U.S. Department of Labor

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

BRB No. 21-0571 BLA

CHARLES R. BARRETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTHERN OHIO COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 11/29/2022
	)	
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 Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

J. Lawson Johnston and Michael A. Muha (Dickie, McCamey & Chilcote, P.C.), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Steven Winkelman (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits (2019-BLA-05999) rendered on a claim filed on December 9, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant did not establish complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 20 C.F.R. §718.304. Next, the ALJ found Claimant had 11.17 years of underground coal mine employment and therefore could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] Considering whether Claimant established entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established clinical and legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. 20 C.F.R. §§718.202, 718.204(b), (c). Accordingly, he awarded benefits.

On appeal, Employer contends the ALJ erred in finding Claimant has pneumoconiosis and is totally disabled following his double-lung transplant. Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the award of benefits. Employer filed a reply brief, reiterating its prior 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 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, 362 (1965).

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[1] Claimant withdrew his prior claim; therefore, it is considered not to have been filed. 20 C.F.R. §725.306(b); Director's Exhibit 1.

[2] Section 411(c)(4) 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); *see* 20 C.F.R. §718.305.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

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 element 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, 1-2 (1986) (en banc).

Procedural History and Facts

Claimant filed his claim on December 9, 2016. Director's Exhibit 3. In conjunction with his claim, he submitted two biopsy reports. Dr. Cohen's February 28, 2014 biopsy report identified "[b]ronchiolocentric dust macules and non-necrotizing granulomas," and "[o]rganizing diffuse alveolar damage." Claimant's Exhibit 4. He opined the dust macules "correlate with [Claimant's] history of occupational exposure" as an underground coal miner, which included both mining coal and welding mining equipment. *Id*. He also noted the granuloma "contain dust pigment and are frequently adjacent to dust macules." *Id*. Dr. Konstantin's December 15, 2016 biopsy report identified emphysema in the left lung and organizing pneumonia, interstitial fibrosis, and dust macules "that correlate[] well with [Claimant's] reported occupational history" in both lungs. Director's Exhibit 19 at 1.

Dr. Feicht conducted the Department of Labor's (DOL's) complete pulmonary evaluation of Claimant on January 17, 2017. Director's Exhibit 13. He diagnosed pulmonary fibrosis based on Claimant's lung biopsies and pneumoconiosis based on his positive chest x-ray.[4] *Id.* at 8. In addition, he obtained a qualifying[5] blood gas study with

[4] As part of the DOL exam, Dr. Lahm interpreted the January 17, 2017 x-ray as positive for pneumoconiosis. Director's Exhibit 13 at 12. Dr. Gaziano read this x-ray for quality purposes only. Director's Exhibit 16. Claimant subsequently submitted Dr. Crum's positive interpretation of the January 17, 2017 x-ray. Director's Exhibit 21; Claimant's Exhibit 1. Thus, the ALJ found that the x-ray evidence supports a finding of simple clinical pneumoconiosis. Decision and Order at 15.

[5] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

exercise.[6] *Id.* at 2, 13, 23. He opined the results were "markedly abnormal," showed hypoxia, and rendered Claimant totally disabled. *Id.* at 8. Finally, he identified the etiology of Claimant's pulmonary diagnoses as "occupational coal dust exposure." *Id.*

As a result of his worsening respiratory condition, Claimant underwent a double-lung transplant in August 2017 while his claim was pending before the district director.[7] Hearing Transcript at 19-20, 33; Claimant's Exhibit 3 at 7; Employer's Exhibit 1 at 6. Consistent with the biopsy reports and Dr. Feicht's opinion, Employer's medical expert, Dr. Fino, and Claimant's expert, Dr. Krefft, each concluded that he suffered from clinical pneumoconiosis and interstitial fibrosis due to coal mine dust exposure; he was totally disabled due to his coal mine dust exposure; and his coal dust-induced disabling lung disease caused his need for a double-lung transplant. Employer's Exhibit 2; Claimant's Exhibits 3, 7.

The two physicians disagreed, however, with respect to Claimant's condition following his transplant. Dr. Fino opined Claimant does not have coal workers' pneumoconiosis because his "pulmonary system has never been exposed to coal dust." Employer's Exhibit 2 at 4. He also concluded that Claimant's lungs are functioning normally, "there is no respiratory impairment" and, therefore, from a "functional standpoint, he would [no longer] be disabled." *Id.* at 5. Dr. Krefft disputed Dr. Fino's assessment that Claimant is not disabled from returning to his previous coal mine work. Claimant's Exhibit 7. She stated Dr. Fino's opinion is "misguided," because although Claimant's lung function has improved post-transplant, he is "immunosuppressed with a medication regimen that leaves him susceptible to infection," and at-risk of lung transplant rejection and deterioration to near pre-transplant respiratory disability if exposed to irritants in the mine. Claimant's Exhibit 7 at 2.[8]

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[6] He also obtained a non-qualifying pulmonary function study. Director's Exhibit 13. Pulmonary function studies and blood gas studies measure different types of impairments; either, or both, can support a total disability diagnosis. *See Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984).

[7] The district director ultimately issued a Proposed Decision and Order awarding benefits on April 9, 2019, finding Claimant established pneumoconiosis due to his coal mine employment and that he was totally disabled due to pneumoconiosis. Director's Exhibit 51 at 2, 7-8. At Employer's request, the claim was transferred to the Office of Administrative Law Judges on April 25, 2019, for a hearing. Director's Exhibits 60, 65.

[8] Another physician, Dr. Grodner, agreed Claimant had clinical pneumoconiosis and interstitial fibrosis. Employer's Exhibit 1. He concluded the clinical pneumoconiosis did

Claimant's Entitlement to Benefits

Because Employer has not challenged the ALJ's findings that the biopsies, x-ray readings, blood gas study results, and medical opinions demonstrate Claimant had totally disabling clinical and legal pneumoconiosis that necessitated his double-lung transplant, they are affirmed.[9] *Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15-20, 24-26; Employer's Brief at 3, 11; Director's Brief at 2.

Employer nevertheless contends the ALJ should have found Claimant did not establish entitlement to benefits because he is no longer totally disabled due to pneumoconiosis after his lung transplant. Employer's Brief at 1 (asserting the ALJ erred in finding that "the focus when determining whether pneumoconiosis is present should be before the double lung transplant"), *quoting* Decision and Order at 19. Instead, it argues the ALJ misapplied Board case law in rejecting Dr. Fino's opinion that Claimant is not disabled and does not have pneumoconiosis post-transplant. Employer's Brief at 11-13, *citing Maggard v. Kat Ran Enterprises, Inc.*, BRB No. 18-0451 BLA (Sept. 11, 2019) (unpub.); Employer's Reply Brief at 3-5.

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not cause any significant disability, and attributed Claimant's need for a lung transplant primarily to the interstitial fibrosis. *Id*. As the ALJ found, however, Dr. Grodner did not offer an opinion as to whether the disabling interstitial lung disease was significantly related to coal mine dust exposure, i.e., legal pneumoconiosis. Decision and Order at 19.

[9] As indicated above, Claimant's pre-transplant x-ray and biopsy evidence showed pneumoconiosis. Director's Exhibits 13, 19, 21; Claimant's Exhibits 1, 4. In addition, all of the physicians opined Claimant had pneumoconiosis before his transplant. Director's Exhibit 13; Claimant's Exhibits 3, 6; Employer's Exhibits 1, 2. Claimant's January 2017 blood gas study produced qualifying results and three of the four physicians opined he had a totally disabling respiratory impairment before his transplant. *Id*. The ALJ also noted that Claimant's lay testimony supports a finding of total disability pre-transplant. Decision and Order at 23; Hearing Transcript at 24. Employer argues the ALJ erred in considering Claimant's lay testimony but this assertion does not have merit. Employer's Brief at 16, *citing* 20 C.F.R. §718.305(b); Employer's Reply Brief at 7. While lay testimony alone is insufficient to establish total disability in certain circumstances, here the ALJ permissibly relied on uncontroverted medical evidence as well as Claimant's testimony to establish he was totally disabled before his double-lung transplant. *See* 20 C.F.R. §718.204(d)(5) ("In the case of a living miner's claim, a finding of total disability due to pneumoconiosis shall not be made solely on the miner's statements or testimony."); Decision and Order at 22-24

The Director asserts neither the Act nor the regulations require Claimant to prove that he continues to have pneumoconiosis after his lung transplant, which was necessitated by his pneumoconiosis. Director's Brief at 3-6, *citing McCauley v. DLR Mining, Inc.*, 25 BLR 1-259 (2019); *Maggard*, BRB No. 18-0451 BLA, slip op. at 2-3; *Simpson v. U.S. Steel Mining Co. Ala.*, BRB Nos. 11-0684 BLA and 11-0834 BLA (Sept. 24, 2012) (unpub.). Employer replies, asserting the cases that the Director cites are distinguishable. Employer's Reply Brief at 4-5. We agree with the Director that they are not.

In determining that Claimant need not establish his pneumoconiosis remained after his double-lung transplant, the ALJ relied upon the Board's prior decision in *Maggard*, while the Director cites *Maggard*, as well as *Simpson* and *McCauley*, for the same proposition. While Employer points out that these cases involved miners suffering from complicated pneumoconiosis, not simple clinical or legal pneumoconiosis as in this case, this is not a material distinction. Employer's Reply Brief at 4-5; *see* Employer's Brief at 12.

In *Maggard*, the Board considered whether a claimant could prove the existence of complicated pneumoconiosis when a biopsy removed the only massive lesion evidencing the disease. *Maggard*, BRB No. 18-0451 BLA, slip op. at 3-5. It held that "[n]either the Act nor the regulations require a claimant to also prove that residual complicated pneumoconiosis remains after the biopsy." *Id.* at 4-5; *see also Simpson*, BRB Nos. 11-0684 BLA and 11-0834 BLA, slip op. at 5 (claimant "is not required to provide evidence that residual pneumoconiosis remains after [a] massive lesion had been surgically excised during [a] lobectomy").

The Board reached the same conclusion in *McCauley*, 25 BLR at 1-262-63. There, the employer "argue[d] that because claimant's lesion of complicated pneumoconiosis was surgically removed before he filed his current claim, he [was] precluded from invoking the irrebuttable presumption of total disability due to pneumoconiosis." *Id.* at 1-262. The Board rejected that argument, noting the Act and its implementing regulations mandate that a claimant may use biopsy evidence to prove complicated pneumoconiosis (which, by its very presence, establishes total disability). *Id.*, *citing* 30 U.S.C. § 921(c)(3)(B); 20 C.F.R. § 718.304(b). The irrebuttable presumption, the Board explained, "would be rendered useless if there had to be other qualifying evidence that complicated pneumoconiosis existed after the biopsy excised the lesion of complicated pneumoconiosis." *Id*.

In a more recent decision, *Ooten*, the Board considered whether a claimant needed to reestablish total disability after a lung transplant necessitated by his disabling pneumoconiosis. *Ooten v. Pittston Coal Mgmt. Co.*, BRB Nos. 18-0066 BLA and 18-0066 BLA-A, slip op. at 12-15 (Sept. 30, 2022) (unpub.). In that case, the employer maintained

that the transplant that removed the claimant's lung also removed his disability, thereby rendering him ineligible for benefits. *Id.* at 13. Relying on *Maggard, Simpson,* and *McCauley*, the Board rejected that argument, noting "the medical opinion evidence conclusively establishe[d] [c]laimant was disabled prior to his lung transplant." *Id.* at 15. As the Board held, "[n]othing required him to reestablish disability after receiving a new lung[.]" *Id*. at 12.

> The analyses in those cases apply with equal force to this claim. Whether disability causation is established by the irrebuttable presumption or medical opinion, Employer cites no authority holding a claimant must reestablish that he continues to suffer from totally disabling pneumoconiosis following a life-saving lung transplant necessitated by his disabling pneumoconiosis. And requiring it would plainly contradict the basic purpose of the Act. *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019); *Southard v. Director, OWCP*, 732 F.2d 66, 71 (6th Cir. 1984). As the Board explained in *Ooten*, Employer's argument gives miners a false choice: forego life-saving medical treatment and remain eligible for compensation benefits; or receive treatment,[10] and render themselves – and their survivors – ineligible for compensation and future medical benefits. Such an absurd result cannot be tolerated.

Claimant is not required to prove he continues to suffer from totally disabling pneumoconiosis following his double-lung transplant, after indisputably establishing disability prior to his surgery. *See* 20 C.F.R. §725.701(b); *McCauley*, 25 BLR at 1-262-63; *Ooten*, BRB Nos. 18-0066 BLA and 18-0066 BLA-A, slip op. at 12-15; *Maggard*, BRB No. 18-0451 BLA, slip op. at 3-5; *Simpson*, BRB Nos. 11- 0684 BLA and 11-0834 BLA, slip op. at 5. Therefore, we affirm the ALJ's discrediting of Dr. Fino's opinion that Claimant does not have pneumoconiosis or a totally disabling respiratory impairment due to pneumoconiosis post-transplant. *Id*.; Decision and Order at 19-26; Employer's Brief at 11-14.

Employer also asserts the ALJ erred in considering Dr. Krefft's opinion regarding Claimant's disability post-transplant because it was inconsistent with the Act. Employer's Brief at 14-15; Employer's Reply Brief at 5-6. Remand is not required on this basis. It is uncontested Claimant was totally disabled by pneumoconiosis before his double-lung

[10] The Act and its regulations require a responsible operator to pay for a miner's lung transplant when the procedure is necessary to treat the miner's pneumoconiosis. *See Kenner v. Tenn. Consol. Coal Co*., 22 BLR 1-287, 1-289, 1-291-92 (2003) (employer required to pay "reasonable medical expenses associated with the miner's lung transplant" when the transplant "was necessary and related to the treatment of the miner's pneumoconiosis"); *see also* 33 U.S.C. §907(a); 20 C.F.R. §725.701(b).

transplant and, as discussed above, Claimant is not required to reestablish he suffers from totally disabling pneumoconiosis after his transplant. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge