U.S. Department of Labor

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

BRB No. 20-0397 BLA

EARL DAVID FERGUSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ADDINGTON, INCORPORATED	)	
	)	DATE ISSUED: 09/15/2021
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 Awarding Benefits of Natalie A. Appetta, 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.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2019-BLA-05547) 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 the third request for modification of a subsequent claim filed on August 31, 2009.[1]

In a November 30, 2011 Decision and Order Denying Benefits, ALJ Richard A. Morgan denied the claim because Claimant failed to establish any element of entitlement, and thus failed to establish a change in an applicable condition of entitlement. 20 C.F.R. §725.309; Director's Exhibit 54.

Pursuant to Claimant's third request for modification filed on January 9, 2017,[2] ALJ Appetta (the ALJ) issued her Decision and Order Awarding Benefits that is the subject of the current appeal. The ALJ found Claimant established twenty-seven years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant established a change in an applicable condition of entitlement and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309. She further found Employer did not rebut the presumption and, consequently, Claimant established a change in conditions. 20 C.F.R. §725.310. Finding granting modification would render justice under the Act, she awarded benefits.

[1] The district director denied Claimant's initial claim on May 4, 2004 because he failed to establish any element of entitlement. Director's Exhibit 1.

[2] Claimant filed two requests for modification between ALJ Morgan's initial denial of the claim and the filing of the instant request for modification. The district director denied Claimant's first request on July 16, 2012, because he failed to establish a basis for modification by establishing a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310; Director's Exhibit 57. ALJ Morgan denied his second request for modification in a November 29, 2016 Decision and Order Denying Benefits because Claimant again failed to establish a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310; Director's Exhibit 101.

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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.

On appeal, Employer argues the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not 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 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 Associates, 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 did not establish rebuttal by either method.[7]

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[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established twenty-seven years of underground coal mine employment, total disability at 20 C.F.R. §718.204(b)(2), invocation of the Section 411(c)(4) presumption, and a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §725.309; Decision and Order at 5, 22.

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 24.

[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).

[7] The ALJ found Employer disproved the existence of clinical pneumoconiosis. Decision and Order at 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." 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 United States Court of Appeals for the Sixth Circuit holds this standard requires Employer to show 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 impairment." *Id*. at 407, *citing Arch on the Green v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

Employer argues the ALJ erred in discrediting the opinions of Drs. Basheda and Zaldivar that Claimant does not have legal pneumoconiosis. Employer's Brief at 12-16, 19-21. We disagree.

Dr. Basheda opined Claimant's most recent arterial blood gas testing demonstrates severe disabling hypoxemia at rest and during exercise. Employer's Exhibit 1 at 15-17. He had no explanation for the hypoxemia but concluded the impairment is not consistent with legal pneumoconiosis because pulmonary function testing reveals no evidence of an obstructive or restrictive lung disease or a diffusion impairment. *Id*. at 15-17, 23, 38. He recommended Claimant undergo additional examination in the form of CT scans, echocardiograms, and liver function tests to determine the cause of the hypoxemia. *Id*.

Dr. Zaldivar also opined Claimant has hypoxemia on arterial blood gas testing that is unrelated to coal mine dust exposure. Employer's Exhibit 2 at 15-16, 22-23. He stated "further investigation regarding heart disease, vascular disease or obstructive sleep apnea" is necessary to address the cause of the impairment. *Id*. at 15-16, 23-24. He excluded coal mine dust exposure because Claimant's pulmonary function testing revealed no ventilatory or diffusion impairment. *Id*. at 24-25.

In weighing these medical opinions, the ALJ correctly noted the regulations do not limit legal pneumoconiosis to only obstructive and restrictive lung impairments. Decision and Order at 27. The definition of 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) (emphasis added). This "includes, *but is not limited to*, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(b) (emphasis added). Further, the term "arising out of coal mine employment" 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) (emphasis added). The ALJ permissibly found the opinions of Drs. Basheda and Zaldivar unpersuasive because they relied "upon a narrower definition of legal pneumoconiosis, rather than the regulatory definition [of] legal pneumoconiosis," and did not adequately explain why Claimant's hypoxemia is not significantly related to, or substantially aggravated by, coal mine dust exposure. Decision and Order at 27; *see Young*, 947 F.3d at 405; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Because the ALJ permissibly discredited the opinions of Drs. Basheda and Zaldivar that Claimant does not have legal pneumoconiosis, we affirm her determination that Employer did not disprove the existence of the disease. Decision and Order at 29. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[8] *See* 20 C.F.R. 718.305(d)(2)(i).

Disability Causation

The ALJ next addressed whether Employer established "no part of [Claimant]'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). She permissibly discredited[9] the disability causation opinions of Drs. Basheda and Zaldivar because neither diagnosed legal pneumoconiosis, contrary to her finding that Employer failed to disprove the existence of

[8] Drs. Green and Alvarez opined Claimant has legal pneumoconiosis. Claimant's Exhibits 10, 11. Contrary to Employer's argument, the ALJ did not credit these opinions or rely on them to find Employer did not meet its burden of disproving legal pneumoconiosis. Employer's Brief at 9-12. She correctly found that, because they diagnosed legal pneumoconiosis, their opinions do not aid it in rebutting the presumption of the disease. *Hawkinberry v. Monongalia County Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015); Decision and Order at 26.

[9] As the ALJ discredited the opinions of Drs. Basheda and Zaldivar on disability causation, we conclude her statement that "Employer has ruled out pneumoconiosis as a cause of Claimant's total respiratory or pulmonary disability" to be a harmless typographical error. Decision and Order at 31; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

the disease.[10] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 30-31. 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)(2)(ii). Thus we affirm her finding Claimant established modification by establishing a change in conditions.[11] 20 C.F.R. §725.310.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[10] Because the ALJ provided a valid reason for discrediting Dr. Zaldivar's disability causation opinion, any error in discrediting his opinion for other reasons is harmless. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 16-18.

[11] As it is unchallenged, we affirm the ALJ's finding that granting modification renders justice under the Act. *Skrack*, 6 BLR at 1-711; Decision and Order at 9.