U.S. Department of Labor

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

BRB Nos. 20-0490 BLA
and 20-0490 BLA-A

LAYTON CLINE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
BRANDY MINING, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 09/24/2021
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
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.

Leonard Stayton, Inez, Kentucky, for Claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal and Claimant cross-appeals Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits (2018-BLA-05879) 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 May 9, 2016.[1]

The ALJ credited Claimant with twenty-one years of underground coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus he 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.[2] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. It also argues the ALJ erred in crediting Claimant with at least fifteen years of underground coal mine employment and in finding he invoked the Section 411(c)(4) presumption. Alternatively it contends the ALJ erred in finding it did not rebut the presumption.[3] Claimant responds in support of the award of benefits. The Director, Office

[1] Claimant filed four prior claims for benefits. Director's Exhibits 1-4. The district director denied the most recent claim on November 18, 2014, because Claimant failed to establish total disability. Director's Exhibit 4.

[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] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established total disability and a change in an applicable condition of entitlement. *See*

of Workers' Compensation Programs (the Director), has filed a limited response, urging rejection of Employer's constitutional arguments. On cross-appeal, Claimant argues the ALJ erred in discrediting Dr. Gaziano's opinion that Claimant is totally disabled due to pneumoconiosis. Neither Employer nor the Director has responded to Claimant's cross-appeal.

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 31-34. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

Invocation of the Section 411(c)(4) Presumption - Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines, or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination based on a reasonable method of calculation

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Skrack v. Island Creek Coal Co., 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.204(b), 725.309(c); Decision and Order at 16-19.

[4] 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); Decision and Order at 4; Hearing Tr. at 12; Director's Exhibit 7.

that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

In calculating the length of Claimant's coal mine employment, the ALJ considered Claimant's employment history form, Social Security Administration (SSA) records, and hearing testimony. Decision and Order at 4-6; Director's Exhibits 6, 7, 9; Hearing Tr. at 11-13. He noted the SSA records include earnings from various coal mine companies[5] that employed Claimant from 1964 to 1988, excluding the years of 1965 and 1982 because no coal mine employment wages were listed. Decision and Order at 4; Director's Exhibit 9.

Referencing the formula at 20 C.F.R. §725.101(a)(32)(iii),[6] the ALJ divided Claimant's yearly earnings as reported in his SSA records by the coal mine industry's average yearly earnings for 125 days of employment, as reported in Exhibit 610[7] of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*. Decision and Order at 4-5. For each year in which Claimant's earnings met or exceeded the Exhibit 610 average yearly earnings for 125 days of employment, the ALJ credited Claimant with a full year of coal mine employment. *Id*. at 5. For the years in which Claimant's earnings fell short, he credited him with a fractional year calculated by dividing his annual earnings by the Exhibit 610 average yearly earnings for 125 days of employment. *Id*. In applying this formula,

[5] The ALJ specifically noted the SSA records show earnings from Brandy Mining, New Elk Coal, Cline Brothers Mining, ABC Coal, Peter White Coal Mining, Jumacris Mining, CNB Coal, RJF Coal, Powellton Company, MARC, L&D Coal, D&A Coal, B&D Coal, L&C Coal, P&F Coal, and Ned Hollow Coal. Decision and Order at 4.

[6] Pursuant to 20 C.F.R. §725.101(a)(32)(iii):

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's daily average earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

The BLS data is reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*.

[7] The "average yearly earnings" figures appear in the center column of Exhibit 610 and reflect multiplication of the "average daily wage" by 125 days.

the ALJ credited Claimant with seventeen years of coal mine employment for the years 1964 to 1988. *Id*.

The ALJ independently found Claimant credibly testified "he was paid in cash" when he worked for Ned Hollow Coal Company for four years. Decision and Order at 5; Hearing Tr. 11-12, 13. Thus he credited Claimant for an additional four years of coal mine employment with this operator. Adding the four additional years, the ALJ found Claimant established twenty-one years of underground coal mine employment. Decision and Order at 4-6.

We agree with Employer's argument that the ALJ erred in finding the SSA records establish seventeen years of coal mine employment for the years 1964 to 1988. Employer's Brief at 5-9. To credit a miner with a year of coal mine employment, the ALJ must first determine whether that miner was engaged in coal mine employment for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). *If the threshold one-year period is met*, the ALJ must then determine whether the miner worked for at least 125 working days within that one-year period.[8] 20 C.F.R. §725.101(a)(32) (emphasis added). Proof that a miner worked at least 125 days or that a miner's earnings exceeded the industry average for 125 days of work in a given year, however, does not satisfy the requirement that such employment occurred during a 365-day period and therefore, in itself, does not establish one full year of coal mine employment as defined in the regulations.[9] *See Clark*, 22 BLR at 1-281. In attempting to apply the regulatory formula for the years 1964 to 1988,

[8] If the threshold one-year period is met, "it must be presumed, in the absence of evidence to the contrary, that the miner spent 125 working days in such employment[,]" in which case the miner would be entitled to credit for one full year of employment. 20 C.F.R. §725.101(a)(32)(ii).

[9] The method set forth at 20 C.F.R. §725.101(a)(32)(iii) – "divid[ing] the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year" – results in an estimate of the number of *days* that a miner worked in a given year, but does not establish that such employment occurred during a 365-day period. 20 C.F.R. §725.101(a)(32)(iii). The ALJ deviated from this formula by comparing Claimant's income to the yearly income of employees who worked for 125 days, rather than dividing Claimant's income by the daily average. Under the ALJ's method of calculation, Claimant can be said to have established at least 125 working days, but not that such work occurred during "a period of one calendar year . . . or partial periods totaling one year." 20 C.F.R. §725.101(a)(32).

the ALJ failed to acknowledge the threshold inquiry of whether Claimant established a calendar year of employment, prior to determining whether Claimant worked at least 125 days in a given year or a fraction thereof. *See Mitchell*, 479 F.3d at 334-36; *Clark*, 22 BLR at 1-281.

We also agree with Employer's argument that the ALJ rendered inconsistent findings when crediting Claimant with an additional four years of coal mine employment with Ned Hollow Coal Company based on his hearing testimony. Employer's Brief at 9-13. Claimant indicated "the first place [he] worked at the mines was Ned Hollow Coal Company in 1964." Hearing Tr. at 11. He stated he worked there "[a]bout four years." *Id*. at 12. When asked why the SSA records reflect only $37.55 of earnings in 1964, Claimant stated he was "paid in cash." *Id*. at 12-13. Finding Claimant's testimony credible,[10] the ALJ concluded Claimant had four years of coal mine employment with Ned Hollow Coal Company starting in 1964. Decision and Order at 4-5.

As discussed above, however, the ALJ independently found the SSA records establish 0.01 years of coal mine employment with Ned Hollow Coal Company in 1964, 0.29 years with P&F Coal Company in 1966, and 0.16 years with L&C Coal in 1967 based on the recorded earnings and the application of the formula at 20 C.F.R. §725.101(a)(32)(iii). Decision and Order at 4-5. To the extent the ALJ also credited Claimant with whole years of coal mine employment with Ned Hollow Coal Company from 1964 to 1967 based on his credible hearing testimony, the ALJ double counted. Thus we conclude his length of coal mine employment determination is not rational. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-33 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 389 (4th Cir. 1997).

In light of the foregoing errors, we vacate the ALJ's finding that Claimant established twenty-one years of coal mine employment.[11] *See Mitchell*, 479 F.3d at 334-

[10] Contrary to Employer's argument, the ALJ permissibly found Claimant's testimony credible. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ evaluates the credibility of the evidence of record, including witness testimony); Decision and Order at 5; Employer's Brief at 10-13.

[11] The ALJ found Claimant performed all of his coal mine employment underground. Decision and Order at 4; *see* Hearing Transcript at 12 (Claimant responding affirmatively to his counsel's question as to whether "all of [his] work was underground coal mine employment"). Because this finding is not challenged, we affirm it. *See Skrack*, 6 BLR at 1-711.

36. We also vacate his finding that Claimant invoked the Section 411(c)(4) presumption and the award of benefits, and remand the case for further consideration of this issue.

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

In the interest of judicial economy, we address the ALJ's rebuttal findings. Because the ALJ found Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[12] 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.[13]

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).

Employer argues the ALJ erred in discrediting the opinions of Drs. Zaldivar and Spagnolo that Claimant does not have legal pneumoconiosis. Employer's Brief at 23-31. We disagree.

Dr. Zaldivar diagnosed Claimant with a moderate obstructive respiratory impairment due to cigarette smoking and unrelated to coal mine dust exposure. Director's Exhibit 22. He excluded legal pneumoconiosis, in part, because Claimant's pulmonary function testing was normal "several years" after he left coal mining. *Id*. at 8.

[12] "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).

[13] The ALJ found Employer disproved the existence of clinical pneumoconiosis. Decision and Order at 26.

Dr. Spagnolo also diagnosed an obstructive respiratory impairment, opining it is due to asthma and unrelated to coal mine dust exposure. Employer's Exhibit 1. In his deposition, he testified that the obstructive impairment developed twenty years after Claimant left coal mining. Employer's Exhibit 5 at 17. He explained if the impairment was due to coal mine dust exposure, he would have expected it to develop before that time. *Id*. He also stated Claimant "probably has some chronic bronchitis," but excluded coal mine dust exposure as a cause of this disease because in most individuals, chronic bronchitis from coal mine dust exposure will go away once they leave the mines. *Id*. at 27-30.

Contrary to Employer's contention, the ALJ permissibly found the opinions of Drs. Zaldivar and Spagnolo entitled to reduced weight because their rebuttal testimony relied on reasoning inconsistent with the Department of Labor's recognition that pneumoconiosis is "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); *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); Decision and Order at 27. Thus we affirm his finding that Employer failed to disprove Claimant has legal pneumoconiosis based on Drs. Zaldivar's and Spagnolo's opinions. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A).

The ALJ next considered whether Employer established no part of Claimant's respiratory or pulmonary total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 29-30. The ALJ rationally discounted the disability causation opinions of Drs. Zaldivar and Spagnolo because they failed to diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove Claimant has the disease. *See Epling*, 783 F.3d at 504-05; *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 29-30. Thus we affirm the ALJ's findings that, if the Section 411(c)(4) presumption applies, Employer did not rebut it. 20 C.F.R. §718.305(d)(1)(ii).

Claimant's Cross-Appeal

Because we have vacated the award of benefits, we address Claimant's arguments on cross-appeal. Claimant argues the ALJ did not adequately explain his basis for discrediting Dr. Gaziano's medical opinion that Claimant is totally disabled due to legal pneumoconiosis. Claimant's Cross-Appeal Brief at 7-11. We agree. The ALJ summarily discredited Dr. Gaziano's opinion because he found the doctor considered evidence outside of the record. Decision and Order at 26, 28, 30. The ALJ did not, however, explain what evidence Dr. Gaziano considered that is outside of the record. Thus his credibility finding with respect to this doctor does not satisfy the explanatory requirements of the

Administrative Procedure Act[14] (APA), and we vacate it. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Further, the applicable regulations are silent as to what an ALJ should do when evidence not admitted in the record is referenced in an otherwise admissible medical opinion. 20 C.F.R. §725.414(a)(2)(i), (3)(i). Thus, the disposition of this issue is committed to an ALJ's discretion. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004). An ALJ, however, must first ascertain what portions of the opinion, if any, are tainted by reliance on inadmissible evidence. *Id*. Moreover, even if an ALJ finds that a medical opinion is tainted, he is not required to exclude the report or testimony in its entirety. *Id*. Rather, he may redact the objectionable content, ask the physician to submit a new report, or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which the physician's opinion is entitled. *Harris*, 23 BLR at 1-108; *Dempsey*, 23 BLR at 1-67.[15] The ALJ erred by failing to conduct this analysis. *Hicks*, 138 F.3d at 532-33; *Akers*, 131 F.3d at 389.

Remand Instructions

On remand, the ALJ must first determine the length of Claimant's coal mine employment, taking into consideration the relevant evidence and using any reasonable method of computation. *See Muncy*, 25 BLR at 1-27; *Kephart*, 8 BLR at 1-186. He must determine whether the record evidence shows Claimant worked a calendar year or partial periods totaling a calendar year before applying the formula at 20 C.F.R. §725.101(a)(32)(i). *Mitchell*, 479 F.3d at 334-36; *Clark*, 22 BLR at 1-281.

If the ALJ finds Claimant established fifteen or more years of coal mine employment and invokes the Section 411(c)(4) presumption, he may reinstate the award of benefits.

If, however, Claimant does not invoke the presumption on remand, the ALJ must consider whether Claimant can establish entitlement to benefits under 20 C.F.R. Part 718.

[14] The Administrative Procedure Act provides that every adjudicatory decision must include "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).

[15] Exclusion of evidence is not the favored option, as it would result in the loss of probative evidence developed in compliance with the evidentiary limitations. *Harris*, 23 BLR at 1-108; *Dempsey*, 23 BLR at 1-67.

The ALJ should address whether the opinions of Drs. Go, Cohen, and Gaziano establish that Clamant has legal pneumoconiosis and is totally disabled due to the disease.[16] 20 C.F.R. §§718.201, 718.202, 718.203, 718.204(c). In evaluating the medical opinions, the ALJ should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441. The ALJ must fully explain all of his findings in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

[16] We decline to address, as premature, Employer's argument that the ALJ erred in finding the opinions of Drs. Go and Cohen that Claimant has legal pneumoconiosis well-reasoned and documented. Employer's Brief at 13-23. The ALJ's finding with respect to the length of Claimant's coal mine employment may affect whether Employer has the burden of disproving legal pneumoconiosis. It may also affect the weight he assigns their opinions because he should address, as necessary, whether they relied on an accurate coal mine employment history when diagnosing legal pneumoconiosis. *Creech v. Benefits Review Board*, 841 F.2d 706, 709 (6th Cir. 1988); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-81 (1993).

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the ALJ for further proceedings consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge