U.S. Department of Labor

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

BRB No. 20-0340-BLA

JOSEPH S. NIXON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KEYSTONE COAL MINING CORPORATION	)	
	)	
and	)	
	)	DATE ISSUED: 09/24/2021
CONSOL ENERGY, INCORPORATED	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long) Ebensburg, Pennsylvania, for Claimant.

Deanna Lyn Istik (SutterWilliams, LLC) Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2019-BLA-05864) rendered on a subsequent claim filed March 23, 2018,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with thirty-four years of coal mine employment, with at least fifteen years occurring underground, and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked 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] and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] Finally, the ALJ found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[4] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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[1] ALJ Michael P. Lesniak denied Claimant's initial claim, filed on March 15, 2002, for failure to establish pneumoconiosis. Director's Exhibit 1 at 17.

[2] 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 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 he 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)(1); *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 Claimant did not establish pneumoconiosis in his prior claim, he had to submit evidence establishing this element in order to obtain review of the merits of his current claim. *Id*. Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 by invoking the Section 411(c)(4) presumption. *See Eastern Associated Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-12 (4th Cir. 2015).

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established thirty-four years of coal mine employment with at least fifteen years occurring underground, total disability at 20 C.F.R. §718.204(b)(2), and invocation of the Section

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 & 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 of total disability due to pneumoconiosis, the burden shifted to Employer to establish Claimant has neither clinical nor legal pneumoconiosis[6] 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); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). The ALJ found Employer failed to rebut the presumption under either method. Decision and Order at 24.

Clinical Pneumoconiosis

To disprove clinical pneumoconiosis, Employer must establish Claimant does not have any of the 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).

411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 7, 22.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hr. Transcript at 11.

[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). 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).

X-Rays and CT scans

The ALJ considered five readings of two x-rays. Drs. Ahmed and DePonte, each dually qualified as B readers and Board-certified radiologists, read the June 12, 2018 x-ray as positive for simple clinical pneumoconiosis, while Dr. Meyer, also dually qualified, read it as negative. Director's Exhibits 16, 21; Employer's Exhibit 1. Based on the preponderance of the readings by the dually-qualified radiologists, the ALJ found the June 12, 2018 x-ray "positive for the presence of simple clinical coal workers' pneumoconiosis." Decision and Order at 11. Dr. Meyer provided the only reading of the July 30, 2019 x-ray as negative for clinical pneumoconiosis, therefore the ALJ considered the film to be negative. *Id.*; *see* Employer's Exhibit 6. Because one x-ray was positive for pneumoconiosis and one x-ray was negative, the ALJ found the x-ray evidence as a whole to be in equipoise and therefore Employer did not satisfy its burden to disprove clinical pneumoconiosis. Decision and Order at 11.

Employer generally argues that "the chest x-rays are overwhelmingly negative." Employer's Brief at 6. The Board's limited scope of review requires a party challenging the Decision and Order below to address that decision and demonstrate why substantial evidence does not support the result reached or why it is contrary to law. *See* 20 C.F.R. §§802.211(b), 802.301(a); *see Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Because the ALJ conducted both qualitative and quantitative analyses of the conflicting readings and Employer does not identify any specific error in the ALJ's weighing of the x-ray evidence, we affirm it. *See Sea "B" Mining Company v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992).

Similarly, the ALJ considered three readings of a computed tomography (CT) scan dated August 11, 2016. Dr. DePonte read the CT scan as positive for simple coal workers' pneumoconiosis, while Drs. Meyer and Basheda interpreted it as negative for simple pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibits 2, 5. Noting Dr. Basheda is a B reader and not a Board-certified radiologist, the ALJ gave his negative reading less weight. Decision and Order at 12. Because there was an equal number of positive and negative readings by dually qualified radiologists, the ALJ found the CT scan evidence was in equipoise and insufficient to support finding Claimant does not have clinical pneumoconiosis. *Id.* Although Employer generally asserts the weight of the CT scan evidence is negative, it does not explain how the ALJ erred in weighing Dr. Basheda's reading or in determining the CT scan evidence is in equipoise. *See Sarf*, 10 BLR at; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); Employer's Brief at 7-9. We therefore affirm the ALJ's finding that Employer did not disprove clinical pneumoconiosis based on the CT scan evidence.

Medical Opinions

The ALJ considered four medical opinions. He found: Dr. Zlupko diagnosed clinical pneumoconiosis based on the x-ray evidence, pulmonary function studies and blood gas studies; Dr. Basheda could not rule out clinical pneumoconiosis; and Drs. Fino and Rosenberg opined Claimant does not have clinical pneumoconiosis. Decision and Order at 13-14; Director's Exhibit 16; Claimant's Exhibit 3 at 7; Employer's Exhibits 3 at 11, 4 at 23. The ALJ determined that the opinions of Drs. Zlupko and Basheda were better supported by the diagnostic evidence and concluded that the totality of the medical opinions did not establish the absence of clinical pneumoconiosis. Decision and Order at 15.

Employer alleges the ALJ mischaracterized Dr. Basheda's opinion. It notes that while Dr. Basheda first stated he could not exclude clinical pneumoconiosis based on the x-ray evidence, he later read the August 11, 2016 CT scan as negative, thereby undermining his initial conclusion. Employer's Brief at 8; Employer's Exhibits 4 at 23, 5 at 1. Even if we were to agree with Employer that Dr. Basheda diagnosed clinical pneumoconiosis, it has not shown why remand is necessary since the ALJ specifically found Dr. Basheda's negative CT scan reading unpersuasive and entitled to little weight. *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"). Moreover, because the ALJ found the x-ray and CT scan evidence underlying each of the physicians' opinions to be in equipoise, we see no error in his overall determination that the medical opinion evidence is insufficient to disprove clinical pneumoconiosis. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986); Decision and Order at 14-15. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption by establishing Claimant does not have clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 23 (3d Cir. 1997); Decision and Order at 14-15.

Disability Causation

The ALJ also found Employer failed to establish that no part of Claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 22-24. Aside from its assertion that Claimant does not have pneumoconiosis, Employer states only that Drs. Basheda's and Fino's reasoned medical opinions establish that "without the resolution of Claimant's pleural effusion, there is no way to assess [the extent to which lung disease contributes to]

Claimant's impairment."[7] Employer's Brief at 15-16. However, because Employer does not challenge the ALJ's finding that Claimant successfully invoked the Section 411(c)(4) presumption, Employer's Brief at 5, it now has the burden to *affirmatively* establish that clinical pneumoconiosis did not contribute to Claimant's disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(d)(1)(ii); *Minich*, 25 BLR at 1-150. As Employer asserts, Drs. Basheda and Fino indicated they were unable to discern the extent to which Claimant's presumed clinical pneumoconiosis contributed to Claimant's respiratory disability.[8] Employer's Exhibits 3, 4, 5. We see no error in the ALJ's conclusion that their opinions are insufficient to affirmatively establish that no part of Claimant's respiratory disability is due to clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Minich*, 25 BLR at 1-150; *see Soubik*, 366 F.3d at 234 (citing *Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70 (4th Cir. 2002) (a doctor's opinion as to causation may not be credited unless there are "specific and persuasive reasons" for concluding the doctor's view on causation is independent of the doctor's mistaken belief that the miner did not have pneumoconiosis)). Thus, we affirm the ALJ's finding that Employer failed to

[7] Dr. Basheda diagnosed chronic obstructive pulmonary disease and was unable to exclude coal dust exposure as a contributing cause. Employer's Exhibit 4 at 25. He further opined Claimant does not have clinical pneumoconiosis and stated he was "[u]nable to assess [Claimant's] impairment/disability at this time due to the presence of a moderate to large left pleural effusion, which may adversely affect pulmonary function test results and oxygenation studies." *Id*. at 26; Employer's Exhibit 5 at 1. Dr. Fino opined Claimant does not have clinical or legal pneumoconiosis; he has obstructive and restrictive defects due to obesity, age, and a pleural effusion. Employer's Exhibit 3 at 11-12. He further stated: "the values for the [the pulmonary function tests] from June of 2018 and April of 2019 cannot be relied upon as being indicative of intrinsic lung disease because those values are distorted by the pleural effusion;" "I cannot comment on the permanency of his disability until the effusion has resolved;" and, "[t]he pleural effusion is not related to coal mine dust exposure." *Id*. at 12

[8] The ALJ found Drs. Zlupko, Basheda, and Rosenberg either attributed Claimant's disabling pulmonary impairment to his coal mine dust exposure or could not exclude it from having contributed to it and therefore their opinions "do nothing to rebut the presumption." Decision and Order at 24. He found Dr. Fino focused on Claimant's pleural effusion. *Id*.

rebut the Section 411(c)(4) presumption.[9] *See* 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305; Decision and Order at 24.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[9] Because Employer has failed to rebut the presumption that Claimant is totally disabled due to clinical pneumoconiosis, we need not reach Employer's challenges to the ALJ's findings concerning legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).