U.S. Department of Labor

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

BRB No. 22-0509 BLA

BRENDA COLEMAN AND DEBRA BOLLING (o/b/o KERMIT GREENE, Deceased)	)	
Claimants-Respondents	)	
v.	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 10/24/2023
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Heather C. Leslie, Administrative Law Judge, United States Department of Labor.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

Before: BOGGS, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Heather C. Leslie's Decision and Order Granting Benefits (2020-BLA-06100) 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 miner's subsequent claim filed on April 17, 2019.[1]

The ALJ found the Miner had 27.47 years of qualifying coal mine employment and was totally disabled at the time of his death. 20 C.F.R. §718.204(b)(2). Thus, she found Claimants[2] invoked the presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[3] and established a change in an applicable condition of entitlement.[4] 20 C.F.R. §725.309(c). The ALJ further found Employer did not rebut the presumption, and she therefore awarded benefits.

On appeal, Employer argues the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption. Neither Claimants nor the Director, Office of Workers' Compensation Programs (the Director), filed a response brief.

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

[1] The Miner filed a prior claim on November 28, 1973, which the district director denied on June 23, 1980, for failure to establish any element of entitlement. Director's Exhibit 1.

[2] Claimants are the daughters of the Miner, who died on August 7, 2020. Claimants' Request to Have Claim Recaptioned Due to [the Miner's] Death. They are pursuing this claim on his behalf.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had 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. §92l(c)(4) (2018); 20 C.F.R. §718.305(b).

[4] 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 he finds "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(d); *see 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 Miner failed to establish any element of entitlement in his prior claim, Claimants had to submit new evidence establishing at least one element to obtain a review of the Miner's subsequent claim on the merits. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c); Director's Exhibit 4.

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

Rebuttal of the Section 411(c)(4) Presumption

Because Claimants invoked the Section 411(c)(4) presumption,[6] the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[7] 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 establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did 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).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4 and n.4; Director's Exhibit 5.

[6] We affirm, as unchallenged on appeal, the ALJ's findings that the Miner had 27.47 years of qualifying coal mine employment, he was totally disabled, and that Claimants 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 6, 20.

[7] "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 that is 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).

Employer relies on Drs. Sargent's and Fino's opinions that the Miner did not have legal pneumoconiosis. Director's Exhibit 21; Employer's Exhibits 1, 4, 6, 7. The ALJ found their opinions unpersuasive and insufficient to satisfy Employer's burden of proof. Decision and Order at 26-28.

Employer asserts the ALJ applied the wrong legal standard by requiring its medical experts to "rule out" legal pneumoconiosis. Employer's Brief at 9. It also argues the ALJ did not adequately explain her credibility determinations. *Id*. at 7-14. We disagree.

The ALJ properly recognized that in order to disprove legal pneumoconiosis, Employer must affirmatively establish that the Miner's respiratory impairment was not "significantly related to or significantly aggravated by dust exposure in coal mine employment." *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018); Decision and Order at 25. Applying the correct legal standard, the ALJ sufficiently explained why she found neither Dr. Sargent's nor Dr. Fino's opinion was well reasoned.

Dr. Sargent prepared a report based on his review of the evidence. As the ALJ noted, Dr. Sargent understood the Miner stopped work in the mines in 1992. He stated that "because spirometry done in 1980 was normal after 15 years of coal mine employment, 'any deterioration in lung function after 1980 was due to smoking and to generalized weakness due to metastatic prostate cancer.'" Decision and Order at 15, *quoting* Employer's Exhibit 4 at 1. Dr. Sargent opined the Miner's disabling respiratory impairment was related to smoking and metastatic prostate cancer because his impairment developed at the same time as his cancer and because the Miner stopped working in the mines twenty to thirty years ago. Decision and Order at 16; Employer's Exhibit 7 at 15.

Dr. Fino reviewed the Miner's medical records and examined him six months before his death. He opined the Miner had a moderate but disabling impairment due to prostate cancer and smoking but not coal mine dust exposure. Decision and Order at 14; Director's Exhibit 21 at 15; Employer's Exhibit 6 at 13. He noted the waxing and waning of the Miner's impairment over time was consistent with smoking and discussed literature comparing the effects of smoking and coal mine dust exposure. Decision and Order at 14, 27; Employer's Exhibit 6.

Contrary to Employer's contention, the ALJ permissibly found Dr. Sargent's reliance on the remoteness of the Miner's coal mine employment as a basis to exclude legal pneumoconiosis inconsistent with both the regulations and preamble to the revised 2001 regulations, which recognize pneumoconiosis can be a latent and progressive disease that can develop or worsen years after a miner leaves the mines. 20 C.F.R. §718.201(c)(1); *see* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000) ("[I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant

pulmonary impairment after a latent period."); *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 both latent and progressive may be discredited); Decision and Order at 27.

Additionally, considering both Dr. Sargent's and Dr. Fino's opinions, the ALJ acknowledged the Miner's prostate cancer had an impact on his impairment at the end of his life. Decision and Order at 28. However, she permissibly found neither Dr. Sargent nor Dr. Fino adequately explained why he completely discounted the Miner's twenty-seven years of underground coal mine dust exposure as a significant contributing or aggravating factor for the Miner's impairment along with his cancer diagnosis and smoking history. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 28. She also permissibly found both opinions unpersuasive in view of the Department of Labor's recognition in the preamble that the risks of coal mine dust and smoking may be additive. *See* 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. at 79,940; *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, 313-14 (4th Cir. 2012); Decision and Order at 28.

Employer's arguments are a request to reweigh the evidence which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ permissibly discredited the opinions of Drs. Sargent and Fino, we affirm her determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing the Miner did not have legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 28. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis.[8] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ also found Employer did not rebut the Section 411(c)(4) presumption by establishing "no part of the [M]iner'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); *see Epling*, 783 F.3d at 502; Decision and Order at 29. Specifically, the ALJ discredited the opinions of Drs. Sargent and Fino regarding the cause of the Miner's respiratory disability

[8] Because we affirm the ALJ's findings on legal pneumoconiosis, we need not address Employer's contention the ALJ erred in finding it did not disprove clinical pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 3-7.

for the same reasons she found their opinions unpersuasive on legal pneumoconiosis. The ALJ accurately noted that as all the physicians agree the Miner's respiratory impairment is disabling, "'[t]here was no need for [her] to analyze the opinions a second time' at disability causation where [Employer] failed to establish that the impairment was not legal pneumoconiosis." Decision and Order at 29 n.35, *quoting Brandywine Explosives & Supply v. Kennard*, 790 F.3d 657, 668 (6th Cir. 2015); *see Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 186-87 (4th Cir. 2014) (death causation satisfied where the court found the miner's COPD constituted legal pneumoconiosis and all medical experts agreed COPD contributed to the miner's death); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 1-256 (2019); Employer's Brief at 14-16.[9]

Having rejected Employer's arguments on legal pneumoconiosis and because it is supported by substantial evidence, we affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing no part of the Miner's total respiratory disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 29.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[9] Neither physician explained how pneumoconiosis played no role in the Miner's impairment apart from having concluded the Miner did not have pneumoconiosis.