U.S. Department of Labor

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

BRB No. 21-0183 BLA

KAREN L. ZARNESKY (Widow of DAVID A. ZARNESKY) Claimant-Respondent v. KEYSTONE COAL MINING CORPORATION and ROCHESTER & PITTSBURGH COAL COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 3/24/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Natalie A. Appetta, 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: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2019-BLA-05773) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim filed on October 4, 2017.[1]

The ALJ credited the Miner with 16.6 years of underground coal mine employment and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore determined Claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer asserts the ALJ erred in finding the Miner had at least fifteen years of coal mine employment and Claimant therefore invoked the Section 411(c)(4) presumption. It also argues she erred in finding it did not rebut the presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to respond to Employer's appeal.

The Benefit 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).

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[1] Claimant is the widow of the Miner, who died on July 28, 2017. Director's Exhibit 14.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's death was 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 at the time of his death. 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 finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17.

[4] The Board will apply the law of the United States Court of Appeals for the Third Circuit because the Miner performed his last coal mine employment in Pennsylvania. *See*

Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mine employment or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years the Miner worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

The ALJ found the record contains an "employment verification letter from Keystone Mining Corporation dated February 15, 2000 [which] shows 16.6 years of coal mine employment between October 19, 1981 and November 24, 1999 and includes both the month, day, and year of starting and stopping dates." Decision and Order at 6. She permissibly found this evidence controlling because it "is the most specific information in the record of the dates of the [M]iner's coal mine employment and is consistent with the Social Security records." *Id.*; *see Kertesz v. Director, OWCP*, 788 F.2d 158, 162-63 (3d Cir. 1986); 20 C.F.R. §725.101(a)(32)(ii) ("The dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony.").

Employer generally argues the evidence establishes less than fifteen years of coal mine employment, but identifies no error in the ALJ's analysis or credibility findings on this issue. Employer's Brief at 4. Because Employer has not identified any specific error, we affirm the ALJ's finding of 16.6 years of coal mine employment. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Muncy*, 25 BLR at 1-27; *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b).

We also affirm as unchallenged the ALJ's finding that all of the Miner's coal mine employment took place in underground mines. Decision and Order at 6; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.305(b)(1)(i). We therefore affirm her determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 7; Parties' Stipulations (Dated June 4, 2020).

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to Employer to establish the Miner had neither legal[5] nor clinical pneumoconiosis,[6] or that "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(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." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The ALJ considered the medical opinions of Drs. Rosenberg and Swedarsky that the Miner did not have legal pneumoconiosis. Employer's Exhibits 2-5.

Dr. Rosenberg diagnosed the Miner with chronic obstructive pulmonary disease (COPD) and emphysema due to cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibit 3 at 5. He opined the Miner's smoking history caused these lung conditions because the Miner's pulmonary function testing produced a reduced FEV1/FVC ratio, which he indicated is inconsistent with legal pneumoconiosis. *Id.* at 6-7. He explained medical literature supports the conclusion that "cigarette smoking drives the FEV1 down much farther than the FVC" and "coal dust reduces the FEV1 and FVC in equal measure." *Id.* The ALJ permissibly found this rationale conflicts with the medical science credited by the Department of Labor in the preamble to the revised 2001 regulations that "a reduction in the FEV1/FVC ratio is a marker for obstructive lung disease, including that caused by coal mine employment." Decision and Order at 22; *see Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011);

[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).

[6] "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).

Westmoreland Coal Co. v. Stallard, 876 F.3d 663, 671-72 (4th Cir. 2017); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000).

As further support for his opinion excluding legal pneumoconiosis, Dr. Rosenberg cited recent medical studies indicating cigarette smoking's effects are much more detrimental to the lungs than was known when the Department of Labor promulgated the 2001 revised regulations. Employer's Exhibits 3 at 7-8; 5 at 33. The ALJ permissibly found this reasoning unpersuasive because "studies showing that cigarette smoking is more detrimental than coal [mine] dust does not preclude coal [mine] dust as a contributor or aggravating factor in the [M]iner's" COPD or emphysema. Decision and Order at 22; *see Stallard*, 876 F.3d at 673 n.4; 20 C.F.R. §718.201(a)(2), (b).

Dr. Swedarsky also diagnosed the Miner with COPD and emphysema due to cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibits 2, 4. He explained that when coal mine dust causes emphysema, "[t]he severity of emphysema correlates with increasing [] coal dust retention" in the lungs. Employer's Exhibit 2 at 24. He testified that the Miner's autopsy prosector, Dr. Heggere, identified coal dust particles in ten percent of the autopsy slides. Employer's Exhibit 4 at 55. Dr. Swedarsky also reviewed the slides and testified there is "very little black pigment in the parenchyma at all," with slide ten revealing "significant black pigment in it." *Id*. Based on the limited amount of coal dust present on the autopsy slides, he opined coal mine dust exposure did not cause the Miner's COPD or emphysema. *Id*. at 55-57. The ALJ found Dr. Swedarsky's opinion unpersuasive because he "did not adequately address whether the [M]iner's COPD and emphysema would not also have been aggravated by the coal mine dust he observed in his lungs and thus, would constitute legal pneumoconiosis." Decision and Order at 21; *see Kertesz*, 788 F.2d at 162-63; 20 C.F.R. §718.201(a)(2), (b).

Employer generally argues Dr. Swedarsky's opinion is well-reasoned and documented and sufficient to rebut the presumption of legal pneumoconiosis. Employer's Brief at 5, 16-17. But it is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Kertesz*, 788 F.2d at 162-63; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). We consider Employer's argument with respect to Dr. Swedarsky 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).

Because we affirm the ALJ's discrediting of Drs. Rosenberg's and Swedarsky's opinions, the only opinions[7] that support Employer's burden on rebuttal,[8] we also affirm her finding that Employer did not disprove legal pneumoconiosis.[9] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

Death Causation

The ALJ also found Employer failed to establish "no part of the Miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(ii); *see* Decision and Order at 25-26. Because Employer does not challenge this finding, we affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order at 25-26.

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[7] We reject Employer's argument that the ALJ erred in considering the Miner's treatment records from Dr. Kanouff. Employer's Brief at 9-10. Dr. Kanouff treated the Miner for chronic obstructive pulmonary disease (COPD). Director's Exhibit 17. Although the treatment notes indicate he advised the Miner to stop smoking cigarettes, the doctor never opined the Miner's COPD was due to cigarette smoking alone or unrelated to coal mine dust exposure. *Id*. Thus, contrary to Employer's argument, the ALJ rationally found Dr. Kanouff's treatment records insufficient to rebut the presumption of legal pneumoconiosis. *Kertesz v. Director, OWCP*, 788 F.2d 158, 162-63 (3d Cir. 1986); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015); Decision and Order at 21.

[8] Contrary to Employer's argument, the ALJ did not err in her consideration of the Miner's death certificate on the issue of legal pneumoconiosis. Employer's Brief at 7-8. Dr. Masser signed the death certificate and listed end-stage emphysema as a cause of death. Director's Exhibit 14. The ALJ correctly found Dr. Masser did not address the cause of the emphysema and thus the death certificate cannot rebut the presumption of legal pneumoconiosis. *Kertesz*, 788 F.2d at 162-63; *Minich*, 25 BLR at 1-155 n.8; Decision and Order at 26. To the extent the ALJ found this evidence insufficient to rebut the presumption that the Miner's emphysema constitutes legal pneumoconiosis, the ALJ correctly found the death certificate supports a finding that the Miner's death was due legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii).

[9] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i)(A), (B). Therefore, we need not address its arguments that the ALJ erred in finding it did not disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Consequently, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits. *See* 30 U.S.C. §921(c)(4).

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