U.S. Department of Labor

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

BRB No. 20-0466 BLA

JAMES R. JENKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOUNTAINEER MINING d/b/a MARROWBONE MINING COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 11/09/2021
SHELL MINING COMPANY	)	
	)	
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 Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

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

Bonnie Hoskins and Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for Employer.

Olgamaris Fernandez (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 GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits (2019-BLA-05001) 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 November 6, 2017.[1]

The ALJ credited Claimant with twenty-nine years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined 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. He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues that its lack of access to Claimant's prior claim record constitutes a due process violation and thus liability for benefits should transfer to the Black Lung Disability Trust Fund (Trust Fund). Employer also challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, it contends the ALJ erred in finding it did not rebut the presumption.[3] Claimant responds in support of the award of benefits.

[1] Claimant's initial claim was withdrawn. Director's Exhibit 1. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306. Claimant filed a second claim on October 24, 2013, which was denied because the evidence failed to establish that he was totally disabled due to a pulmonary or respiratory impairment. Director's Exhibit 2; Decision and Order at 2; *see also* Director's Brief, Attachment 1, 2.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-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, 16.

The Director, Office of Workers' Compensation (the Director), argues Employer's due process and constitutional arguments have no merit.

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Due Process

We reject Employer's argument that its due process rights have been violated because the Office of Workers' Compensation Programs (OWCP) "failed to maintain the records" from Claimant's prior 2013 claim. Employer's Brief at 3-4; Director's Exhibit 2.

Due process requires that an employer be afforded notice of the claim and the opportunity to mount a meaningful defense. *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807 (4th Cir. 1998). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has emphasized that the pertinent inquiry is whether the complainant suffered prejudice. *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 183 (4th Cir. 1999).

In the absence of deliberate misconduct, "the mere failure to preserve evidence [from a prior black lung claim] – evidence that may be helpful to one or the other party in some hypothetical future proceeding – does not violate [a party's right to due process]." *Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (rejecting coal mine operator's argument that due process is violated whenever the Trust Fund loses or destroys evidence from a miner's prior claim). Instead, Employer must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim. *See Borda*, 171 F.3d at 183; *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000). Specifically, Employer must establish the claim proceedings included a "prejudicial, fundamentally unfair element." *Oliver*, 555 F.3d at 1219, *citing Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 501 (4th Cir. 1999). Thus Employer must "demonstrate that the contents of [the] lost claim file were so vital to its case that it would be fundamentally unfair to make the company live with the outcome of this proceeding

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

without access to those records." *Oliver*, 555 F.3d at 1219. Employer has not met this burden.

Employer argues the destruction of this evidence deprived it of the opportunity to adequately evaluate whether Claimant established a change in an applicable condition of entitlement in this subsequent claim. [5] Employer's Brief at 3-4; 20 C.F.R. §725.309(c). As the Director correctly argues, however, the relevant threshold inquiry in a subsequent claim involves determining whether a claimant has established a change in an applicable condition of entitlement based on the newly submitted evidence (the evidence that the parties submitted in the current 2017 claim). Director's Brief at 9; *see* 20 C.F.R. §725.309(c). In order to obtain review of the merits of the claim, a claimant bears the burden of first establishing through newly submitted evidence that the applicable element of entitlement "upon which the prior denial was based" has changed since that denial. *Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 758-59 (6th Cir. 2013); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); 20 C.F.R. §725.309(c).

Employer does not challenge the ALJ's findings that Claimant has established total disability at 20 C.F.R. §718.204(b)(2) based on the new evidence, thereby invoking the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.304(b); Decision and Order at 16. Thus, we affirm the ALJ's findings as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-

[5] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also 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). Claimant filed his prior claim on October 24, 2013. Director's Exhibit 2. Although the record does not does not contain an initial or final determination of the prior claim, the ALJ noted that "the Director found by way of the Schedule for the Submission of Additional Evidence ('SSAE') that the evidence established that Claimant had pneumoconiosis caused by his coal mine employment, but the evidence was unable to establish that he was totally disabled due to a pulmonary or respiratory impairment." Decision and Order at 2. In addition, the Director attached to his response brief to the Board the district director's August 11, 2014 Proposed Decision and Order denying the prior claim because Claimant failed to establish that he was totally disabled due to a pulmonary or respiratory impairment. Director's Brief at 10 n. 2, Attachment 1, 2. Consequently, Claimant had to submit new evidence establishing total disability to have his claim reviewed on the merits. 20 C.F.R. §725.309(c).

710, 1-711 (1983). Moreover, the Fourth Circuit has specifically held that invocation of the Section 411(c)(4) presumption establishes an element of entitlement for purposes of demonstrating a change in an applicable condition of entitlement in a subsequent claim. *E. Assoc. Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-14 (4th Cir. 2015); *see also Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794-95 (7th Cir. 2013); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 731 (7th Cir. 2013). Thus regardless of the basis for the prior denial, Claimant has established a change in an applicable condition of entitlement. *Toler*, 805 F.3d 502, 511-14; *White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c).

Employer has not explained how the record from Claimant's prior 2013 claim is necessary to resolve whether he established a change in the applicable condition of entitlement.[6] *Oliver*, 555 F.3d at 1222-23. Thus, Employer has not established it was deprived of a fair opportunity to mount a meaningful defense against the claim, and consequently we reject its argument that it was deprived of due process. *Borda*, 171 F.3d at 184; *Oliver*, 555 F.3d at 1219. We therefore reject Employer's assertion that liability for benefits should transfer to the Trust Fund.

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 3. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

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 clinical nor legal pneumoconiosis,[7] or "no part of

[6] As previously noted, the Director attached to his brief the district director's August 11, 2014 Proposed Decision and Order denying the prior claim because Claimant failed to establish that he was totally disabled due to a pulmonary or respiratory impairment. *See* Director's Brief at 10 n.2, Attachment 1, 2.

[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 that is 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

[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 failed to establish rebuttal by either method.

We affirm as unchallenged the ALJ's finding that Employer failed to disprove clinical pneumoconiosis. *See Skrack* , 6 BLR at 1-711 ; 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 24. Although Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis, we will address the issue of legal pneumoconiosis because it is relevant to the second method of rebuttal. 20 C.F.R. §718.305(d)(1)(i).

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." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered Dr. Rosenberg's opinion that Claimant has chronic obstructive pulmonary disease (COPD) and emphysema due solely to cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibit 3 at 8. The ALJ assigned Dr. Rosenberg's opinion no weight because he found his explanations "contrary to the preamble [to the 2001 revised regulations] and inconsistent with the regulations and legal precedent regarding the potentially latent and progressive nature of pneumoconiosis." Decision and Order at 24-25.

Employer argues the ALJ misread Dr. Rosenberg's opinion regarding whether pneumoconiosis is latent and progressive. Employer's Brief at 6. We disagree. Dr. Rosenberg relied on various medical studies to conclude "it is unlikely that a miner who has no impairment when he leaves coal mining will suddenly develop an obstruction related to coal [mine] dust years after the last exposure." Employer' Exhibit 3 at 14-15. He excluded a diagnosis of legal pneumoconiosis because "[t]here is no scientific literature that establishes obstructive lung disease as displayed by [Claimant] represents latent and progressive legal [coal workers' pneumoconiosis]." *Id*. The ALJ permissibly found his opinion contrary to the regulation that recognizes pneumoconiosis "as a latent and progressive disease which may first become detectable only after the cessation of coal mine

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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).

dust exposure." 20 C.F.R. §718.201(c); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (a medical opinion not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014) (upholding ALJ's decision to discredit physician whose opinion regarding legal pneumoconiosis conflicted with the recognition that pneumoconiosis is a latent and progressive disease); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 24-25.

Employer generally argues the ALJ should have found Dr. Rosenberg's opinion well-reasoned. Employer's Brief at 15-17. We consider Employer's argument 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 the ALJ permissibly discredited Dr. Rosenberg's opinion, the only opinion supportive of Employer's burden on rebuttal, we need not address Employer's arguments regarding the opinions of Drs. Green and Ammisetty who diagnosed legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 4-6. We therefore affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing Claimant does not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A).

Upon finding Employer did not disprove pneumoconiosis, the ALJ addressed whether Employer established that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The ALJ rationally discounted Dr. Rosenberg's opinion regarding the cause of Claimant's disability because he failed to diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove Claimant has the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); *Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 23-24. We therefore affirm the ALJ's determination that Employer failed to establish that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge