U.S. Department of Labor

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

BRB No. 21-0507 BLA

FLOYD ROSE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNIVERSAL COAL SERVICES, INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 11/22/2022
	)	
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 Larry A. Temin, Administrative Law Judge, United states Department of Labor.

Thomas W. Moak (Moak & Nunnery), Prestonburg, Kentucky, for Claimant.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Larry A. Temin's Decision and Order Awarding Benefits (2019-BLA-06077) rendered on a claim filed on June 19, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 8.85 years of coal mine employment. Because Claimant had less than fifteen years, the ALJ found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] Considering entitlement under 20 C.F.R. Part 718,[2] the ALJ found Claimant established legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment due to legal pneumoconiosis. 20 C.F.R. §§718.202, 718.204(b), (c). The ALJ therefore awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant totally disabled due to legal pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

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 Assocs., Inc.*, 380 U.S. 359 (1965).

---

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[2] As the record contains no evidence of complicated pneumoconiosis, Claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3).

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2). Decision and Order at 25-26; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 12-13.

Entitlement under 20 C.F.R. Part 718

Under 20 C.F.R. Part 718, 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

"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). In order to establish legal pneumoconiosis, Claimant must prove he has a chronic lung disease or an impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). The United States Court of Appeals for the Sixth Circuit holds that a miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The ALJ found Claimant has a "substantial" smoking history and considered the medical opinions of Drs. Forehand, Jarboe and Rosenberg, all of whom diagnosed Claimant with disabling chronic obstructive pulmonary disease (COPD). Decision and Order at 19-24; Director's Exhibits 8 at 4, 14 at 1, 16 at 5;[5] Employer's Exhibits 4 at 5, 5 at 8. Dr. Forehand attributed Claimant's obstruction to both smoking and coal mine dust exposure. Director's Exhibits 8 at 4, 14 at 1. Drs. Jarboe and Rosenberg opined Claimant's disabling obstruction is due solely to cigarette smoking, and not coal dust exposure. Director's Exhibit 16 at 8-10; Employer's Exhibits 4 at 5, 5 at 8.

The ALJ found Dr. Forehand's opinion well-reasoned, consistent with the preamble to the revised 2001 regulations, and entitled to probative weight. Decision and Order at 24. He found the opinions of Drs. Rosenberg and Jarboe not well-reasoned and inconsistent with the preamble. *Id*. at 23-24. He therefore found the medical opinion

[5] Dr. Rosenberg opined Claimant has a significant gas exchange abnormality that also contributes to his disabling impairment. Director's Exhibit 16 at 5.

evidence established legal pneumoconiosis in the form of COPD due in part to coal mine dust exposure. *Id*. at 24. Employer argues the ALJ erred in crediting Dr. Forehand over Drs. Rosenberg and Jarboe. Employer's Brief at 2-8. We disagree.

Initially, we reject Employer's assertion that Dr. Forehand's opinion is insufficient to establish legal pneumoconiosis because he attributed only an insignificant portion of Claimant's lung disease to his coal mine employment. Employer's Brief at 3-4. Contrary to Employer's assertion, Dr. Forehand explicitly stated:

> coal mine dust-related lung disease can arise in response to 8 years of exposure to coal mine dust working as an auger operator, loader operator and utility worker.
>
> *I find that 8 years of coal mine dust exposure substantially contributed to Mr. Rose's obstructive lung disease*, legal coal workers' pneumoconiosis, impairment of ventilation and totally disabling respiratory impairment.

Director's Exhibit 14 (emphasis added). As Dr. Forehand explicitly opined Claimant's coal mine employment is a contributing cause of his obstructive lung disease, the ALJ properly found he diagnosed legal pneumoconiosis. *See Groves*, 761 F.3d at 598-99.

We additionally reject Employer's contentions that Dr. Forehand's opinion is not well-reasoned because he relied on an inaccurate coal mining history and merely "assume[s]" coal dust exposure contributes to Claimant's obstructive impairment. Employer's Brief at 3. It is the province of the ALJ to evaluate the physician's opinions. *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). Although Dr. Forehand initially considered a coal mine employment history of sixteen years, contrary to the ALJ's finding of 8.85 years, the ALJ accurately noted Dr. Forehand supplemented and affirmed his initial opinion based on an accurate coal mine employment history of eight years.[6] Decision and Order at 11, 19; *see* Director's Exhibit 14. Further, as substantial evidence supports the ALJ's findings that Dr. Forehand predicated his diagnosis on Claimant's symptoms, pulmonary function test results, substantial smoking history, and eight-year mining history with significant coal dust exposure,[7] the ALJ permissibly found Dr. Forehand's opinion sufficiently documented

[6] The ALJ found Dr. Forehand's consideration of an eight-year coal mine employment history "sufficiently similar" to his finding of 8.85 years of coal mine employment. Decision and Order at 21.

[7] The ALJ accurately observed Dr. Forehand stated Claimant was regularly exposed to dust in his work as an equipment operator and utility worker because he did not work in

and reasoned. *See Morrison*, 644 F.3d at 478; *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 21.

We further see no error in the ALJ's determination to discredit the opinions of Drs. Jarboe and Rosenberg. Employer's Brief at 4-6. Employer's contention that the ALJ did not evaluate the record but instead used the preamble to the 2001 regulatory revisions as "a litmus test" for discrediting Employer's experts lacks merit. Employer's Brief at 5. An ALJ may evaluate expert opinions in conjunction with the preamble, as it sets forth the scientific evidence the Department of Labor found credible in preparing the regulations. *See* 65 Fed. Reg. 79,920, 79,939-42 (Dec. 20, 2000); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008). As discussed below, the ALJ permissibly evaluated the medical opinions in light of the specific evidence before him, taking into account the preamble's interpretation of the scientific studies the DOL relied upon in amending the regulations. *See Adams*, 694 F.3d at 801-02.

Among the reasons Dr. Rosenberg provided to exclude coal mine dust exposure as a contributor to Claimant's impairment is he indicated "the reduction of the FEV_1 in comparison to the reduction in the FVC [on pulmonary function testing] provides a basis for distinguishing between the effects of cigarette smoking and coal mine dust exposure" in that "cigarette smoking drives the FEV_1 down much farther than the FVC" but "coal dust reduces the FEV_1 and FVC in equal measure." Director's Exhibit 16 at 6. Thus, Dr. Rosenberg indicated Claimant's reduction of the ratio to "around 39% . . . is entirely consistent with the effects of cigarette smoking, not coal dust." *Id.* at 8. The ALJ permissibly discredited this rationale as inconsistent with the scientific evidence noted in the preamble that coal dust exposure may cause COPD with associated decrements in FEV_1 and the FEV_1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); Decision and Order at 22.

Further, the ALJ correctly observed that both Drs. Rosenberg and Jarboe eliminated coal mine dust exposure as a cause of Claimant's disabling obstructive impairment, in part, because they believe smoking carries a greater risk of pulmonary impairment than coal mine dust exposure. Decision and Order at 21; Director's Exhibit 16 at 6; Employer's

---

an enclosed cab and did not wear a mask. Decision and Order at 11 (citing Director's Exhibits 8 at 4, 14 at 1).

Exhibit 5 at 7. He permissibly found their opinions unpersuasive to the extent they relied on generalities drawn from medical literature, rather than the specifics of Claimant's case. 65 Fed. Reg. at 79,94; *see Sterling*, 762 F.3d at 491-92; *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 21. Further, we see no error in the ALJ's finding that Drs. Rosenberg and Jarboe failed to adequately explain why coal mine dust exposure was not additive along with smoking in causing or aggravating Claimant's COPD. *See* 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. at 79,940; *Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 22-23.

Similarly, the ALJ permissibly rejected their explanations that coal-dust-related COPD does not progress after exposure to coal mine dust ceases as inconsistent with the DOL's recognition that coal mine dust exposure can cause a latent chronic pulmonary impairment. *See* 20 C.F.R. §718.201; *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 can be a latent and progressive disease); Decision and Order at 22; Director's Exhibit 16 at 11; Employer's Exhibit 5 at 7.

Employer's arguments on appeal are a request to reweigh the evidence, which we are not empowered to do. *See Anderson*, 12 BLR at 1-113. Having both permissibly credited Dr. Forehand and discredited the opinions of Drs. Rosenberg and Jarboe, we affirm the ALJ's finding that Claimant established he has legal pneumoconiosis. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 21-22, 24.

Disability Causation

To establish that his total disability is due to pneumoconiosis, Claimant must prove that 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," or 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); *Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003). The ALJ credited Dr. Forehand's opinion that Claimant's legal pneumoconiosis substantially contributes to his disabling obstruction for the same reasons he credited the physician's opinion with respect to the existence of the disease at 20 C.F.R. §718.202(a)(2). Decision and Order at 27. He similarly discredited the causation opinions of Drs. Rosenberg and Jarboe because they failed to diagnose the disease, contrary to the ALJ's finding. *Id.*

Where, as here, all medical experts agree that Claimant has disabling COPD, the ALJ's finding that it constitutes legal pneumoconiosis subsumes and resolves the disability causation question. *See Brandywine Explosives & Supply v. Kennard*, 790 F.3d 657, 668-69 (6th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Hawkinberry v. Monongalia County Coal Co.*, 25 BLR 1-249, 1-255-57 (2019). Because the ALJ permissibly credited Dr. Forehand's opinion that Claimant's disabling COPD constitutes legal pneumoconiosis, it necessarily follows that Dr. Forehand's opinion also establishes disability causation at 20 C.F.R. §718.204(c). *See Kennard*, 790 F.3d at 668-69; *Ramage*, 737 F.3d at 1062; *Hawkinberry*, 25 BLR at 1-255-57; Decision and Order at 27. As Claimant has established each element of entitlement under 20 C.F.R. Part 718, we affirm the ALJ's award of benefits. Decision and Order at 28.

Accordingly, the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge