U.S. Department of Labor

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

BRB No. 23-0300 BLA

CARL NOBLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CUMBERLAND RIVER COAL COMPANY	)	
	)	DATE ISSUED: 03/22/2024
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 in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for Claimant.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits in an Initial Claim (2013-BLA-05743) rendered on a claim filed

on June 1, 2012, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for the second time.[1]

After considering Employer's prior appeal, the Board vacated ALJ Peter B. Silvain, Jr.'s Decision and Order Awarding Benefits. *Noble v. Cumberland River Coal Co.*, BRB No. 18-0419 BLA, slip op. at 3-4 (Feb. 27, 2019) (unpub.). The Board held that in light of *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018), ALJ Silvain was not properly appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2,[2] and thus lacked the authority to hear and decide the case. *Id.* Consistent with *Lucia*, the Board remanded the case to the Office of Administrative Law Judges for reassignment. *Id.* The case was assigned to ALJ Merck (the ALJ), who held a new hearing on October 21, 2021, and issued the April 12, 2023 Decision and Order that is the subject of this appeal. Decision and Order at 2.

The ALJ accepted the parties' stipulation that Claimant has twenty-three years of coal mine employment, all of which he determined to be qualifying, and found Claimant 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.[3] 30 U.S.C. §921(c)(4)

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[1] We incorporate the procedural history of this case as set forth in *Noble v. Cumberland River Coal Co.*, BRB No. 18-0419 BLA (Feb. 27, 2019) (unpub.).

[2] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, cl. 2.

[3] 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); *see* 20 C.F.R. §718.305.

(2018). The ALJ also found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption through Dr. Jarboe's medical opinion.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response.[5]

The 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, 362 (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 he has neither legal nor clinical pneumoconiosis,[7] or that "no part of

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established twenty-three years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment and therefore invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-5, 7, 15; Hearing Transcript at 14-15.

[5] While the Director indicated he would not file a substantive response, he commented on Employer's argument that the ALJ erred in relying on *Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995), to discredit Dr. Jarboe's opinion. He asserts any error in the ALJ's reliance on that case was harmless. Director's Letter at 1 n.1.

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Director's Exhibit 1 at 363.

[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

[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 disproved clinical pneumoconiosis but did not rebut the existence of legal pneumoconiosis or establish that no part of Claimant's total disability is caused by legal pneumoconiosis. Decision and Order at 22, 26.

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)(2)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held an employer can "disprove the existence of legal pneumoconiosis by showing that [the miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal-dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id.* at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relies on Dr. Jarboe's opinion[8] that Claimant does not have legal pneumoconiosis. Dr. Jarboe diagnosed Claimant with a totally disabling restrictive respiratory or pulmonary impairment with "severely reduced" diffusion capacity due to cardiac disease. Employer's Exhibits 1 at 6-7, 4 at 5-6, 9 at 20-23, 10 at 6-7. He explained that Claimant's restrictive impairment is not legal pneumoconiosis:

> [I]f the restriction were caused by the inhalation of coal mine dust, it would do so in 1 of 2 ways. The coal mine dust would cause fibrotic reaction in the lung parenchyma which would manifest as coal workers' pneumoconiosis. There is no such finding in the claimant. The 2nd mechanism by which coal dust could cause a *restrictive* defect is by causing obstruction in the small airways with resultant air trapping. This would manifest as a normal or increased total lung capacity and an increased residual volume due to air

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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).

[8] The ALJ also considered the opinions of Drs. Alam and Sanders that Claimant has legal pneumoconiosis, diagnosing obstructive lung disease due to both coal mine dust and smoking. Director's Exhibit 1 at 292, 306-10; Claimant's Exhibit 19.

> trapping. Again, there [is] no such finding in the claimant. His total lung capacity is actually moderately reduced and the residual volume is mildly lowered. These findings indicate the restriction is caused by something other than the inhalation of coal mine dust.

Employer's Exhibit 10 at 6 (emphasis added).

Although Dr. Jarboe acknowledged Claimant had some radiographic evidence of emphysema and chronic bronchitis, he opined that cigarette smoking most likely caused the emphysema as there was no evidence of dust retention on Claimant's computed tomography (CT) scans and x-rays. Employer's Exhibit 9 at 18-19, 36-38. In his most recent report, dated May 20, 2021, Dr. Jarboe conceded Claimant had chronic bronchitis by history but concluded it was not due to his coal mine employment because Claimant "had no exposure to coal mine dust in over [twenty] years." Employer's Exhibit 10 at 6-7.

The ALJ found Dr. Jarboe's opinion not well-reasoned and insufficient to satisfy Employer's burden of proof. Decision and Order at 23-25. Specifically, the ALJ found Dr. Jarboe did not adequately explain why coal mine dust exposure could not have been either a significant or aggravating factor in Claimant's restrictive lung disease. *Id*. at 23.

Contrary to Employer's contention, we see no error in the ALJ's weighing of Dr. Jarboe's opinion and conclude his credibility finding satisfies the Administrative Procedure Act.[9] Employer's Brief at 7-10. As the ALJ noted, Dr. Jarboe excluded a diagnosis of legal pneumoconiosis, in part, because he did not believe Claimant had evidence of an obstructive lung disease. Decision and Order at 24-25. The ALJ permissibly found Dr. Jarboe's opinion unpersuasive in view of the conflicting evidence in the record regarding the presence of an obstructive impairment – namely Dr. Abadilla's treatment notes diagnosing chronic obstructive pulmonary disease in the form of emphysema and chronic bronchitis,[10] and Dr. Alam's diagnosis of a "moderate airflow obstruction" based on the

[9] The Administrative Procedure Act 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).

[10] The ALJ found Dr. Abadilla's diagnosis credible, given his status as Claimant's treating physician, and we affirm the ALJ's credibility finding as it is unchallenged by Employer on appeal. *See Skrack*, 6 BLR at 1-711; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2002); Decision and Order at 24 n.64.

July 18, 2012 pulmonary function study. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order at 24; Claimant's Exhibits 1, 5, 6, 8, 9, 14-16.

Moreover, the ALJ permissibly found Dr. Jarboe's opinion undermined by his subsequent acknowledgement that Claimant has emphysema and chronic bronchitis. *See Skrack*, 6 BLR at 1-711; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 25; Employer's Exhibits 4 at 6, 9 at 18, 10 at 7. As the ALJ noted, Dr. Jarboe conceded Claimant has emphysema and that coal mine dust can cause it.[11] Decision and Order at 25; Employer's Exhibit 9 at 18. Further, although Dr. Jarboe opined Claimant's chronic bronchitis could not be due to coal mine dust exposure because he stopped working in the mines twenty years ago, the ALJ rationally found this explanation inconsistent with the regulations recognizing pneumoconiosis is "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(a)(2), (b), (c); 65 Fed. Reg. 79,920, 79,937 (Dec. 20, 2000); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738 (6th Cir. 2014); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012); Decision and Order at 25.

Employer's arguments on appeal relating to Dr. Jarboe's opinion 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 it is supported by substantial evidence, we affirm the ALJ's permissible determination that Dr. Jarboe's opinion is not well reasoned because he did not sufficiently explain why coal dust exposure was not a significant or aggravating factor in Claimant's respiratory impairment.[12] *Brandywine*

[11] He stated, "The primary finding on CT scans has been upper zone centrilobular emphysema, and, of course, cigarette smoking will [cause] centrilobular emphysema, and coal mine dust has been reported to cause it as well . . . ." Employer's Exhibit 9 at 18.

[12] Employer alleges the ALJ erred in concluding Claimant has an obstructive respiratory disease, but that is not what the ALJ did. Employer's Brief at 9-10. Rather, the ALJ concluded Dr. Jarboe did not adequately explain the inconsistencies in his own opinion as to whether there was any evidence of an obstructive impairment to support his elimination of coal dust exposure as a causative factor for Claimant's purely restrictive respiratory impairment. 20 C.F.R. §718.201 (Act's implementing regulations recognize legal pneumoconiosis may take the form of an obstructive or restrictive condition, or both); *see* 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000); Decision and Order at 23-25. Moreover, given Dr. Jarboe's own acknowledgment of Claimant's emphysema and chronic bronchitis, two obstructive lung diseases, we see no error in the ALJ's considering whether Dr. Jarboe

Explosives & Supply v. Director, OWCP [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *A & E Coal Co. v. Adams*, 694 F.3d 798, 802 (6th Cir. 2012); *Rowe*, 710 F.2d at 255; *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999) (An ALJ's "duty of explanation" is satisfied if "a reviewing court can discern what the ALJ did and why he did it."); Decision and Order at 23, 25.

Consequently, we affirm the ALJ's conclusion that Employer did not disprove legal pneumoconiosis. Decision and Order at 25. 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); Decision and Order at 26.

Disability Causation

The ALJ next considered whether Employer established "no part of [Claimant'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 26. The ALJ concluded that Dr. Jarboe's opinion was not sufficiently reasoned to satisfy Employer's burden of proof.

Employer does not challenge the ALJ's findings on disability causation beyond the arguments it raised regarding legal pneumoconiosis. Thus, we affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Skrack*, 6 BLR at 1-711; *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013) (ALJ permissibly discounted expert opinion regarding the cause of disability because he did not diagnose legal pneumoconiosis); Decision and Order at 23. We therefore affirm the ALJ's finding that Employer failed to rebut the Section 411(c)(4) presumption and the award of benefits. Decision and Order at 26.

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adequately explained why those diseases are not significantly related to, or substantially aggravated by, coal mine dust exposure. 20 C.F.R. §718.201(a)(2) (legal pneumoconiosis includes "any chronic lung disease" if it arises from coal mine employment); Decision and Order at 25. We further reject Employer's contention that the ALJ's reliance on *Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995), to support rejection of Dr. Jarboe's opinion is "irrational" and requires remand, as Dr. Jarboe's opinion was neither equivocal nor vague regarding whether Claimant has legal pneumoconiosis. Employer's Brief at 10-11. Because the ALJ adequately explained why he gave little weight to Dr. Jarboe's opinion, and that finding is supported by substantial evidence, any reference to *Griffith* is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits in an Initial Claim.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge