U.S. Department of Labor

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

BRB No. 21-0081 BLA

CLARENCE D. REED	)	
	)	
Claimant-Respondent	)	
	)	
V.	)	
	)	
TWENTYMILE COAL COMPANY	)	
	)	
and	)	
	)	
UNDERWRITERS SAFETY & CLAIMS	)	DATE ISSUED: 3/15/2022
	)	
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 Stewart F. Alford, Administrative Law Judge, United States Department of Labor.

Robert S. Seer (Ellis Legal, PC), Chicago, Illinois, for Claimant.

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Stewart F. Alford's Decision and Order Awarding Benefits (2019-BLA-05326) rendered on a claim filed on September 18, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with at least thirty-one years of underground coal mine employment, based on the parties' stipulation and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the ALJ's finding that it did not rebut the Section 411(c)(4) presumption.[2] Neither Claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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, 362 (1965).

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled 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), as implemented by 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 29.

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

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,[4] 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.[5]

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 Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 821-22 (10th Cir. 2017); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the opinions of Drs. Tuteur and Rosenberg. Employer's Exhibits 2-4. Dr. Tuteur diagnosed chronic obstructive pulmonary disease (COPD) due to cigarette smoke and unrelated to coal mine dust exposure. Employer's Exhibits 3, 5. Dr. Rosenberg diagnosed COPD, emphysema, and chronic bronchitis caused by smoking tobacco and unrelated to coal mine dust exposure. Employer's Exhibit 4. The ALJ found their opinions inadequately explained and contrary to the premises underlying the Act, and thus insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 35.

Employer contends the ALJ relied on an inaccurate smoking history in evaluating the credibility of the medical opinions. Employer's Brief at 3-5. We disagree.

[4] "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).

[5] The ALJ found Employer rebutted the existence of clinical pneumoconiosis. Decision and Order at 30.

The ALJ considered the smoking histories contained in the medical opinions and medical treatment records, together with Claimant's deposition testimony. Decision and Order at 5. As the ALJ observed, the treatment record demonstrates Claimant smoked over the course of at least fifty years, and Claimant testified to having smoked, on average, a half a pack of cigarettes per day; he smoked more at times, less at others, and temporarily quit smoking on numerous occasions.[6] Decision and Order at 5; Claimant's Exhibits 1 at 59; 4 at 31-32. The ALJ further noted Claimant reported to Dr. James that he smoked an average of a half a pack per day and to Dr. Tuteur that he smoked between a half pack and two packs per day. Decision and Order at 5; Director's Exhibit 16 at 12; Employer's Exhibit 2 at 1. Thus, concluding the evidence concerning Claimant's smoking history is "not entirely consistent," the ALJ found Claimant smoked at least a half pack of cigarettes per day for fifty years with periods where he quit entirely. Decision and Order at 5.

The length and extent of Claimant's smoking history is a factual, not medical, determination committed to the ALJ's discretion. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Further, the credibility of witnesses and the weight to be accorded the hearing testimony are within the discretion of the ALJ. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985). Because the record reflects that the ALJ considered the complete range of Claimant's reported smoking histories, we affirm the ALJ's finding Claimant smoked at least a half pack of cigarettes per day for fifty years. *See Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149. 1-155 (1989); Decision and Order at 5.

Moreover, the ALJ did not reject Drs. Tuteur's and Rosenberg's opinions for relying on an over-inflated smoking history. He did not dispute the physicians' opinions that Claimant's "extensive" smoking history contributed to his impairment; he rejected their opinions for failing to adequately explain why Claimant's "extensive" thirty-year history of coal dust exposure also did not contribute to his impairment. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

[6] Claimant testified he quit smoking for three years in the 1970s, a "little while" in the 1980s, and four to five years in the 1990s. Claimant's Exhibit 4 at 32.

Employer next argues the ALJ erred in discrediting the opinions of Drs. Tuteur and Rosenberg and applied an incorrect rebuttal standard by requiring its medical experts to "completely rule out" any contribution of coal dust to Claimant's respiratory or pulmonary impairment. Employer's Brief at 5-7, 11-24. We disagree.

As the ALJ correctly observed, to rebut the presumed existence of legal pneumoconiosis, Employer must prove Claimant's respiratory impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 29; *see* 20 C.F.R. §718.201(a)(2), (b). He also specifically noted that the "rule out" standard applies only to the second method of rebuttal, i.e., disability causation. Decision and Order at 29. The ALJ's other limited use of the term "rule out" simply described Drs. Tuteur's and Rosenberg's own opinions that coal mine dust could be completely excluded as a cause or contributor to Claimant's impairment. See Decision and Order at 35 (the physicians did not credibly explain "why *they entirely ruled out* the possibility that coal dust exposure played *any role* in contributing to or aggravating Claimant's respiratory impairment") (emphasis added). Further, the ALJ ultimately rejected their opinions as inadequately explained and contrary to the principles underlying the Act, and not because their opinions failed to satisfy a heightened legal standard. Decision and Order at 35.

Dr. Tuteur excluded a diagnosis of legal pneumoconiosis based in part on studies concerning the relative likelihoods that coal mine dust and smoking may cause COPD.[7] Decision and Order at 30; Employer's Exhibit 2 at 7. The ALJ permissibly discredited Dr. Tuteur's opinion for being based on general statistics, explaining that even assuming Dr. Tuteur is correct that Claimant's chances of developing obstruction due to coal dust were minimal as compared to smoking, the physician did not explain why Claimant was not one of the allegedly statistically rare individuals who develop obstruction as a result of coal mine dust exposure. Decision and Order at 32; *see Antelope Coal Co./Rio Tinto Energy*

[7] Dr. Tuteur explained that

> [W]hen one compares the 20% risk of COPD among smokers who never mined to the 1% to 2% risk of nonsmoking miners, and apply standard medical reasoning process to Mr. Reed, who has an extensive smoking history, it is with reasonable medical certainty that his clinical picture of [COPD] is uniquely due to the chronic inhalation of tobacco smoke, not coal mine dust . . . . It is possible, but highly unlikely that coal mine dust influenced the COPD seen in Mr. Reed. Yet, with reasonable medical certainty, it did not."

Employer's Exhibit 2 at 7.

America v. Goodin, 743 F.3d 1331, 1345 (10th Cir. 2014); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). He further permissibly found that Dr. Tuteur did not persuasively explain why he concluded, in this case, that Claimant's more than thirty years of coal mine dust exposure did not contribute, along with smoking, to his respiratory impairment. *See Mountain Energy v. Director, OWCP* [*Gunderson*], 805 F.3d 1254, 1260-61 (10th Cir. 2015); *Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000) (recognizing that the risks of smoking and coal mine dust are additive); Decision and Order at 31.

Dr. Rosenberg opined Claimant does not have legal pneumoconiosis based, in part, on studies which he indicated establish that the average losses in FEV1 from cigarette smoking are greater than those from coal mine dust exposure, and that coal mine dust, unlike smoking, causes an equal reduction in FEV1 and FVC. Decision and Order at 32; Employer's Exhibit 4 at 5. The ALJ permissibly found his opinion unpersuasive and inconsistent with the Department of Labor's (DOL) recognition that "COPD may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC." Decision and Order at 32, *quoting* 65 Fed. Reg. at 79,943; *see Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014). The ALJ also rationally found that in relying on statistics of the prevalence of COPD in non-smoking coal miners, non-smokers who do not mine coal, and the general population of smokers and non-smokers, Dr. Rosenberg did not explain why Claimant could not be one of the allegedly statistically rarer individuals who develop obstruction as a result of coal mine dust exposure. Decision and Order at 32; *Goodin*, 743 F.3d at 1345; *Beeler*, 521 F.3d at 726; *Knizner*, 8 BLR at 1-7.

In addition, he permissibly found Dr. Rosenberg did not provide adequate rationale for his conclusion that the partial reversibility of Claimant's impairment with bronchodilators "is inconsistent with a coal dust-related lung disease, and that coal dust exposure played no role in causing Claimant's residual, fixed" impairment. Decision and Order at 34; *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004).

Dr. Rosenberg further opined Claimant's chronic bronchitis is unrelated to his history of coal mine dust exposure because any such bronchitis would have dissipated within months after Claimant left coal mining. Employer's Exhibit 4 at 9. Contrary to Employer's argument, Employer's Brief at 20-21, the ALJ permissibly found Dr. Rosenberg's reasoning inconsistent with the regulations, which recognize pneumoconiosis as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.'" Decision and Order at 33, *quoting* 20 C.F.R. §718.201(c); *see Gunderson*, 601 F.3d at 1025. He further permissibly determined Dr. Rosenberg did not adequately explain why Claimant's more than thirty years of coal mine dust exposure did not contribute, along with smoking, to his respiratory impairment. *See Gunderson*, 805 F.3d at 1260-61; *Pickup*, 100 F.3d at 873; *Hansen*, 984 F.2d at 370; 65 Fed. Reg. at 79,940.

The ALJ has the duty to assess the credibility of the evidence and determine the weight to assign it; the Board cannot reweigh the evidence or substitute its inferences for the ALJ's. *See Pickup*, 100 F.3d at 873; *Hansen*, 984 F.2d at 370. As the ALJ provided valid reasons for discrediting the opinions of Drs. Tuteur and Rosenberg,[8] we affirm his finding that Employer failed to establish that Claimant does not have legal pneumoconiosis. Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Upon finding Employer did not disprove pneumoconiosis, the ALJ addressed whether it established that no part of Claimant's respiratory or pulmonary total disability is caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The ALJ rationally discredited the opinions of Drs. Tuteur and Rosenberg regarding the cause of Claimant's disability because they failed to diagnose legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); *Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 35-36. We therefore affirm the ALJ's determination that Employer

[8] As the ALJ gave valid reasons for discrediting Drs. Tuteur's and Rosenberg's opinions, we need not address Employer's other arguments regarding the additional reasons he gave for rejecting their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 11-24. Further, because Employer has the burden of proof and we have affirmed the ALJ's rejection of its medical experts, we need not address Employer's contention that Dr. James's opinion that Claimant has legal pneumoconiosis is not credible. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 7-10.

failed to establish that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge