U.S. Department of Labor

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

BRB No. 21-0148 BLA

JOHN W. SEXTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
A & G COAL CORPORATION	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH/AIG	)	DATE ISSUED: 5/31/2022
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Paul R. Almanza, Associate Chief Administrative Law Judge, United States Department of Labor.

Sarah Y. M. Himmel (Two Rivers Law Group, PC), Christiansburg, Virginia, for Employer.

Steven Winkelman (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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Associate Chief Administrative Law Judge (ALJ) Paul R. Almanza's Decision and Order Awarding Benefits (2018-BLA-05973) rendered on a claim filed on January 4, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation of 37.01 years of coal mine employment at surface mines but found that fewer than fifteen of those years were spent in conditions substantially similar to those in an underground mine. He therefore determined Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established he is totally disabled due to legal pneumoconiosis and awarded benefits. 20 C.F.R. §§718.202(a), 718.204(b)(2).

On appeal, Employer contends the ALJ erred in finding Claimant established legal pneumoconiosis in the form of an obstructive disease arising out of his coal mine employment.[2] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting the ALJ did not err in finding Claimant's obstructive disease arises out of his coal mine employment and thus constitutes legal pneumoconiosis. Employer filed a reply brief reiterating its contentions.

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] Section 411(c)(4) of the Act provides a rebuttable presumption that miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground coal mine employment 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.

[2] We affirm, as unchallenged on appeal, that Claimant established total disability. 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 27.

accordance with applicable law.[3] 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).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must demonstrate he has 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(b).

The ALJ considered the opinions of Drs. Forehand, Rosenberg, and McSharry. Decision and Order at 23-25. Dr. Forehand diagnosed legal pneumoconiosis in the form of obstructive lung disease due to coal mine dust exposure and smoking. Director's Exhibit 10 at 7. Dr. Rosenberg diagnosed a disabling pulmonary impairment caused by the residuals of a sternotomy performed during Claimant's cardiac bypass surgery and unrelated to coal mine dust exposure. Employer's Exhibit 5 at 3. Dr. McSharry diagnosed a moderate to severe obstructive disorder caused by a combination of smoking and severe congestive heart failure but unrelated to coal mine dust exposure. Employer's Exhibit 6 at 4. The ALJ found Dr. Forehand's opinion well-documented and well-reasoned, whereas he found the opinions of Drs. Rosenberg and McSharry are not reasoned. Decision and Order at 24-15. Crediting Dr. Forehand's opinion over those of Drs. Rosenberg and McSharry, the ALJ determined Claimant established the existence of legal pneumoconiosis. *Id.* at 25.

Employer contends the ALJ erred in crediting Dr. Forehand's opinion because he relied on an incorrect understanding of Claimant's coal mine dust exposure. Employer's Brief at 8-10. We disagree.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2; Hearing Transcript at 7-8.

Addressing whether Claimant could invoke the rebuttable presumption at Section 411(c)(4) of the Act, the ALJ found that, although Claimant had worked in coal mines for thirty-seven years, he spent fewer than fifteen of those years in conditions substantially similar to those in an underground coal mine.[4] Decision and Order 14-16. Nevertheless, the ALJ credited Dr. Forehand's opinion on the issue of legal pneumoconiosis because "Dr. Forehand explained that Claimant's workplace exposure to coal mine dust and silica over thirty-seven years interacted with his cigarette smoking to substantially contribute and materially aggravate his obstructive lung disease." Decision and Order 23; Director's Exhibit 10 at 7.

As the ALJ correctly observed, Dr. Forehand diagnosed legal pneumoconiosis in the form of obstructive lung disease based on Claimant's relevant histories, a physical examination, and objective testing. Decision and Order 23-24. The ALJ also noted that Dr. Forehand "reported thirty-seven years of coal mine employment . . . , similar to my findings." *Id.* at 21; Director's Exhibit 10 at 4. Contrary to Employer's argument, while the ALJ found Claimant did not establish fifteen years of his surface coal mine work occurred in conditions "substantially similar" to those of an underground mine, Decision and Order at 15-16, that finding is not necessarily incompatible with Dr. Forehand's observation that Claimant's dust exposure was "not insignificant." Director's Exhibit 10 at 7; Employer's Brief at 9-10. Indeed, as the ALJ noted, Claimant testified he worked for nearly ten years operating loaders without enclosed cabs and with regular dust exposure.

[4] Claimant operated front-end loaders, in both open and enclosed cabs, at surface coal mines from 1973 until he retired in November 2009. Director's Exhibit 2; Hearing Transcript at 18-19, 23-28. Claimant testified that, prior to 1983, he worked in an open cab with no protection from coal mine dust. Hearing Tr. at 18-19, 23, 28. Beginning in 1983, he spent seventy percent of his time working in an enclosed cab, and that figure rose to ninety percent in 2004. *Id.* at 23-24. He testified dust levels in the enclosed cabs were not "real bad if they kept the filters and everything changed and the air conditioner ran," *id.* at 27, but dust would come through the loader vents and settle on him if the filters were not changed. *Id.* at 28. He further testified he performed other jobs that exposed him to dusty conditions, including operating a drill, cleaning coal by sweeping it with a broom mounted on a tractor, and working at the tipple loading train cars. *Id.* at 18, 24-25. His dustiest job was working on the unenclosed tractor with a rotating broom attached to the front of it. *Id.* at 18, 24-26. Based on this testimony, the ALJ concluded that, even assuming Claimant's work prior to 1983 occurred in conditions substantially similar to underground coal mine employment, Claimant did not demonstrate he was regularly exposed to coal mine dust after that date. Decision and Order at 16. The ALJ therefore found Claimant failed to establish at least fifteen years of surface mine work in conditions substantially similar to those in an underground mine. *Id.*

Decision and Order at 15-16; Hearing Transcript at 23. The ALJ thus permissibly found Dr. Forehand's opinion well-documented and well-reasoned. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order at 24.

As the trier-of-fact, the ALJ has the discretion to assess the credibility of the medical opinions and assign those opinions appropriate weight; the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). Employer's argument that Dr. Forehand's opinion is not well-reasoned and well-documented amounts to a request to reweigh the evidence, which the Board cannot do.[5] *Anderson*, 12 BLR at 1-113.

Employer next contends the ALJ erred in discrediting the opinions of Drs. Rosenberg and McSharry. Employer's Brief at 11-21. It initially argues that because the ALJ found Claimant's coal mine dust exposure was not sufficiently regular to invoke the Section 411(c)(4) presumption, the ALJ erroneously discounted their opinions for failing to adequately explain why Claimant's thirty-seven years of coal mine dust exposure was not a factor contributing to his obstructive disease. Employer's Brief at 11. However, as already noted above, that at least fifteen years of Claimant's surface exposure was not substantially similar to underground mining to invoke the Section 411(c)(4) presumption does not mean his exposure throughout his thirty-seven years of mining was insignificant. Here, the ALJ permissibly determined that neither physician sufficiently explained why he concluded Claimant's coal mine dust exposure was not a contributing factor in Claimant's obstructive disease. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999) (Board must uphold decisions that rest within the realm of rationality; a reviewing court has no license to "set aside an inference merely because it finds the opposite conclusion more reasonable or because it questions the factual basis.").

[5] Employer further contends the ALJ erred in crediting Dr. Forehand's opinion because the physician did not discuss Claimant's congestive heart failure as a possible cause of his impairment. Employer's Brief at 14. Contrary to Employer's assertion, Dr. Forehand specifically noted Claimant's history of previous coronary artery bypass surgery and opined that the residuals of this surgery would cause a restrictive impairment, whereas Claimant has an obstructive impairment. Director's Exhibit 10 at 1-2.

Employer further argues the ALJ erroneously shifted the burden to Employer disprove pneumoconiosis. Employer's Brief at 14-20. Employer's contention is without merit.

The ALJ correctly noted Claimant is required to establish the existence of legal pneumoconiosis by a preponderance of the evidence and recognized Claimant has the burden of proof in establishing the elements of entitlement. Decision and Order at 2, 14, 23, 25. The ALJ did not shift the burden to Employer but rather determined Drs. McSharry's and Rosenberg's opinions are not adequately reasoned to support their conclusion that coal mine dust exposure did not contribute to Claimant's condition.[6] Decision and Order at 24-25. He thus rationally credited Dr. Forehand's opinion that Claimant has legal pneumoconiosis over the contrary opinions of Drs. McSharry and Rosenberg.[7] *See Looney*, 678 F.3d at 316-17; *Hicks*, 139 F.3d at 528; 20 C.F.R. §718.201(b); Decision and Order at 25. We thus affirm the ALJ's finding that Claimant established the existence of legal pneumoconiosis.[8] 20 C.F.R. §718.202(a); *see Compton*, 211 F.3d at 207-208; Decision and Order at 23-25.

[6] As the Director accurately observes, Employer does not argue Drs. McSharry and Rosenberg adequately explained their opinions that coal mine dust did not contribute to Claimant's obstructive impairment. Director's Brief at 9; *see* Employer's Brief at 15-19.

[7] Because the ALJ provided a valid reason for discrediting Drs. McSharry's and Rosenberg's opinions, we need not address Employer's remaining arguments regarding the weight he accorded their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 11-18.

[8] Employer further contends the ALJ erred in finding Claimant invoked the ten-year presumption that his pneumoconiosis arose out of coal mine employment. 30 U.S.C. §921(c)(1); 20 C.F.R. §718.203(b); Decision and Order at 25 Employer's Brief at 21-24. To the contrary, because the ALJ properly found Claimant established legal pneumoconiosis, *i.e.*, he has a chronic lung disease or impairment "arising out of coal mine employment," 20 C.F.R. §718.201(a)(2), the finding of disease causation is subsumed in the legal pneumoconiosis finding. *Kiser v. L & J Equipment Co.*, 23 BLR 1-246 (2006); *Henley v. Cowan & Co., Inc.*, 21 BLR 1-147 (1999); Decision and Order at 25.

Disability Causation

To establish disability causation, Claimant must prove pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition" if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 37-38 (4th Cir. 1990).

Because there is no dispute Claimant has a totally disabling obstructive respiratory impairment, and as the ALJ permissibly found this impairment is legal pneumoconiosis, Claimant has established disability causation in this case. Decision and Order at 24-25; Director's Exhibit 10; Employer's Exhibits 5-6; *see Hicks*, 138 F.3d at 533. We therefore see no error in the ALJ's finding that Dr. Forehand's opinion is sufficient to establish Claimant's legal pneumoconiosis is a substantially contributing cause of his total disability. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Hawkinberry v. Monongalia County Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); Decision and Order at 27-28.

In addition, the ALJ permissibly discounted the opinions of Drs. McSharry and Fino on the cause of Claimant's respiratory disability because they did not diagnose legal pneumoconiosis. *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (doctor's opinion as to causation may not be credited unless there are "specific and persuasive reasons" for concluding it is independent of his mistaken belief the miner did not have pneumoconiosis); Decision and Order at 28. As Employer does not specifically challenge the ALJ's finding that the evidence establishes disability causation at 20 C.F.R. §718.204(c), we affirm it. *See Skrack v. Island Creek Coal Co*, 6 BLR at 1-710, 1-711 (1983); Decision and Order at 28.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge