U.S. Department of Labor

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

BRB No. 20-0357 BLA

CLARENCE A. HARDING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LONE MOUNTAIN PROCESSING, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 09/23/2021
ARCH RESOURCES, INCORPORATED	)	
	)	
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Scott R. Morris's[1] Decision and Order Awarding Benefits (2016-BLA-05535) rendered on a miner's claim filed on February 2, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with thirty-seven years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he 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] The ALJ further found Employer did not rebut the presumption and awarded benefits commencing February 2015, the month in which Claimant filed his claim.

On appeal, Employer argues the ALJ erred in finding it failed to rebut the presumption and in determining the commencement date for benefits. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.[3]

[1] ALJ Morris noted this case was initially assigned to ALJ Theresa C. Timlin, who held a hearing and issued a Decision and Order Awarding Benefits on January 18, 2018. Employer appealed to the Benefits Review Board. The Director, Office of Workers' Compensation Programs, filed a Motion to Remand based on the United States Supreme Court's decision in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). The Board granted the motion, vacated Judge Timlin's decision, and remanded the case for her to "reconsider the substantive and procedural actions taken and to issue a decision accordingly." *Harding v. Lone Mountain Processing, Inc.*, BRB No. 18-0199 BLA (May 30, 2018) (Order) (unpub.). The case was subsequently assigned to ALJ Morris, who held a new hearing on April 16, 2019.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that Claimant 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] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 20.

The 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, 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 that Claimant has neither legal nor clinical pneumoconiosis,[5] 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). The ALJ found Employer failed to establish rebuttal by either method.

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." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-155 n.8 (2015). The Sixth Circuit holds Employer can "disprove the existence of legal pneumoconiosis by showing that [Claimant's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "[A]n employer may prevail under the not 'in part' standard by showing that coal-dust exposure had no more than a *de minimis* impact on the miner's lung

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3 n.3; Director's Exhibit 3; Hearing Transcript at 13.

[5] "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).

impairment." *Id*. at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

Employer relies on the opinions of Drs. Dahhan and Jarboe to disprove legal pneumoconiosis. The ALJ found their opinions inadequately reasoned. Decision and Order at 26-27.

Employer initially contends the ALJ failed to properly resolve the conflict between the medical opinions of Drs. Dahhan and Jarboe, who diagnosed a restrictive impairment unrelated to coal mine dust exposure, and Dr. Chavda, who opined Claimant has both an obstructive and restrictive impairment significantly related to his coal mine employment. Employer's Brief at 15-16. Employer's contention of error has no merit. Because Employer has the burden of proof on rebuttal, the ALJ properly focused his analysis on whether Employer's experts gave reasoned opinions regarding the etiology of the restrictive impairment they diagnosed. *See Morrison v. Tenn. Consol. Co.*, 644 F.3d 473, 479-80 & n. 5 (6th Cir. 2011). As explained below, we see no error in the ALJ's finding that Employer's experts did not persuasively explain why Claimant does not have legal pneumoconiosis.

Dr. Dahhan examined Claimant and opined in his initial report that Claimant has a "non-parenchymal restrictive ventilatory impairment as confirmed by the reduction of his spirometry values in the face of normal diffusion capacity consistent with chest wall abnormalities and obesity." Director's Exhibit 31 at 2. He summarily stated that Claimant's "pulmonary impairment and secondary disability [have] not resulted from the inhalation of coal dust" but are "due to a non-parenchymal restrictive defect such as seen due to chest wall abnormalities and obesity which are conditions of the general public at large and not caused by, related to, contributed to, or aggravated by [the] inhalation of coal dust." *Id*. In a supplemental report, Dr. Dahhan acknowledged Claimant's coal mine dust exposure was sufficient to be "injurious to the respiratory system in a susceptible host," but again summarily concluded Claimant's pulmonary impairment is due to a "markedly elevated right hemidiaphragm and secondary collapse of the right lung" unrelated to coal mine dust exposure. Employer's Exhibit 4 at 3. We see no error in the ALJ's permissible determination that Dr. Dahhan's opinion is lacking sufficient rationale and does not adequately explain why he completely eliminated thirty-seven years of coal mine dust exposure as a causative or aggravating factor for Claimant's respiratory impairment. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 26; Director's Exhibit 31 at 2; Employer's Exhibit 4 at 3.

Dr. Jarboe similarly opined Claimant does not have legal pneumoconiosis and explained that "[i]f [coal mine dust exposure] were *causing* the restrictive disease" it would

produce one of two outcomes not seen in Claimant's case: "a fibrotic reaction to coal mine dust in the lung parenchyma" or "air trapping and [a] reduction of the forced vital capacity." Employer's Exhibit 7 at 9 (emphasis added). Dr. Jarboe attributed Claimant's restrictive impairment to paralysis or weakness of the right diaphragm and possibly bronchial asthma. *Id*. at 9-10. The ALJ permissibly found Dr. Jarboe failed to adequately explain why coal mine dust exposure did not also contribute to Claimant's restrictive impairment given he is a non-smoker and worked for thirty-seven years in coal mine employment. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Clark*, 12 BLR at 1-155; Decision and Order at 26-27; Employer's Exhibits 7 at 9-10; 9 at 1-2.

Employer asserts the ALJ did not adequately explain his reasons for rejecting its experts' opinions in accordance with the Administrative Procedure Act.[6] To the contrary, the ALJ fully considered the physicians' opinions and identified why he found them not credible; he thus satisfied his duty under the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 15-17, 26-27. Claimant invoked the rebuttable presumption and thus is presumed to have a respiratory condition substantially aggravated by coal mine dust exposure. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. Dr. Dahhan stated coal mine dust was not an aggravating factor but the ALJ permissibly determined he did not explain his rationale. Decision and Order at 15-16, 26; Director's Exhibit 31 at 2; Employer's Exhibit 4 at 3. Dr. Jarboe did not specifically address whether coal mine dust exposure aggravated Claimant's restrictive impairment, couching his opinion in terms of what "caused" it.[7] *See* Decision and Order at 17-18, 26-

[6] The Administrative Procedure Act (APA) requires the ALJ to consider all relevant evidence in the record, and to set forth his "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If a reviewing court can discern what the ALJ did and why he did it, the duty of explanation under the APA is satisfied. *See Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354 (3d Cir. 1997); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013).

[7] Employer appears to acknowledge that Dr. Jarboe does not address aggravation because it argues physicians should not be expected to specifically address whether a miner has legal pneumoconiosis, but only what they believe to be the cause of any respiratory condition or impairment. Employer's Brief at 17-18. However, Employer in this case has the burden to prove Claimant's impairment is not significantly related to, or substantially aggravated by, coal mine dust exposure and bears the risk of non-persuasion if its evidence is found insufficient on rebuttal. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994).

27; Employer's Exhibits 7 at 10; 9 at 2. Thus, the ALJ permissibly found neither opinion adequate to satisfy Employer's burden of proof. 20 C.F.R. §718.201(a)(2)(b); Decision and Order at 26-27; *see Rowe*, 710 F.2d at 255; *Clark*, 12 BLR at 1-155.

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the ALJ's determination that Employer did not disprove the existence of legal pneumoconiosis.[8] 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[9] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ also found Employer failed to rebut the presumption by establishing "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R. §718.305(d)(1)(ii).

Contrary to Employer's contention, the ALJ permissibly discredited Dr. Dahhan's opinion because while he identified other causes of Claimant's disability, he did not explain why "no part" of it was due to legal pneumoconiosis, aside from his mistaken belief that Claimant does not have the disease. *See Owens*, 724 F.3d at 558; *Clark*, 12 BLR at 1-155; Decision and Order at 30; Director's Exhibit 31 at 2; Employer's Exhibit 4 at 3. Because neither Dr. Dahhan nor Dr. Jarboe diagnosed legal pneumoconiosis, contrary to the ALJ's finding Claimant has the disease, we affirm his finding that their opinions are not credible on disability causation. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 30-31; Employer's Exhibits 7 at 9-10; 9 at 1-2. Therefore, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption by establishing no part of Claimant's total disability is due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

[8] Because Employer has the burden of proof and we affirm the ALJ's discrediting of its medical experts, we need not address its argument that the ALJ erred in crediting Dr. Chavda's opinion on legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 16, 18; Decision and Order at 27; Director's Exhibits 15, 27, 30.

[9] Consequently, we need not address Employer's argument that the ALJ erred in finding Employer failed to disprove clinical pneumoconiosis. Employer's Brief at 5-15.

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis and Employer did not rebut it, we affirm the ALJ's award of benefits.

Commencement Date for Benefits

The date for the commencement of benefits is the month in which Claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date is not ascertainable, benefits commence the month the claim was filed, unless credible evidence establishes Claimant was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

The ALJ found the onset date of Claimant's total disability due to pneumoconiosis is not ascertainable from the record and awarded benefits commencing February 2015, the month in which Claimant filed his claim. Decision and Order at 31. Employer maintains the earliest date benefits can commence is February 2019, the month in which Dr. Jarboe evaluated Claimant and obtained a qualifying pulmonary function study.[10] We disagree.

Contrary to Employer's contention, the onset date is not established by the first "qualifying" pulmonary function study because this evidence shows only that Claimant became totally disabled at some time prior to the date of that evidence. *See Owens*, 14 BLR at 1-50; *Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-109 (1985). The ALJ found Claimant established total disability based on the qualifying, pre-bronchodilator values of the February 14, 2019 and March 15, 2019 pulmonary function studies, and he further credited Dr. Chavda's opinion that Claimant's non-qualifying June 1, 2015 pulmonary function study showed an impairment that would preclude Claimant from performing his usual coal mine employment. Decision and Order at 19. Because it is supported by substantial evidence, we affirm the ALJ's finding that the onset date of Claimant's total disability is not ascertainable from the record; therefore, benefits should commence in February 2015, the month in which Claimant filed his claim. 20 C.F.R. §725.503(b); *see Edmiston*, 14 BLR at 1-69; *Owens*, 14 BLR at 1-47; Decision and Order at 31.

[10] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge