U.S. Department of Labor

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

BRB No. 22-0078 BLA

ERIC J. GRIEDEL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL OF PENNSYLVANIA COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 7/12/2023
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Deanna Lyn Istik (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2021-BLA-05051) rendered on a claim filed on September 5, 2021,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with thirty-four years of coal mine employment, at least fifteen years of which was performed in underground mines, and found Claimant has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). Finally, he found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer asserts the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

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. Director's Exhibit 1. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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 findings 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 13.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. Decision and Order at 6; Director's Exhibits 4, 6, 7.

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,[5] 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.

We affirm, as unchallenged on appeal, the ALJ's finding that Employer failed to disprove the existence of clinical pneumoconiosis.[6] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). However, we will address Employer's contentions regarding legal pneumoconiosis because the ALJ's findings on that issue have bearing on whether Employer disproved disability causation by establishing that no part of Claimant's total disability is due to either clinical or legal pneumoconiosis. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 155 n.8 (2015).

As an initial matter, Employer's arguments on legal pneumoconiosis are framed in terms of the ALJ's alleged error "in finding that Claimant established" legal pneumoconiosis. Employer's Brief at 3, 15. However, the burden is on Employer to disprove legal pneumoconiosis, and we address Employer's assertions of error accordingly. 20 C.F.R. §718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 159.

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated

[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). "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).

[6] Employer concedes that Claimant has clinical pneumoconiosis arising out of coal mine employment. Employer's Brief at 7.

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 the medical opinions of Drs. Rosenberg, Basheda, and Swedarsky. Employer's Exhibits 2, 2A, 4, 7. Dr. Rosenberg diagnosed chronic obstructive pulmonary disease (COPD) with asthmatic bronchitis due to cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibit 4 at 23. Dr. Basheda diagnosed obstructive airway disease with an asthmatic component and emphysema caused by smoking and unrelated to coal mine dust exposure. Employer's Exhibit 2 at 21-25. Dr. Swedarsky opined Claimant has moderate emphysema due to smoking and unrelated to coal mine dust exposure. Employer's Exhibit 7 at 31-34. The ALJ discredited their opinions because he found them neither well-reasoned nor documented, and thus he concluded Employer did not disprove legal pneumoconiosis. Decision and Order at 22-24.

Employer contends the ALJ erred in discrediting Dr. Rosenberg's opinion on the basis that the physician did not accurately understand Claimant's coal mine employment. Employer's Brief at 13-14. We disagree.

Dr. Rosenberg noted while summarizing Claimant's records that he ceased working in coal mines in 2014 and had thirty-three-and-a-quarter years of coal mine employment. Employer's Exhibit 4 at 1, 5. However, as the ALJ accurately observed, in explaining his conclusion that Claimant's COPD was caused entirely by cigarette smoke and unrelated to coal mine dust exposure, he repeatedly indicated Claimant's coal mine employment ended in 2001. Decision and Order at 22; Employer's Exhibit 4 at 5, 9, 11, 13. The ALJ further correctly noted Dr. Rosenberg specifically premised his opinion that Claimant's COPD was caused by smoking and is unrelated to coal mine dust exposure on the basis that Claimant "continued to smoke cigarettes for years after his last coal dust exposure ended in 2001." Employer's Exhibit 4 at 11; Decision and Order at 22. Thus, the ALJ rationally found Dr. Rosenberg premised his rationale on the inaccurate understanding that Claimant's coal mine employment ceased in 2001, thirteen years before it actually ended. *See Mancia v. Director,* OWCP, 130 F.3d 579, 589 (3d Cir. 1987); Decision and Order at 22.

Employer next contends the ALJ applied an incorrect legal standard in discrediting Dr. Basheda's opinion by assuming that "all respiratory and/or pulmonary diseases automatically relate to a person's prior coal dust exposure." Employer's Brief at 11-12. We disagree.

Contrary to Employer's assertion, the ALJ properly acknowledged the regulatory definition of legal pneumoconiosis includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust

exposure in coal mine employment." Decision and Order at 23 (quoting 20 C.F.R. §718.201(b)). Further, as previously noted, by operation of the Section 411(c)(4) presumption, Claimant is presumed to have the disease and Employer has the burden to rebut it. 20 C.F.R. §718.305(d)(1)(i)(A). Thus, while the ALJ noted Dr. Basheda's explanation that cigarette smoke caused Claimant's COPD, he permissibly discredited the physician's opinion because he failed to adequately address why Claimant's thirty-four years of coal mine dust exposure did not contribute to or aggravate his COPD along with smoking. *See Balsavage* v. *Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *see also Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (affirming rejection of medical opinion which failed to adequately explain why coal dust exposure did not aggravate smoking-related impairments); Decision and Order at 23.

Finally, Employer asserts the ALJ erred in discrediting Dr. Swedarsky's opinion on the basis that he did not adequately consider whether Claimant's coal mine dust exposure substantially aggravated his emphysema. Employer's Brief at 15. It asserts Dr. Swedarsky provided sufficient rationale to support his conclusion because he opined that the amount of dust revealed on pathology of Claimant's lungs "cannot account for the degree of emphysema seen." Employer's Brief at 15; *see* Employer's Exhibit 7 at 33, 40. Employer infers Dr. Swedarsky's statement thereby excluded coal dust as even an aggravator to Claimant's disease. *Id.* However, it is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 162-63 (3d Cir. 1986); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). The ALJ considered Dr. Swedarsky's rationale and acted within his discretion in concluding that while the physician identified smoking as the "significant contributing cause" of Claimant's emphysema, he did not adequately address whether coal mine dust exposure substantially aggravated the disease. *See Kertesz*, 788 F.2d at 163; Decision and Order at 23. We consider Employer's argument with respect to Dr. Swedarsky's opinion to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Thus, we affirm the ALJ's rejection of Drs. Rosenberg's, Basheda's, and Swedarsky's opinions. Because the ALJ permissibly discredited the only medical opinions supportive of a finding that Claimant does not have legal pneumoconiosis, we affirm his finding that Employer failed to disprove the existence of the disease. 20 C.F.R. §718.305(d)(1)(i)(A).

Disability Causation

The ALJ next considered whether Employer established "no part of [Claimant's] respiratory or pulmonary 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 24-26.

Contrary to Employer's arguments, the ALJ permissibly discredited Drs. Rosenberg's, Basheda's, and Swedarsky's opinions on the cause of Claimant's respiratory or pulmonary disability because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the disease. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *see also Hobet Mining, LLC., v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 25-26. We therefore affirm the ALJ's finding that Employer failed to establish that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge