U.S. Department of Labor

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

BRB Nos. 22-0487 BLA
and 22-0518 BLA

GENEVIEVE OSBORNE (o/b/o and Widow of ROY E. OSBORNE) Claimant-Respondent v. ELKAY MINING COMPANY and PITTSTON COMPANY C/O HEALTHSMART CCS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 7/27/2023 DECISION and ORDER

Appeals of the Decisions and Orders Awarding Benefits of Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

Donna E. Sonner and Joseph E. Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for Employer.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Patricia J. Daum's Decisions and Orders Awarding Benefits (2019-BLA-05738 and 2022-BLA-05498) 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 miner's subsequent claim[1] filed on April 19, 2017, and a survivor's claim filed on December 28, 2021.

The ALJ credited the Miner with fifteen and one-half years of coal mine employment in conditions substantially similar to those in an underground mine and found he had a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant[2] 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.

[1] This is the Miner's second claim. On January 12, 2011, the district director denied Miner's prior claim for failure to establish any element of entitlement. Survivor's Claim (SC) Director's Exhibit 1.

[2] Claimant is the widow of the Miner, who died on November 22, 2021. SC Director's Exhibit 8. She is pursuing his claim on his behalf, along with her own survivor's claim.

[3] 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.

[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 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). The ALJ further found Employer did not rebut the presumption and awarded benefits.

In a separate Decision and Order Awarding Benefits, the ALJ found Claimant entitled to survivor's benefits pursuant to Section 422(*l*) of the Act.[5] 30 U.S.C. §932(*l*) (2018).

On appeal, Employer asserts the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption in the miner's claim. With respect to the survivor's claim, Employer argues the ALJ's derivative award to Claimant was premature. Claimant responds, urging affirmance of the awards in both claims. The Director, Office of Workers' Compensation Programs, submitted a limited response, urging the Benefits Review Board to reject Employer's contention that the award in the survivor's claim was premature.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decisions and Orders if they are rational, supported by substantial evidence, and in accordance with applicable law.[6]

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

Because Claimant invoked the Section 411(c)(4) presumption in the miner's claim,[7] the burden shifted to Employer to establish the Miner had neither legal nor clinical

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§725.309(c)(3). Because the district director denied the Miner's prior claim for failure to establish any element of entitlement, Claimant was required to submit new evidence establishing an element of entitlement to warrant a review of this subsequent claim on the merits. *See White,* 23 BLR at 1-3; SC Director's Exhibit 1.

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

[6] These cases arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 20; Miner's Claim (MC) Director's Exhibit 5.

[7] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established at least fifteen years of qualifying coal mine employment and total disability at 20 C.F.R. §718.204(b)(2), and therefore invoked the Section 411(c)(4) presumption. *See*

pneumoconiosis,[8] 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 rebut the presumption by either method.[9]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner 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 the opinions of Drs. Jarboe[10] and McSharry, both of whom diagnosed the Miner with a disabling restrictive impairment and hypoxemia unrelated to coal dust exposure.[11] Employer's Exhibits 1 at 8-9, 4 at 6, 5 at 11-12 & 29-30. Dr. Jarboe attributed the Miner's restrictive lung disease to morbid obesity and a paralyzed right diaphragm; he attributed the Miner's hypoxemia to obesity, diaphragm paralysis, and hypoventilation. Employer's Exhibits 1 at 8-9, 5 at 11-12 & 29-30. Dr. McSharry attributed the Miner's restrictive lung disease to smoking, right hemidiaphragm elevation,

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Skrack v. Island Creek Coal Co., 6 BLR 1-710, 1-711 (1983); MC Decision and Order at 35.

[8] "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). "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).

[9] The ALJ found Employer rebutted the presumption that the Miner had clinical pneumoconiosis. MC Decision and Order at 41.

[10] The ALJ erroneously referred to Dr. Jarboe as "Dr. Jarobe" throughout the Decision and Order in the miner's claim. Employer's Exhibit 1 at 34.

[11] The ALJ also considered the opinions of Drs. Raj and Green that Claimant has legal pneumoconiosis. MC Decision and Order at 39. Because these opinions do not support Employer's burden to rebut the Section 411(c)(4) presumption, we decline to address Employer's arguments relating to them. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 25-27.

and marked obesity; he opined the Miner's hypoxemia was secondary to his restriction. Employer's Exhibit 2 at 4. He further stated, "there may be a small component of contribution due to lung cancer and radiation therapy, but there is no objective affirmative evidence that coal dust exposure is contributing in any measurable way." *Id.* at 5.

The ALJ found the opinions of Drs. Jarboe and McSharry not well-reasoned and inconsistent with applicable regulations. MC Decision and Order at 40-41. She therefore found them insufficient to meet Employer's burden to rebut the existence of legal pneumoconiosis. *Id.* at 41. Employer contends substantial evidence does not support the ALJ's credibility determinations. We disagree.

The ALJ observed correctly that Drs. Jarboe and McSharry eliminated coal mine dust exposure as a cause of the Miner's disabling lung condition, in part, because his x-rays were negative for clinical pneumoconiosis. MC Decision and Order at 40. The ALJ permissibly found this aspect of their opinions inconsistent with the regulations which recognize that legal pneumoconiosis is a separate disease from, and can exist in the absence of, clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4), (b); 65 Fed. Reg. 79,920, 79,940-43 (Dec. 20, 2000); *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); MC Decision and Order at 18, 21, 40; Employer's Exhibits 1 at 8-9, 2 at 4. The ALJ also permissibly found Dr. Jarboe's opinion excluding coal dust exposure a cause of the Miner's restrictive impairment, due to the absence of a co-existing obstructive impairment, is inconsistent with the regulations which recognize that coal dust-induced impairments can be restrictive, obstructive, or a combination of the two. 20 C.F.R. §718.201(a)(2); MC Decision and Order at 40.

Furthermore, we see no error in the ALJ's finding that Drs. McSharry and Jarboe failed to adequately explain why coal mine dust exposure was not additive along with obesity, diaphragm paralysis, and smoking in causing or aggravating the Miner's respiratory or pulmonary impairment. *See* 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. at 79,940; *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Looney*, 678 F.3d at 313-14; MC Decision and Order at 40. Although both physicians opined that the rapid progression in the Miner's impairment between his pulmonary function testing in 2017 and 2019 is atypical of coal dust related lung disease, the ALJ accurately observed the Miner's 2017 pulmonary function study produced qualifying values.[12] MC Decision and Order at 40; Employer's Exhibits 1 at 8-9, 2 at 4. She permissibly found neither physician adequately explained how he eliminated coal dust exposure as a contributing cause of the 2017 impairment or subsequent deterioration in lung function. *See Island*

[12] Employer concedes the Miner's 2017 pulmonary function study was qualifying for total disability. Employer's Brief at 23.

Creek Coal Co. v. Compton, 211 F.3d 203, 207-08, 211 (4th Cir. 2000); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987) (explaining a reasoned opinion is one in which the ALJ finds the underlying documentation adequate to support the physician's conclusions); MC Decision and Order at 40.

Although Employer suggests Drs. Jarboe and McSharry sufficiently explained their opinions in attributing the Miner's impairment to extrinsic factors and smoking, the weighing of the evidence is the purview of the ALJ. *See Owens*, 724 F.3d 55 at 558; *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Looney*, 678 F.3d at 313-14; Employer's Brief at 16-24. The ALJ permissibly discounted their opinions for failing to explain how they eliminated the Miner's history of coal dust exposure as a contributing cause of his impairment. *See Owens*, 724 F.3d 55 at 558; *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).

Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ acted within her discretion in discrediting the opinions of Drs. Jarboe and McSharry, we affirm her finding that Employer did not disprove legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(A).

Disability Causation

The ALJ next considered whether Employer established "no part of the miner'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); MC Decision and Order at 42-43. She rationally discounted Drs. Jarboe's and McSharry's disability causation opinions because they did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Toler v. E. Assoc. Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); MC Decision and Order at 42-43. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii), and the award of benefits.

Survivor's Claim

The ALJ found Claimant established each element necessary to demonstrate entitlement under Section 422(*l*): she filed her claim after January 1, 2005; she is an eligible survivor of the Miner; her claim was pending on or after March 23, 2010; and the Miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*); SC Decision and Order at 3-4.

We reject Employer's argument that the ALJ's application of Section 422(*l*) was erroneous because the Miner's award of benefits was not yet final. Employer's Brief at 28-34. The Board has rejected that argument and has held that an award of benefits in a miner's claim need not be final for a claimant to receive benefits under Section 422(*l*).[13] *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-145-47 (2014). We decline Employer's request to reconsider the Board's holding in *Rothwell.*

Because we have affirmed the award of benefits in the miner's claim and Employer raises no other specific challenge to the ALJ's determination that Claimant is entitled to benefits under Section 422(*l*), we affirm it.[14] 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

[13] Employer contends the facts in *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141 (2014) are distinguishable from the facts in this case because *Rothwell* involved modification proceedings that left intact an ALJ's award, whereas the Miner's award in this case was pending appeal before the Board. Employer's Brief at 28. *Rothwell* specifically states that benefits under the Act are due "after the issuance of an effective order requiring the payment of benefits . . . notwithstanding the *pendency of a motion for reconsideration before an* [*ALJ*] *or an appeal to the Board or court* . . . ." 25 BLR at 1-146 (quoting 20 C.F.R. §725.502(a)(l) (emphasis added)). Additionally, "[a]n effective order shall remain in effect *unless it is vacated* by an [ALJ] on reconsideration, or, upon review . . . by the [Board] or an appropriate court . . . ." 20 C.F.R. §725.502(a)(l) (emphasis added). The implementing regulation similarly conditions automatic survivor's entitlement on a miner's claim that "results or resulted in a final award of benefits," which the Board interpreted as encompassing awards that are final (a claim which "resulted" in a final award) and those that are not yet final (a claim which "results" in a final award). 20 C.F.R. §725.212(a)(3)(ii); *Rothwell,* 25 BLR at 1-146.

[14] Employer also asserts the ALJ erred in failing to hold a hearing in the survivor's claim. However, Employer does not challenge the ALJ's findings that Claimant satisfies the eligibility requirements for derivative entitlement. We thus consider the ALJ's error, if any, harmless. *See Sea "B" Mining Co. v. Addison,* 831 F.3d 244, 253-54 (4th Cir. 2016) (moving party has burden of proving prejudicial error); *Larioni,* 6 BLR at 1-1278; Employer's Brief at 28-29; Director's Brief at 1-2 (unpaginated).

Accordingly, the ALJ's Decisions and Orders Awarding Benefits in both the miner's claim and the survivor's claim are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge