*. at 11-13.

The ALJ noted Dr. Rosenberg initially opined Claimant's lung conditions are likely caused by congestive heart failure or emphysema, but later stated he could find no evidence of congestive heart failure and could not make a definitive diagnosis of emphysema. Decision and Order at 23. Contrary to Employer's argument, the ALJ thus permissibly discredited Dr. Rosenberg's opinion as equivocal.[11] *See Island Creek Coal Co. v.*

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[9] Because the ALJ provided valid reasons for discrediting Dr. Jarboe's opinion on legal pneumoconiosis, we need not address Employer's remaining argument regarding the weight accorded to his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 13-14.

[10] Dr. Rosenberg testified the elevated carboxyhemoglobin levels in this case are "consistent" with cigarette smoking, which can cause diffuse emphysema and an associated reduction in diffusion capacity. Employer's Exhibit 13 at 11-13. Although he acknowledged coal mine dust exposure can cause emphysema, he explained it would not cause diffuse emphysema. *Id*. at 11-13, 16.

[11] Because the ALJ gave a valid reason for discrediting Dr. Rosenberg's opinion, we need not address Employer's other contentions regarding the ALJ's weighing of his opinion. *See Kozele*, 6 BLR at n.4; Employer's Brief at 11-13.

Holdman, 202 F.3d 873, 882 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-7 (6th Cir. 1995); Decision and Order at 23. Further, the ALJ permissibly found Dr. Rosenberg failed to adequately explain why coal mine dust could not be a contributing or aggravating factor to Claimant's impairments, even if smoking was a more likely cause. *Young*, 947 F.3d at 407; Decision and Order at 23.

Employer generally argues the opinions of Drs. Jarboe and Rosenberg are reasoned and documented and should have been afforded full probative weight. Employer's Brief at 11-14. Employer's argument is 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 permissibly discredited the only opinions supportive of Employer's burden on rebuttal, we affirm his finding that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

We further affirm, as unchallenged on appeal, the ALJ's finding that Employer failed to rebut the presumption by establishing that no part of Claimant's respiratory or pulmonary total disability is caused by pneumoconiosis. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 25.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge