U.S. Department of Labor

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

BRB No. 22-0040 BLA

LONNIE G. HOLMES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LESLIE HAULERS, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS' MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 03/22/2023
	)	
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 Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

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

Denise Hall Scarberry (Jones & Jones, PLLC), Pikeville, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Awarding Benefits (2017-BLA-06014) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on March 28, 2016.[1]

The ALJ found Claimant established at least fifteen years of qualifying coal mine employment, and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). He further found Employer did not rebut the presumption and awarded benefits.

[1] The record of Claimant's prior claim, filed on November 8, 1994, was destroyed by the Federal Records Center. Decision and Order at 2 n.3; Director's Exhibits 1, 69.

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

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must 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); *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). The ALJ found that because Claimant established every element of entitlement based on the newly submitted evidence, he established a change in an applicable condition of entitlement, entitling him to review of the merits of his subsequent claim. Decision and Order at 11. Employer does not challenge this finding on appeal and thus it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

On appeal, Employer argues the ALJ erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.[4]

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.[5] 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).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[6] or 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)(i), (ii); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). The ALJ found Employer did not rebut the presumption by either method.[7]

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[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4). *See Skrack*, 6 BLR at 1-711; Decision and Order at 11, 18.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Hearing Transcript at 53-54; Director's Exhibit 3.

[6] "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).

[7] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 21.

Smoking History

Employer argues the ALJ failed to make a specific finding regarding the length and rate of Claimant's smoking history. Employer's Brief at 5. But Employer is wrong: the ALJ noted Claimant smoked about one pack of cigarettes per day for approximately forty-five years and was still smoking as of the date of the hearing. Decision and Order at 4. Other than mistakenly arguing the ALJ did not make a finding, Employer does not otherwise argue the ALJ's finding is incorrect. Moreover, Employer does not explain how the ALJ's alleged error could have affected the outcome of the case since the ALJ did not discount Employer's experts on rebuttal for relying on an inaccurate smoking history. *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

Legal Pneumoconiosis

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." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) (rebuttal inquiry is "whether the employer has come forward with affirmative proof that the [miner] does not have legal pneumoconiosis"); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the opinions of Drs. Dahhan and McSharry, both of whom diagnosed an obstructive impairment due to smoking and not coal mine dust exposure, to disprove legal pneumoconiosis.[8] Director's Exhibits 16; 39 at 13; Employer's Exhibits 5, 7, 10. The ALJ found their opinions insufficient to satisfy Employer's burden of proof. Decision and Order at 27.

Employer contends the ALJ applied a "stricter" legal standard by requiring Drs. Dahhan and McSharry to "rule out" or "exclude" coal mine dust exposure as a causative factor in Claimant's pulmonary impairment. Employer's Brief at 6-9. We disagree. The

[8] The ALJ found there are no other medical opinions in the record to assist Employer, as Drs. Silman, Green, and Raj concluded that Claimant has legal pneumoconiosis. Decision and Order at 27; Director's Exhibits 12, 18, 19; Claimant's Exhibits 1, 3. He also found the treatment records specifically note that Claimant's chronic hypoxic respiratory failure was "[l]ikely secondary to diastolic heart failure and underlying COPD due to smoking and coal dust exposure." Decision and Order at 27; Claimant's Exhibit 4.

ALJ correctly stated Employer must establish Claimant's impairment was not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 21, 23; *see* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A). Moreover, as explained below, the ALJ did not reject Employer's experts because they failed to meet a heightened legal standard; rather, he found their opinions poorly reasoned and thus entitled to little weight. *See* 20 C.F.R. §718.201(a)(2); *Smith*, 880 F.3d at 699; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441-42 (4th Cir. 1997).

Dr. Dahhan excluded a diagnosis of legal pneumoconiosis, in part, because he opined Claimant's "significantly reversible airway obstruction" was "inconsistent with the permanent fixed adverse effect of coal dust on the respiratory system." Director's Exhibit 16 at 3. The ALJ permissibly found Dr. Dahhan's reasoning unpersuasive because he did not adequately explain why the irreversible portion of Claimant's obstructive impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Harman Mining Co. v. Director, OWCP* [*Looney*] 678 F.3d 305, 316 (4th Cir. 2012); Decision and Order at 23-24. The ALJ also permissibly rejected Dr. Dahhan's opinion because he relied on general statistics to exclude coal mine dust exposure as a causative factor for Claimant's obstructive impairment rather than Claimant's specific case.[9] *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 674 (4th Cir. 2017); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 24. Besides arguing that the ALJ applied the wrong standard in discrediting its experts' opinions, Employer does not identify any specific error in the ALJ's determination that Dr. Dahhan's opinion is not adequately reasoned. We therefore affirm the ALJ's finding. *See* 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

We further reject Employer's assertion the ALJ mischaracterized Dr. McSharry's opinion in finding it "equivocal, speculative, and based on generalities[.]" Employer's

[9] Dr. Dahhan explained that "[c]oal dust exposure can cause an obstructive ventilatory impairment, however, the degree of loss in the FEV1 due to the inhalation of coal dust has been estimated by Dr. Attfield and associate as being 5-9cc per year of coal dust exposure. This amount cannot account for the degree of loss in [Claimant's] FEV1." Employer's Exhibit 7 at 5. He further noted that "Dr. Love and Dr. Miller studied 1,677 men who were exposed to coal dust for 11 years and reported a loss of 40cc in the FEV1 over that period of time" and reiterated that "this amount is not sufficient to explain the degree of loss that [Claimant] demonstrates in his FVC and FEV1." *Id*.

Brief at 7-8. As the ALJ accurately noted, Dr. McSharry opined Claimant does not have legal pneumoconiosis because: Claimant's pattern of impairment is "commonly" seen among long-time smokers; emphysema from tobacco abuse is "often" associated with no x-ray abnormalities as demonstrated in this case; there is "almost always" radiographic evidence of pneumoconiosis when pulmonary function abnormalities caused by dust exposure are severe; and pneumoconiosis "generally" causes both obstructive and restrictive abnormalities but Claimant's impairment is purely obstructive. Decision and Order at 26-27; Employer's Exhibits 5 at 5; 10 at 4-5. We see no error in the ALJ's discrediting of Dr. McSharry's opinion as unpersuasive based on his qualified language. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 391 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988).

The ALJ also properly found Dr. McSharry's opinion inconsistent with the regulations, which recognize that legal pneumoconiosis can be present in the absence of a positive x-ray and may include a restrictive respiratory impairment, an obstructive respiratory impairment, or both. 20 C.F.R. §§718.201(a)(2), 718.202(a)(4) (recognizing a physician can render a credible diagnosis of pneumoconiosis notwithstanding a negative x-ray reading); 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000); *Looney*, 678 F.3d at 315; Decision and Order at 26-27; Employer's Exhibits 5 at 5; 10 at 4-5.

Employer's arguments on legal pneumoconiosis are a request to 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 the ALJ's credibility determinations are supported by substantial evidence, we affirm them and his conclusion that Employer did not disprove legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

To disprove disability causation, Employer must establish "no part of the [M]iner's disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The ALJ discredited the opinions of Drs. Dahhan and McSharry for the same reasons he provided regarding legal pneumoconiosis and found that because Drs. Dahhan and McSharry opined Claimant does not have legal pneumoconiosis, their opinions regarding disability causation are entitled to, at most, little weight. Decision and Order at 28, *citing Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (citing *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (Where a physician erroneously fails to diagnose pneumoconiosis, his opinion on causation "may not be credited at all" absent "specific and persuasive reasons" for concluding it is independent of the mistaken belief the miner did not have the disease.). Employer raises no specific allegations of error regarding the ALJ's findings other than its assertion that it has successfully demonstrated

that pneumoconiosis did not cause Claimant's disabling impairment. *See Skrack*, 6 BLR at 1-711; Employer's Brief at 9. Thus, we affirm the ALJ's determination that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. Decision and Order at 28.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge