U.S. Department of Labor

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

BRB No. 22-0094 BLA

BRENDA PHILLIPS (o/b/o WOODROW CRUM) Claimant-Respondent v. AGIPCOAL USA, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 6/12/2023 DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration (Order Denying

Reconsideration) (2016-BLA-05453) rendered on a subsequent miner's claim filed on June 8, 2012,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with 13.57 years of coal mine employment and therefore found Claimant[2] could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, he found the Miner had 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). Thus he concluded Claimant established a change in applicable condition of entitlement and entitlement to benefits.[4] 20 C.F.R. §725.309(c).

On appeal, Employer asserts the ALJ erred in finding Claimant established legal pneumoconiosis.[5] Claimant responds in support of the award of benefits. The Director,

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[1] The Miner filed two prior claims for benefits. Director's Exhibits 1, 2. The district director denied his previous claim, filed on January 15, 1986, for failure to establish any element of entitlement. Director's Exhibit 2 at 4.

[2] The Miner died on May 11, 2015, while his case was pending. Director's Exhibit 26 at 5-6; Hearing Transcript at 10-11. Claimant is the executrix of his estate and is pursuing the miner's claim on his behalf. Director's Exhibit 26 at 7.

[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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[4] Where 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)(1); *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 the Miner did not establish any element of entitlement in his previous claim, Claimant had to submit evidence establishing at least one element to obtain review of the merits of the Miner's current claim. *See White*, 23 BLR at 1-3; Director's Exhibit 2.

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 13.57 years of coal mine employment and a totally disabling respiratory or pulmonary

Office of Workers' Compensation Programs, has declined to file a brief, unless requested to do so.

The Benefits Review 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] 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).

Without the benefit of statutory presumptions, Claimant must establish disease (pneumoconiosis);[7] 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 one of these elements precludes an award of benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

To establish legal pneumoconiosis, Claimant must prove the Miner had 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 United States Court of Appeals for the Sixth Circuit has held that a claimant can establish a lung impairment was significantly related to coal mine dust exposure "by showing that [the] disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see Island Creek Coal Co. v. Young*, 947 F.3d 399,

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impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2); Decision and Order at 7, 25.

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 25 at 209; Hearing Transcript at 8.

[7] "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).

407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The ALJ considered the medical opinions of Drs. Forehand, Spagnolo, and Castle. Decision and Order at 20-24; Order Denying Reconsideration at 2-3. Dr. Forehand diagnosed a totally disabling obstructive lung disease and hypoxemia caused by coal mine dust exposure and cigarette smoking. Director's Exhibit 10; Employer's Exhibit 3. Drs. Spagnolo and Castle diagnosed chronic obstructive pulmonary disease with an asthmatic component and hypercapnia caused by smoking alone. Employer's Exhibits 7, 8, 11, 12. The ALJ found Dr. Forehand's opinion, that the Miner suffered from legal pneumoconiosis, reasoned and documented. Decision and Order at 22, 24; Order Denying Reconsideration at 2-3. He rejected the contrary opinions of Drs. Spagnolo and Castle as not adequately reasoned and contrary to the regulations and the medical science set forth in the preamble to the 2001 revised regulations. Decision and Order at 22-24. Consequently, the ALJ found the weight of the medical opinion evidence establishes legal pneumoconiosis. *Id.*

Employer argues the ALJ erred in finding Dr. Forehand's opinion reasoned and documented. Employer's Brief at 7-15. We are unpersuaded.

Dr. Forehand based his diagnosis on the Miner's history of exposure and objective tests, attributing the impairment to the combined effects of the Miner's seventeen years of coal mine dust exposure and twenty years of cigarette smoking. *Id.* In his deposition, Dr. Forehand testified he understood the Miner worked at the face of the mine near the cutting machine. Employer's Exhibit 3 at 15-16. According to Dr. Forehand, the Miner informed him the conditions at the face were "so dusty" he could not "see the scoop" or "see co-workers because of the density and severity of the dusty conditions." *Id.* The Miner also told Dr. Forehand that, "when the dust levels got particularly high at the face during work, he would also feel short of breath." *Id.* at 21.

Dr. Forehand further noted the Miner's pulmonary function testing revealed his obstructive impairment was only partially reversible after the administration of a bronchodilator. *Id.* at 26-27. Because the obstructive impairment was still disabling after bronchodilators, he found the pattern consistent with an obstructive impairment due to coal mine dust exposure and not asthma. *Id.* Dr. Forehand conceded he could not differentiate between the effects the Miner's smoking and coal mine dust exposure based on their respective lengths. *Id.* Nonetheless, he concluded even though the effects of cigarette smoking on the Miner's lungs were substantial, coal mine dust exposure still significantly contributed to the totally disabling respiratory impairment. *Id.*

Given Dr. Forehand's consideration of the Miner's exposure histories and his reliance on objective testing in diagnosing the cause of the Miner's disabling impairment,

the ALJ permissibly found his opinion reasoned and documented. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 22; Order Denying Reconsideration at 2. Employer's argument otherwise is a simple request to reweigh the evidence, which we are not empowered to do. *See Anderson*, 12 BLR at 1-113; Employer's Brief at 8-15.

Employer similarly argues the ALJ's finding does not satisfy the explanatory requirements of the Administrative Procedure Act (APA).[8] Employer's Brief at 7. We disagree. The ALJ explained:

> [Dr. Forehand] found that [the] Miner's symptoms and testing were consistent with obstructive lung disease, and he found that given the fact that his [pulmonary function testing] was 66% irreversible, it was more consistent with coal mine dust than asthma. He found that even if [the Miner's] continued smoking had caused greater lung function decline than coal mine dust, it was still reasonable to find that coal mine dust caused a significant or substantial contribution, attributing his obstruction to both smoking and coal mine dust given the fact that he was likely susceptible to the effects of each, and the high association between coal mine dust and the development of obstructive lung disease. (sic) I find this explanation to be supported by the evidence in the record. He did not find that all miners would develop pneumoconiosis, but stated that he took into account the length of mining, the type of work described by Miner, and the description of his dust conditions.

Order Denying Reconsideration at 2. Because we can discern the ALJ's rationale underlying his finding, we are not persuaded by Employer's argument that it does not satisfy the APA. *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002) (APA satisfied where ALJ properly addressed the relevant evidence and provided a sufficient rationale for his findings); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing court can discern what the ALJ did and why he did it, the duty of explanation under the APA is satisfied).

Employer further argues the ALJ did not address its argument Dr. Forehand relied on an inflated coal mine employment history and underestimated smoking history.

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[8] The Administrative Procedure Act (APA) provides that every adjudicatory decision must include "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).

Employer's Brief at 11-12. We again disagree. The ALJ specifically explained Dr. Forehand's slight underestimation of the Miner's coal mine employment did not affect his diagnosis: "[a]lthough Dr. Forehand considered a [seventeen] year coal mining history, . . . this is only a 3.43 year difference from the length of coal mine employment found" in this case and thus not a "significant difference." Order Denying Reconsideration at 2.

In addition, the ALJ found that Dr. Forehand's assumption of a twenty-year smoking history was not a basis to discredit his opinion because the doctor "discussed the effects of the Miner continuing to smoke" on his lungs and explained why coal mine dust exposure was still a significant factor in the disabling respiratory impairment. *Id.* Thus the ALJ acted well within his discretion in crediting Dr. Forehand's opinion notwithstanding he assumed a slightly inflated coal mine employment history and an underestimated smoking history. *Looney*, 678 F.3d at 311 n.2 (finding a four year difference in the length of coal mine employment "relatively insignificant," and it did not compel rejection of the physician's opinion); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988) (ALJ has discretion in determining the effect of an inaccurate smoking history on the credibility of a medical opinion); *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984) (difference between seven years of coal mine employment that the adjudicator found and eleven years a doctor assumed did not affect the weight given to the doctor's opinion).

We also are not persuaded by Employer's argument that Dr. Forehand's opinion cannot establish legal pneumoconiosis because he indicated he could not allocate the relative contribution of coal mine dust exposure versus cigarette smoking as causes of the Miner's impairment. Employer's Brief at 10-17. As coal dust need not be the sole cause of the Miner's respiratory or pulmonary impairment, Claimant can establish legal pneumoconiosis based on a physician's opinion that coal dust and smoking were both causal factors and that it was impossible to allocate between them. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000) (no requirement that a physician allocate a specific percentage of damage between smoking and dust exposure); *Consol. Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006) (same); 20 C.F.R. §718.201(a)(2), (b).

We also reject Employer's argument that the ALJ erred in discrediting the opinions of Drs. Spagnolo and Castle. Employer's Brief at 15-24. Dr. Spagnolo found the Miner's asthma unrelated to coal mine dust exposure because he ceased working in the mines and once an individual leaves there should not be "any effect from coal dust making asthma worse or triggering asthma." Employer's Exhibit 12 at 23. The ALJ permissibly found his reasoning contrary to the regulation that recognizes pneumoconiosis "as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014) (upholding ALJ's decision to discredit physician whose opinion regarding legal pneumoconiosis conflicted with the recognition that

pneumoconiosis is a latent and progressive disease); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 22.

Dr. Spagnolo also cited the Miner's negative x-rays as a basis for excluding legal pneumoconiosis. Employer's Exhibit 12 at 32. But the regulations provide a claim must not be denied solely on the basis of a negative x-ray and that legal pneumoconiosis can exist in the absence of clinical pneumoconiosis. *See Banks*, 690 F.3d at 487-88 (affirming ALJ's discrediting of physician who relied on negative radiographic evidence to exclude a diagnosis of legal pneumoconiosis, as legal pneumoconiosis may exist in the absence of clinical pneumoconiosis); 20 C.F.R. §§718.201, 718.202(a)(4), (b); Decision and Order at 23.

Dr. Castle also excluded legal pneumoconiosis because the Miner had a reduced FEV1/FVC ratio on pulmonary function testing that the doctor considered "either normal or very near so." Employer's Exhibit 8 at 10. The ALJ permissibly found his rationale conflicted with the Department of Labor's recognition set forth in the preamble that coal mine dust exposure can cause clinically significant obstructive lung disease as measured by a reduction in the FEV1/FVC ratio. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490-91 (6th Cir. 2014); 65 Fed. Reg. at 79,943; Decision and Order at 23-24.

Dr. Castle also cited the obstructive impairment's partially reversibility after bronchodilators to exclude legal pneumoconiosis. Employer's Exhibit 8 at 8-9. The ALJ noted, however, the pulmonary function testing was qualifying[9] for total disability before and after bronchodilators. Decision and Order at 10. And the ALJ further found Dr. Castle's reliance on bronchoreversibility unpersuasive as some reversibility of pulmonary function test values after a miner is given bronchodilators does not preclude the presence of a chronic lung disease due to coal dust exposure. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (ALJ permissibly discredited a physician's opinion that did not adequately explain why bronchoreversibility necessarily eliminated a finding of legal pneumoconiosis); Decision and Order at 23. Because it is supported by substantial

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[9] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

evidence, we affirm the ALJ's finding that Claimant established legal pneumoconiosis.[10] 20 C.F.R. §718.202(a).

As Employer does not challenge the ALJ's finding that Claimant established disability causation, we affirm the ALJ's determination legal pneumoconiosis sufficiently caused the Miner's total respiratory disability. 20 C.F.R. §718.204(c); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 25-27.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

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[10] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Spagnolo and Castle, we need not address Employer's remaining arguments regarding the weight the ALJ assigned to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).