U.S. Department of Labor

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

BRB Nos. 21-0085 BLA
and 21-0086 BLA

DEANNA VANCE (o/b/o and Widow of JERRY W. VANCE)	)	
Claimant-Respondent	)	
v.	)	
ELKAY MINING COMPANY	)	DATE ISSUED: 3/24/2022
Employer-Petitioner	)	
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 Paul R. Almanza, Associate Chief Administrative Law Judge, United States Department of Labor.

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

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Associate Chief Administrative Law Judge (ALJ) Paul R. Almanza's Decision and Order Awarding Benefits (2018-BLA-05907 and 2018-BLA-06240) 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 filed on September 26, 2017,[1] and a survivor's claim filed on June 27, 2018.

In considering the miner's claim, the ALJ found Claimant established the Miner had at least twenty-two years of underground coal mine employment and a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption that the Miner's total disability was due to pneumoconiosis at Section 41l(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[2] and therefore established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). The ALJ further found Employer did not rebut the presumption and awarded benefits.[4] In the survivor's claim,

[1] The Miner filed a prior claim, which the district director denied on April 27, 1998, for failure to establish any element of entitlement. Miner Director's Exhibit 1. Claimant is the widow of the Miner, who died on May 24, 2018. Claimant's Exhibit 1. She is pursuing the miner's claim on his behalf, along with her own survivor's claim.

[2] 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. §92l(c)(4) (2018); 20 C.F.R. §718.305(b).

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the ALJ must also deny the subsequent claim unless he finds "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(d); *see 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 failed to establish any element of entitlement in his prior claim, Claimant had to submit new evidence establishing at least one element to obtain a review of the Miner's subsequent claim on the merits. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c); Miner Director's Exhibit 5.

[4] The ALJ also found Claimant did not establish the Miner had complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total

the ALJ found Claimant was entitled to derivative benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).[5]

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, it argues the ALJ erred in finding it failed to rebut the Section 41l(c)(4) presumption. Claimant responds, urging rejection of Employer's constitutional challenge and affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responded, also urging rejection of Employer's constitutional challenge.

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.[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).

Constitutionality of the Section 411(c)(4) and 422(*l*) Presumptions

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) and 422(*l*) presumptions, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 29-31. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

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

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disability or death due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304; Decision and Order at 17.

[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] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Miner Director's Exhibit 5; Hearing Transcript at 7-8.

Because Claimant invoked the Section 411(c)(4) presumption,[7] the burden shifted to Employer to establish the Miner had neither legal nor clinical 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 establish rebuttal by either method.

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." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on Drs. Basheda's and Spagnolo's opinions that the Miner did not have legal pneumoconiosis. Employer's Exhibits 1, 2, 6. The ALJ found their opinions not well-reasoned and insufficient to satisfy Employer's burden of proof. Decision and Order at 24-27. Employer argues the ALJ selectively analyzed their opinions and did not adequately explain his credibility findings. We disagree.

Dr. Basheda opined the Miner had a restrictive respiratory impairment and a disabling oxygen impairment based on the Miner's objective testing. He diagnosed idiopathic pulmonary fibrosis (IPF) based on subpleural and peripheral reticular bibasilar changes associated with honeycombing and bronchiectasis that were described in the July

[7] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established the Miner had twenty-two years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, 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); Decision and Order at 4, 20.

[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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is 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).

28, 2016 and June 8, 2017 computed tomography (CT) scan interpretations. Employer's Exhibits 1, 6 at 14-15, 24-25. The ALJ noted correctly that Dr. Basheda's only statement as to the etiology of the Miner's restrictive lung disease is that it is "typical of idiopathic pulmonary fibrosis." Employer's Exhibit 6 at 14. The ALJ permissibly found Dr. Basheda's explanation that restrictive lung disease is "common of IPF does not negate the possibility that [the Miner's] restrictive lung disease was caused or aggravated by his coal mine dust inhalation."[9] Decision and Order at 24; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998).

The ALJ also correctly observed that when Dr. Basheda was asked during his deposition if coal dust can cause pulmonary fibrosis, he stated that "there are different forms of scarring in the lungs that have different pathologic and radiographic manifestations." Decision and Order at 25 (quoting Employer's Exhibit 6 at 29). He summarily concluded that, while "coal dust can cause fibrosis, it would not cause the findings" he observed in this case. *Id*. Contrary to Employer's contention, we see no error in the ALJ's conclusion that Dr. Basheda's opinion is not well-reasoned as he failed to explain "what specifically about the presentation of [the Miner's] fibrosis led him to exclude coal dust as a cause or aggravating factor."[10] *Id*. at 25; *see Mingo Logan Coal Co.*

[9] Dr. Basheda stated "although coal dust can cause fibrosis, it would not cause the findings that we see in [the Miner]," but he did not offer any further rationale for this conclusion. Employer's Exhibit 6 at 28. Further, even though Dr. Basheda did not review any records prior to 1998 and the Miner ceased his coal mine employment in 1992, he indicated he was able to "rule out" coal dust as a cause or contributing factor to the Miner's asthma because the Miner "could not have existed in the coal mining industry for 24 years or so without having serious respiratory issues that would cause him to seek medical attention or miss work." *Id*. at 13-14; *see also* Employer's Exhibit 1. Thus, as the ALJ found, Dr. Basheda did not credibly explain how he excluded coal dust as a contributing or aggravating factor to the Miner's restrictive impairment. *See* Decision and Order at 24-25.

[10] Employer asserts the ALJ erred in giving less weight to Dr. Basheda's opinion because he did not examine the Miner. Employer's Brief at 19-20. Contrary to Employer's contention, an ALJ may consider whether a physician personally examined a miner as one of the factors in determining the weight to accord the opinion so long as he also considers whether the physician's underlying rationale is credible, as the ALJ properly did here. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 1097-98 (4th Cir. 1993); Decision and Order at 25; Employer's Brief at 19-20.

v. Owens, 724 F.3d 550, 558 (4th Cir. 2013); *Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Employer's Brief at 21-23.

Dr. Spagnolo provided a written medical report dated August 21, 2019, and was deposed on August 28, 2019. Employer's Exhibit 2. He noted the Miner was a non-smoker and had a history of diabetes, hypertension, heart disease, carotid stenosis, and difficulty swallowing. *Id*. at 16-17, 97. Dr. Spagnolo disagreed that the Miner had "idiopathic" fibrosis and instead diagnosed systemic sclerosis or systemic scleroderma – a collagen vascular disease that can affect the lungs, esophagus, and other organs. *Id*. at 31-32, 98. He indicated the Miner's pulmonary function studies showed moderate restriction and blood gas studies reflected a disabling oxygen impairment. *Id.* at 37-38. He excluded coal mine dust exposure as a cause of the Miner's fibrosis and respiratory impairment because of the radiographic findings of basilar fibrosis, his esophageal testing, his normal lung function in 1998 after leaving the mines in 1992, and his history of heart disease and aspiration. *Id.* at 43.

In rejecting Dr. Spagnolo's opinion, the ALJ permissibly found he did not explain how the factors he relied upon support his diagnosis of systemic sclerosis or otherwise explain how systemic sclerosis is diagnosed[11] and did not adequately explain why a diagnosis of systemic sclerosis necessarily precludes a diagnosis of legal pneumoconiosis. *See Owens*, 724 F.3d at 558; *Hicks*, 138 F.3d at 533; Decision and Order at 26. Moreover, although Dr. Spagnolo cited the Miner's treatment for IPF as support for excluding a diagnosis of legal pneumoconiosis, the ALJ correctly observed that he failed to address the Miner's treating physician's inclusion of fibrosis caused by coal mine dust exposure as a differential diagnosis in his treatment notes.[12] *See Hicks*, 138 F.3d at 533; *Akers*, 131

[11] Dr. Spagnolo stated he based his diagnosis on "the combined findings of severe esophageal disease, severe weight loss and changes of [usual interstitial pneumonia] on the chest imaging make a diagnosis of systemic scleroderma most likely . . . ." *Id*. at 98. However, when asked how systemic sclerosis is diagnosed, he replied that it is "not always an easy diagnosis to make" and, while "[b]iopsies will help make the diagnosis," the Miner did not undergo a biopsy. Employer's Exhibit 2 at 32-33.

[12] Dr. Eggleston, the Miner's treating physician, indicated in May 2016 that he suspected the Miner's "fibrosis is from occupational [exposure]." Employer's Exhibit 4. After the Miner's July 28, 2016 CT scan, he discussed with the Miner "that this CT could represent occupational pneumoconiosis but given that the fibrotic changes are more basilar could also represent IPF." *Id.* He stated the Miner was "very hesitant for any biopsy and I would be very hesitant to put him through this." *Id*. On November 3, 2016, Dr. Eggleston told the Miner "that his fibrosis could be occupational related (coal worker, plus was in Vietnam)" or IPF but he was unable to determine without a biopsy, which the Miner

F.3d at 441; *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); Decision and Order at 26. We therefore affirm the ALJ's finding that Dr. Spagnolo's opinion is "poorly documented and poorly reasoned." Decision and Order at 26.

Because the ALJ's credibility findings are supported by substantial evidence, we affirm his determination that Employer did not disprove legal pneumoconiosis.[13] *See* 20 C.F.R. §718.305(d)(1)(i)(A); *Owens*, 724 F.3d at 558; Decision and Order at 27. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[14] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established that "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); Decision and Order at 27. The ALJ permissibly discounted the opinions of Drs. Basheda and Spagnolo regarding the cause of the Miner's respiratory disability because they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the existence of the disease.[15] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big*

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refused. *Id*. On October 12, 2017, Dr. Eggleston reported he had "a long discussion" with the Miner "regarding CT from June with progressive fibrosis compared to July of 2016." *Id.* Dr. Eggleston was "[c]oncerned for IPF" and recommended starting medication. *Id*.

[13] As the ALJ gave valid reasons for discrediting Drs. Basheda's and Spagnolo'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 19-28. 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 the ALJ erred by crediting Dr. Forehand's opinion that the Miner had legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 15-16.

[14] Having affirmed the ALJ's findings on legal pneumoconiosis, we need not address Employer's arguments that the ALJ erred in concluding it also failed to disprove clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278.

[15] Drs. Basheda's and Spagnolo's opinions as to whether the Miner's respiratory disability was related to legal pneumoconiosis rested on their assumption that the Miner did not have legal pneumoconiosis.

Branch Res., Inc. v. Ogle, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 27; Employer's Brief at 28. We therefore affirm the ALJ's finding that Employer failed to establish no part of the Miner's respiratory disability was caused by legal pneumoconiosis, 20 C.F.R. §718.305(d)(1)(ii), and the award of benefits in the miner's claim.

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the survivor's claim,[16] we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. § 932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[16] Employer asserts only that if the Board reverses or vacates the award in the miner's claim, it must vacate the ALJ's finding that Claimant is entitled to derivative benefits in her survivor's claim. Employer's Brief at 28 n.6.