U.S. Department of Labor

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

BRB No. 20-0505 BLA

OWEN L. VANDEVANDER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WOLF RUN MINING COMPANY	)	
	)	
and	)	
	)	
ARCH COAL COMPANY, INCORPORATED	)	DATE ISSUED: 11/29/2021
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for Claimant.

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

William M. Bush (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, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2020-BLA-05009) rendered on a claim filed on March 26, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with thirty-eight years of underground coal mine employment and found he has a totally disabling respiratory 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.[1] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal,[2] Employer challenges the constitutionality of the Section 411(c)(4) presumption. Employer further argues the ALJ erred in admitting post-hearing supplemental reports from Claimant's experts, Drs. Sood and Krefft. Additionally, Employer argues the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[3] Claimant responds in support of the award of benefits. The Director, Office

[1] 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.

[2] By Order dated April 13, 2021, the Board accepted Employer's show cause response for failure to tile a timely Petition for Review and brief and admitted them as part of the record. April 13, 2021 Order; 20 C.F.R. §802.211.

[3] We affirm, as unchallenged, the ALJ's finding that Claimant established thirty-eight years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4. Employer asserts the ALJ erred by not considering whether the August 1, 2018 blood gas study is invalid. Employer's Brief at 19-20. However, in finding that the blood gas study evidence established total disability, the ALJ relied on the most recent study, which was qualifying at exercise. Decision and Order at 22. Any error in evaluating the validity of the 2018 study was therefore harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Employer does not

of Workers' Compensation Programs (the Director), has filed a limited response urging rejection of Employer's evidentiary and constitutional challenges.

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, 362 (1965).

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 Patient Protection and 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 20-22. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. 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).

Evidentiary Issue

Employer argues the ALJ erred by admitting post-hearing supplemental reports from Drs. Sood and Krefft. Employer's Brief at 17-19. We disagree.

An ALJ exercises broad discretion in resolving procedural and evidentiary matters. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). Thus, a party seeking to overturn the disposition of a procedural or evidentiary issue must establish the ALJ's action

---

otherwise challenge the ALJ's finding that Claimant established the existence of a totally disabling respiratory impairment and invoked the Section 411(c)(4) presumption, and we therefore affirm those findings. *See Skrack*, 6 BLR at 1-711; Decision and Order at 7-8, 26.

[4] 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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 30.

represented an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

Employer challenges the introduction of these supplemental reports by analogizing them to rehabilitative reports submitted in response to rebuttal evidence. Employer's Brief at 17-19. As the Director correctly notes, however, Employer's argument ignores that supplemental reports by physicians whose opinions are already in the record are "explicitly permitted by the regulations." Director's Response at 1, *citing* 20 C.F.R. § 725.414(a)(1) ("Supplemental medical reports prepared by the same physician must be considered part of the physician's original medical report."). Although the ALJ, within his discretion, could have refused to allow Claimant to submit the supplemental reports post-hearing, he specifically addressed and overruled the objection to their admission raised by Employer at the hearing.[5] Hearing Transcript at 9-12. The ALJ did not abuse his discretion in admitting the supplemental reports, *Blake*, 24 BLR at 1-113, and Employer's argument that the regulations do not allow such reports is misplaced. We thus affirm the ALJ's ruling admitting the supplemental reports of Drs. Sood and Krefft. Hearing Transcript at 9-12.

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[6] nor clinical pneumoconiosis,[7] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined

[5] The ALJ further invited Employer to submit its own post-hearing supplemental reports. Hearing Transcript at 12.

[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).

[7] "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).

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.[8]

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." 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). Employer relies on the opinions of Drs. Zaldivar and Farney, both of whom opined Claimant has a restrictive impairment unrelated to coal mine dust exposure. Director's Exhibit 20; Employer's Exhibits 2, 5, 10. The ALJ gave both opinions little weight because he found them not well-reasoned. Decision and Order at 17-18.

Employer argues the ALJ applied an improper rebuttal standard by requiring Employer to "rule out" any contribution of coal mine dust exposure to Claimant's restrictive impairment. Employer's Brief at 6-8. We disagree. As the ALJ correctly observed, to rebut the presumed existence of legal pneumoconiosis, Employer must prove Claimant's respiratory impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 8; 20 C.F.R. §718.201(a)(2), (b). Moreover, the ALJ did not reject the opinions of Drs. Zaldivar and Farney because they were insufficient to meet a "rule out" standard. Rather, he found their opinions on legal pneumoconiosis not credible because they were inadequately reasoned. Decision and Order at 17-18. As the ALJ accurately noted, Drs. Zaldivar and Farney opined they could exclude any impairment related to coal mine dust exposure and provided a list of possible diagnoses for Claimant's impairment, but both conceded they needed additional testing to provide a definitive diagnosis. *Id.*; Employer's Exhibits 5 at 35-40; 10 at 29-31, 41-45. The ALJ permissibly found their opinions not well-reasoned because their conclusion that they needed additional testing to provide a definitive diagnosis demonstrated they were uncertain as to their diagnoses. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Clark*, 12 BLR at 1-155; Decision and Order at 17-18. We thus reject Employer's argument the ALJ applied an improper rebuttal standard in this case.[9]

[8] The ALJ found that Employer disproved the existence of clinical pneumoconiosis. Decision and Order at 16.

[9] The ALJ noted Drs. Zaldivar and Farney "list a litany of potential differential diagnoses for Claimant's pulmonary impairments – *except of course any impairment related to coal mine dust exposure*." Decision and Order at 17 (emphasis in original).

Employer does not otherwise challenge the ALJ's credibility findings with respect to Drs. Zaldivar's and Farney's opinions.[10] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). We thus affirm his determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing Claimant does not have pneumoconiosis.

Disability Causation

The ALJ next considered whether Employer rebutted the presumption by establishing "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). The ALJ rationally discounted the disability causation opinions of Drs. Zaldivar and Farney because neither physician diagnosed legal pneumoconiosis, contrary to his finding that Employer failed to disprove the existence of the disease. *See 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); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 30. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii).

Employer contends the italicized phrase introduced ambiguity into the ALJ's credibility determinations and requires further explanation. Employer's Brief at 15-16. Because the ALJ discredited the opinions of Drs. Zaldivar and Farney as not well-reasoned, there is no ambiguity to resolve. Decision and Order at 17-18.

[10] Employer argues the case must be remanded for the ALJ to resolve a conflict among the opinions of Drs. Celko, Sood, and Krefft as to whether Claimant has an obstructive or restrictive respiratory impairment. Employer's Brief at 8-14. The ALJ discredited the opinions of Drs. Zaldivar and Farney, the only opinions supportive of Employer's burden to affirmatively establish the absence of legal pneumoconiosis. Decision and Order at 17-18. Any error in the ALJ's weighing of the opinions of Drs. Celko, Sood, and Krefft as to the existence of legal pneumoconiosis is therefore harmless. *See Barber v. Director, OWCP*, 43 F.3d 899, 900-01 (4th Cir. 1995); *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni*, 6 BLR at 1-1278.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge