U.S. Department of Labor

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

BRB No. 22-0485 BLA

BILLY H. MAYS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELKAY MINING COMPANY	)	
	)	
and	)	
	)	
PITTSON COMPANY	)	DATE ISSUED: 11/06/2023
	)	
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.

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

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits (2020-BLA-05164) 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 March 2, 2018.[1]

The ALJ found Claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309.[3] He further found Employer did not rebut the presumption and awarded benefits.

[1] This is Claimant's fourth claim for benefits. He filed his first claim on September 16, 1992. Director's Exhibit 1. However, the evidence of record for this claim is incomplete; thus, we are unable to discern the basis for its denial. Director's Exhibit 1. The district director denied Claimant's second claim because he failed to establish total disability. Director's Exhibit 2; Decision and Order at 2, 34. Claimant withdrew his third claim for benefits; it is thus considered "not to have been filed." Director's Exhibit 3; 20 C.F.R. §725.306(b).

[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] 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 she 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). Because the district director denied Claimant's prior claim for failure to establish total disability, Claimant was required to submit new evidence establishing that element of entitlement to warrant a review of this subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 2; Decision and Order at 2, 34.

On appeal, Employer contends the ALJ erred in finding it did not rebut the presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

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.[5] 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).

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,[6] or "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). The ALJ found Employer failed to rebut the presumption by either method.[7]

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established at least fifteen years of underground coal mine employment, total disability, a change in an applicable condition of entitlement, and invocation of the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6, 19-22, 34.

[5] 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); Director's Exhibit 7; Hearing Tr. at 22-23.

[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). "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).

[7] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 25-29.

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

The ALJ considered the opinions of Drs. Jarboe and Spagnolo.[8] Decision and Order at 30-31. Dr. Jarboe diagnosed Claimant with reactive airways disease, significant obesity, and hypertension. Employer's Exhibit 1. He initially diagnosed legal pneumoconiosis, but ultimately changed his opinion and concluded Claimant's ventilatory impairment is unrelated to coal mine dust exposure, and thus Claimant does not have legal pneumoconiosis. Employer's Exhibits 1, 5 at 30-31. Dr. Spagnolo opined Claimant's respiratory impairment is due to obesity and asthma, and there is no evidence that Claimant's coal mine dust exposure caused his restrictive defect. Employer's Exhibit 5 at 21. The ALJ found Dr. Jarboe's opinion internally inconsistent and Dr. Spagnolo's opinion inadequately reasoned. Decision and Order at 30-31. Thus, he concluded both opinions were insufficient to rebut the presumption of legal pneumoconiosis.

We first reject Employer's argument that the ALJ erred in discrediting Dr. Jarboe's opinion. Employer's Brief at 9-14. In his September 4, 2019 report, Dr. Jarboe stated he could not exclude coal mine dust as a contributing factor to Claimant's mild restrictive ventilatory defect because "subsequent studies have failed to show a marked increase in his residual volume," indicating that coal mine dust exposure, not cigarette smoking, was a significant contributing factor to his impairment. Employer's Exhibit 1 at 6. Consequently, Dr. Jarboe opined "it is appropriate to make a diagnosis of legal coal workers' pneumoconiosis." *Id*. at 7. However, during his May 20, 2021 deposition, Dr. Jarboe changed his opinion and testified the pattern of Claimant's restrictive impairment is not consistent with legal pneumoconiosis and instead is due to bronchial asthma, cigarette smoking, and weight gain. Employer's Exhibit 5 at 29-31. While Dr. Jarboe explained he changed his opinion based on additional information and the variable nature of Claimant's impairment, the ALJ permissibly found his opinion "confusing and conflicting,"[9] and thus

[8] The ALJ also considered the opinions of Drs. Gaziano, Green, and Nader, all of whom diagnosed legal pneumoconiosis. Director's Exhibit 19; Claimant's Exhibits 3, 4.

[9] The ALJ explained Dr. Jarboe contradictorily opined the functional loss from coal dust could not be determined with reasonable certainty, while also excluding coal dust as a contributing factor. Decision and Order at 31. Moreover, the ALJ noted other discrepancies in Dr. Jarboe's opinion, including inadequately addressing the etiology of

accorded it less weight. Decision and Order at 31; *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

Employer next argues the ALJ erred in discrediting Dr. Spagnolo's opinion. Employer's Brief at 15-17. We disagree.

Dr. Spagnolo excluded legal pneumoconiosis because Claimant's pulmonary function studies, obtained four years after he ceased his coal mine employment, "show[ed] no evidence of an obstructive or restrictive lung defect or impairment." Employer's Exhibit 2 at 11. He explained that he eliminated coal dust exposure as a contributing factor to Claimant's pulmonary impairment because "he had normal lung function [four] years after he left coal mine work." Employer's Exhibit 5 at 39. Contrary to Employer's contention, the ALJ permissibly found this reasoning unpersuasive in light of the Department of Labor's recognition in the regulations that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."[10] 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (medical opinion not in accord with the accepted view that pneumoconiosis can be latent and progressive may be discredited); Decision and Order at 31. Dr. Spagnolo also excluded

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Claimant's fixed impairment; relying on the variability of Claimant's pulmonary function studies when the testing also showed a decrease over time; and failing to explain, other than by speculating, why the drop in the results of Claimant's exercise arterial blood gas studies were not due to coal dust. *Id.*

[10] Employer further argues that the ALJ "overread the language in the Preamble" to the 2001 revised regulations in applying the latency and progressivity of pneumoconiosis principle to Dr. Spagnolo's opinion. Employer's Brief at 17. We disagree. The preamble sets forth how the Department of Labor has chosen to resolve questions of scientific fact. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013). The ALJ, as part of the deliberative process, may rely on the preamble as a guide in assessing the credibility of the medical evidence and in determining whether a physician has based his opinion on a principle that is antithetical to the preamble. *E. Associated Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502 (4th Cir. 2015); *Cochran*, 718 F.3d at 324; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012). Moreover, latency and progressivity are not discussed in the preamble alone; the regulations specifically state the disease "is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c).

legal pneumoconiosis based, in part, on the partial reversibility of Claimant's impairment in response to bronchodilators seen on his pulmonary function testing. Employer's Exhibits 2 at 11; 5 at 17-18, 21-23. The ALJ permissibly found this reasoning unpersuasive because Dr. Spagnolo failed to adequately explain why the irreversible portion of Claimant's pulmonary impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure.[11] *See Consol. Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 31.

Because the ALJ permissibly discredited the opinions of Drs. Jarboe and Spagnolo, the only opinions supportive of Employer's burden on rebuttal,[12] we affirm his finding that Employer did not disprove legal pneumoconiosis.[13] 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 31. Employer's failure to disprove legal pneumoconiosis precludes

[11] Employer contends Dr. Spagnolo's response at his deposition, in which he discussed airway remodeling, adequately addressed this issue. Employer's Brief at 15-16. However, Dr. Spagnolo discussed airway remodeling in general, agreeing with counsel that "if there is a complete lack of reversibility" after bronchodilation on pulmonary function testing, that factor would not "preclude a diagnosis of asthma" because if asthma is not well treated, "there may be an element of fixed airway obstruction." Employer's Exhibit 5 at 23. The ALJ's finding this reasoning unpersuasive, on the other hand, was based on Claimant's specific response after administration of bronchodilators. Decision and Order at 31. The ALJ found Claimant's pulmonary function testing was still qualifying after bronchodilator administration, a finding not contested by Employer, while Dr. Spagnolo reported that Claimant's testing returned to the lower level of normal after bronchodilator administration. *Id*. at 18-19; Employer's Exhibit 2 at 11.

[12] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Jarboe and Spagnolo on the issue of legal pneumoconiosis, we need not address Employer's remaining arguments regarding the weight accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 10-16.

[13] Employer contests the ALJ's crediting of Drs. Green's and Nader's opinions on the issue of legal pneumoconiosis. Employer's Brief at 17-22. Because Drs. Green and Nader diagnosed legal pneumoconiosis, their opinions do not assist Employer in rebutting legal pneumoconiosis. Decision and Order at 30-31; Claimant's Exhibits 3, 4. Thus we need not address Employer's arguments regarding these physicians' opinions. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

Upon finding Employer did not disprove pneumoconiosis, the ALJ next addressed 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). He rationally discounted Drs. Jarboe's and Spagnolo's disability causation opinions because neither doctor diagnosed legal pneumoconiosis, contrary to his finding that Employer failed to disprove Claimant has the disease.[14] *See Epling*, 783 F.3d

[14] Neither physician offered an opinion on this subject independent of his reasoning relating to the absence of pneumoconiosis.

at 504-05; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 33-34. 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.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge