U.S. Department of Labor

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

BRB No. 23-0380 BLA

VONDA K. SILK (Widow of STANLEY D. SILK) Claimant-Respondent v. CONSOL MINING COMPANY, LLC and CONSOL ENERGY, INCORPORATED, c/o SEDGWICK CMS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/11/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Christopher L. Wildfire and Toni J. Williams (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Deanna Lyn Istik (Gilliland Vanasdale Sinatra Istik Law Office, LLC), Cranberry Township, Pennsylvania, for Claimant.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2022-BLA-05861) 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 survivor's claim filed on April 5, 2021.

The ALJ found Claimant[1] established the Miner had thirty-nine years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found 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). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established the Miner was totally disabled at the time of his death and thus invoked the Section 411(c)(4) presumption. Employer also argues the ALJ 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 not 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 if it is rational, supported by substantial evidence, and in

[1] Claimant is the widow of the Miner, who died on August 7, 2020. Director's Exhibit 12. Administrative Law Judge (ALJ) Drew A. Swank stated the Miner "was not awarded benefits on any lifetime claims." Decision and Order at 8 n.12. Because the Miner was not receiving benefits at the time of his death or "determined to be eligible to receive benefits" on a claim prior to his death, Claimant is not eligible for derivative survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*)(2018).

[2] Section 411(c)(4) of the Act 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 the Miner had thirty-nine years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

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).

Invocation of the Section 411(c)(4) Presumption – Total Disability

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ found Claimant established total disability based on the medical opinions and the evidence as a whole.[5] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 14-20.

Medical Opinions

The ALJ considered the medical opinions of Drs. Go, Basheda, and Sood that the Miner had a totally disabling respiratory or pulmonary impairment. Decision and Order at 15-17; Claimant's Exhibits 1 at 7-8; 5 at 10; Employer's Exhibits 5 at 19; 5a at 4. He found

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because the Miner performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2.

[5] The ALJ found Claimant did not establish total disability based on the pulmonary function studies and there are no arterial blood gas studies in the record. 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 10-12. He also found "there is evidence to suggest that [the Miner] suffered from cor pulmonale with right-sided congestive heart failure." Decision and Order at 14, 19. Because the ALJ did not find Claimant established total disability based on evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, we need not address Employer's assertions regarding the ALJ's finding on this issue. 20 C.F.R. §718.204(b)(2)(iii); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 12-14, 19; Employer's Brief at 6.

Dr. Go's opinion well-reasoned and entitled to great weight. Decision and Order at 18-19. Further, he found Drs. Basheda's and Sood's opinions not reasoned and entitled to no weight. *Id.* at 17-19. He thus found the medical opinion evidence supports a finding of total disability based on Dr. Go's opinion. *Id*. at 19.

Employer does not challenge the ALJ's finding that Dr. Go's opinion is well-reasoned and entitled to great weight. Nor does it dispute that the opinions of Drs. Basheda and Sood do not undermine Dr. Go's opinion as they opined the Miner had a totally disabling respiratory or pulmonary impairment. Thus, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer argues the ALJ erred in discrediting Dr. Basheda's opinion. Employer's Brief at 21-30. Because Dr. Basheda opined the Miner had a totally disabling respiratory or pulmonary impairment, any error the ALJ made in discrediting the doctor's opinion is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Exhibits 5 at 19; 5a at 4.

As Employer raises no further argument, we affirm the ALJ's finding that the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 19. Further, we affirm his finding that Claimant established total disability based on the evidence as a whole, 20 C.F.R. §718.204(b); *Rafferty*, 9 BLR at 1-232, and invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1), (c).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal 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

[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).

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)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the medical opinion of Dr. Basheda.[7] Decision and Order at 27-28, 31-33. Dr. Basheda opined the Miner did not have legal pneumoconiosis but had obstructive and restrictive lung disease and pulmonary fibrosis related to his rheumatoid arthritis and chronic obstructive pulmonary disease (COPD) with an asthmatic component attributed to tobacco smoking and unrelated to coal mine dust exposure. Employer's Exhibits 5 at 17; 5a at 4; 6 at 14-15. The ALJ found Dr. Basheda's opinion unpersuasive, and thus insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 33.

We reject Employer's argument that the ALJ provided invalid reasons for finding Dr. Basheda's opinion not credible. Employer's Brief at 25-27.

Dr. Basheda excluded coal mine dust exposure as a cause of the Miner's obstructive lung disease because his tobacco smoke exposure and rheumatic disease explained his condition. Employer's Exhibits 5 at 17; 6a at 3; 6 at 14-15. Further, he opined the Miner's obstructive lung disease was inconsistent with a fixed and irreversible disease from coal mine dust exposure because it responded to bronchodilators and presented with episodes of exacerbation. *Id*.

The ALJ permissibly found Dr. Basheda's opinion unpersuasive because he did not adequately explain why the Miner's coal mine dust exposure was not a significantly contributing or aggravating factor to his COPD, even if his smoking history and rheumatic

[7] The ALJ also considered the medical opinions of Drs. Go and Sood that the Miner had legal pneumoconiosis. Decision and Order at 28-30, 33-34. As the ALJ correctly found that their opinions do not aid Employer in rebutting the Section 411(c)(4) presumption, we decline to address Employer's assertions regarding the ALJ's weighing of their opinions. *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"); *Larioni*, 6 BLR at 1-1278; Decision and Order at 34; Employer's Brief at 27-28.

disease were more likely causes. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986); Decision and Order at 32-33. He further permissibly discredited Dr. Basheda's opinion that the Miner's coal mine dust exposure did not contribute to his COPD with an asthmatic component as inconsistent with the Department of Labor's recognition that asthma may constitute legal pneumoconiosis if it is significantly related to or substantially aggravated by coal mine dust exposure. *See Helen Mining Co. v. Elliott*, 859 F.3d 226, 239-40 (3d Cir. 2017); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012); 65 Fed. Reg. 79,920, 79,937-39 (Dec. 20, 2000); Decision and Order at 33. Thus, we affirm the ALJ's discrediting of Dr. Basheda's opinion.[8]

Because the ALJ permissibly discredited the only medical opinion supportive of Employer's burden on rebuttal,[9] we affirm his finding that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i)(A); Decision and Order at 32-34. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis.[10] 20 C.F.R. §718.305(d)(2)(i).

[8] Because the ALJ provided valid reasons for discrediting Dr. Basheda's opinion on legal pneumoconiosis, we need not address Employer's remaining arguments regarding the weight assigned to his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 22-28.

[9] Employer further argues the ALJ demonstrated prejudicial bias against the supplemental report of Dr. Basheda by failing to cite it. Employer's Brief at 34-35. A charge of bias against an ALJ is not substantiated by a mere allegation but must be established by concrete evidence of prejudice against a party's interest. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992). Employer has not identified any portions of Dr. Basheda's supplemental opinion which could have affected the ALJ's findings concerning the medical opinion evidence. Because Employer has not explained how the ALJ's alleged bias made any impact on his decision, it has failed to demonstrate concrete evidence of prejudice and we reject its argument. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278; *Cochran*, 16 BLR at 1-107.

[10] Because we have affirmed the ALJ's finding that Employer failed to disprove legal pneumoconiosis, we need not consider Employer's argument that the ALJ erred in finding it failed to disprove clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 24-25.

Death Causation

The ALJ next considered whether Employer established "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). He rationally discredited Dr. Basheda's opinion on death causation because the doctor did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the existence of the disease. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 39. Thus, we reject Employer's argument that the ALJ erred in discrediting Dr. Basheda's opinion. Employer's Brief at 30.

We further reject Employer's argument that the ALJ erred in discrediting the Miner's death certificate. Employer's Brief at 31-33. The Miner's death certificate lists cardiopulmonary arrest, septic shock, and "[p]neumonia; cholecystitis" as causes of his death. Director's Exhibit 12. Director's Exhibit 12. Because the Miner's death certificate is silent on whether his pneumoconiosis contributed to his death, substantial evidence supports the ALJ's finding that it is insufficient to support Employer's burden on rebuttal. *See W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) (once the Section 411(c)(4) presumption is invoked, the burden shifts to employer to affirmatively establish rebuttal); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984) (ALJ has discretion to determine the weight to afford medical evidence which is silent concerning pneumoconiosis); Decision and Order at 36.

As it is supported by substantial evidence, we affirm the ALJ's finding that Employer failed to establish no part of the Miner's death was due to pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge