U.S. Department of Labor

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

BRB No. 21-0024 BLA

ROBERT A. BRAGG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BUFFALO MINING COMPANY	)	
	)	
and	)	
	)	
PITTSTON COMPANY	)	DATE ISSUED: 11/23/2021
	)	
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 Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

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

Jeffrey R. Soukup and Lucinda L. Fluharty (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, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Lauren C. Boucher's Decision and Order Awarding Benefits (2018-BLA-06189) rendered on a subsequent claim filed on August 14, 2017,[1] pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 20.2 years of underground coal mine employment and accepted Employer's stipulation that he is totally disabled by a respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found 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. 20 C.F.R. §725.309(c). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, it contends the ALJ erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, filed a limited response urging the Benefits Review Board to reject Employer's constitutional arguments.[3]

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

[1] Claimant filed two prior claims. Director's Exhibits 1, 2. On April 13, 2016, the district director denied Claimant's most recent claim because he failed to establish total disability and total disability due to pneumoconiosis. Director's Exhibit 2.

[2] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that he 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 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 findings that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 9-10.

[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

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 15. 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*. at 17. 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 legal nor clinical pneumoconiosis,[5] or that "no part of [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); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 555 (4th Cir. 2013); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150 (2015). The ALJ found Employer failed to establish rebuttal by either method.[6]

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

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Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6; Hearing Transcript at 22.

[5] "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).

[6] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 14.

by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8.

Employer relies on the medical opinions of Drs. Basheda and Zaldivar to disprove legal pneumoconiosis. They opined that Claimant has a disabling obstructive respiratory impairment due to either asthma alone, or a combination of asthma and emphysema, caused by smoking and not coal dust exposure.[7] Employer's Exhibits 1 at 5-6; 2 at 15-16; 9 at 14-16, 34-35; 10 at 48, 52-53, 64. Contrary to Employer's contentions, we see no error in the ALJ's findings that their opinions are not well-reasoned and therefore do not satisfy its burden of proof. Decision and Order at 23-26.

Dr. Basheda excluded coal mine dust exposure as a causative factor for Claimant's respiratory condition because he demonstrated a partially reversible obstructive impairment and pneumoconiosis causes a fixed and irreversible impairment. Employer's Exhibit 9 at 14-16, 34-35. Although Dr. Basheda cited literature to support his contentions regarding Claimant's respiratory condition, the ALJ permissibly found that, in excluding an effect by coal dust exposure, he failed to "specifically address any potential additive effects from Claimant's significant history of coal mine dust exposure, or explain why that exposure could not have contributed to [the irreversible portion of] his condition." Decision and Order at 25; *see Owens*, 724 F.3d at 558; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004). We therefore affirm the ALJ's rejection of Dr. Basheda's opinion as supported by substantial evidence.

Dr. Zaldivar similarly excluded a diagnosis of legal pneumoconiosis because he attributed the irreversible portion of Claimant's respiratory impairment to smoking-induced emphysema and lung remodeling caused by asthma. Employer's Exhibit 10 at 48, 52-53, 64. The ALJ accurately observed that when Dr. Zaldivar was questioned about the significance of Claimant's response to bronchodilators, he explained only that acute bronchodilation treatment is not expected to "fully bring the lungs back to their optimal condition"[8] and airway remodeling due to inadequately treated asthma *may* explain

[7] Dr. Basheda diagnosed obstructive lung disease with an asthmatic component caused by smoking. Employer's Exhibit 2 at 15-16. He did not diagnose emphysema. Employer's Exhibit 9 at 20-21. Dr. Zaldivar diagnosed asthma and "some degree of emphysema" due to smoking. Employer's Exhibits 1 at 5, 10 at 52-53. Both doctors opined the clinical presentation of Claimant's asthma is inconsistent with occupational asthma. Employer's Exhibits 9 at 17; 10 at 65-66.

[8] Dr. Zaldivar explained bronchodilators are "short-acting drug[s] and may not penetrate everywhere in the lungs." Employer's Exhibit 10 at 45. He further explained

Claimant's fixed impairment. Decision and Order at 24-25; Employer's Exhibit 10 at 44-48. The ALJ permissibly found Dr. Zaldivar's opinion to be speculative and insufficient to establish that coal dust exposure did not significantly contribute to or aggravate Claimant's pulmonary condition. *Owens*, 724 F.3d at 558; *Looney*, 678 F.3d at 316; *Hicks*, 138 F.3d at 528; Decision and Order at 24-25. We therefore affirm the ALJ's rejection of Dr. Zaldivar's opinion as not well-reasoned.

Employer's arguments on legal pneumoconiosis 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). Thus, we affirm the ALJ's finding that Employer failed to disprove Claimant has legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2)(b), 718.305(d)(1)(i)(A); Decision and Order at 26. 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).

Disability Causation

The ALJ next considered whether Employer established "no part of the miner'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 27. She rationally discounted the disability causation opinions of Drs. Zaldivar and Basheda because she found their conclusions "inseparably linked" to their erroneous beliefs that Claimant does not have legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70 (4th Cir. 2002); Decision and Order at 27. 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) and the award of benefits.

that, "with chronic [bronchodilation] treatment," Claimant's "improvement may be sufficient to allow him to do any work he wants to do." *Id.*

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge