U.S. Department of Labor

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

BRB No. 20-0512 BLA

RICKEY D. MAYS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SIDNEY COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 09/24/2021
ANR, 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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for Claimant.

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

William M. Bush (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, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits (2019-BLA-05286) rendered on a claim filed on April 24, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 20.43 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). He therefore determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). 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. Alternatively, it contends the ALJ erred in finding it did not rebut the presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging rejection of Employer's constitutional arguments.

The Benefit 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.[3] 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).

[1] 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.

[2] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established 20.43 years of underground coal mine employment, total disability at 20 C.F.R. §718.204(b)(2), and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-14.

[3] The Board will apply the law of 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); Director's Exhibits 3, 5.

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 20-23. 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).

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[4] 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.[6]

Legal Pneumoconiosis

Employer argues the ALJ erred in finding it failed to rebut the presumption of legal pneumoconiosis. Employer's Brief at 6-20. To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly

[4] "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).

[5] "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).

[6] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 15-17.

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, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

The ALJ weighed the opinions of Drs. Jarboe and Castle that Claimant does not have a chronic lung disease or impairment significantly related to, or substantially aggravated by, coal mine dust exposure. Director's Exhibits 14, 16; Employer's Exhibits 5, 6. He found their opinions inadequately reasoned and inconsistent with the regulations and the scientific evidence cited in the preamble to the 2001 regulatory revisions. Decision and Order at 17-25. We reject Employer's arguments that the ALJ erred in discrediting their opinions. Employer's Brief at 6-20.

Dr. Jarboe diagnosed Claimant with chronic bronchitis based on symptoms of chronic cough and sputum production. Director's Exhibit 14 at 6. He excluded legal pneumoconiosis, in part, because bronchitis due to coal mine dust exposure will "generally resolve after withdrawal from dust exposure." Director's Exhibit 14 at 6. Because two years passed since Claimant last worked in coal mine employment, Dr. Jarboe opined any bronchitis caused by coal mine dust exposure would have dissipated. *Id.* The ALJ permissibly found Dr. Jarboe's reasoning to be inconsistent with the regulations, which provide 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); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014) (affirming an ALJ's decision to discredit, as inconsistent with the Act, the opinion of a physician who eliminated coal mine dust as a cause of the miner's disease because "bronchitis associated with coal dust exposure usually ceases with cessation of exposure"); 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."); Decision and Order at 17-18.

Dr. Castle acknowledged that Drs. Jarboe and Mettu diagnosed chronic bronchitis.[7] Director's Exhibit 16. The ALJ permissibly found Dr. Castle's exclusion of legal

[7] The ALJ noted Dr. Ammissetty also diagnosed chronic bronchitis. Decision and Order at 18-19; Employer's Exhibit 4.

pneumoconiosis unpersuasive because he did not indicate if he agreed with the diagnosis of chronic bronchitis, or if the disease is significantly related to, or substantially aggravated by, coal mine dust exposure. *Young*, 947 F.3d at 405; *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 18.

Drs. Jarboe and Castle also diagnosed a severe restrictive ventilatory defect, which they attributed to Claimant's asthma and obesity, and opined it is unrelated to coal mine dust exposure. Director's Exhibit 14 at 5-6; Director's Exhibit 16 at 7. Dr. Jarboe opined Claimant's pulmonary function testing demonstrates significant improvement in his restrictive defect after the administration of bronchodilators and excluded legal pneumoconiosis because coal mine dust exposure does not cause a reversible impairment. Director's Exhibit 14 at 5-6. The ALJ noted, however, that three of the four pulmonary function studies, including the three most recent, are qualifying for total disability both before and after the administration of a bronchodilator.[8] Decision and Order at 8-9. The ALJ permissibly found Dr. Jarboe's reasoning unpersuasive because he failed to adequately explain why the irreversible portion of Claimant's restrictive impairment is not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Consol. Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 21.

Dr. Castle excluded coal mine dust exposure as a cause of Claimant's restrictive impairment based on the absence of a "visible or significant degree of fibrotic change in the lung as seen on chest x-ray." Director's Exhibit 14 at 7; *see also* Employer's Exhibit 6 at 18. The ALJ permissibly found Dr. Castle's opinion unpersuasive because the regulations provide that legal pneumoconiosis may be present even in the absence of a positive x-ray for clinical pneumoconiosis. *See A&E Coal Co. v. Director, OWCP* [*Adams*], 694 F.3d 798, 802-03 (6th Cir. 2012); *Banks*, 690 F.3d at 477 (ALJ properly concluded the regulations provide legal pneumoconiosis may exist in the absence of clinical pneumoconiosis); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012) (regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that no claim for benefits shall be denied solely on the basis of a negative chest x-ray") (internal quotations omitted); 20 C.F.R. §§718.201, 718.202(a)(4), (b); Decision and Order at 23.

[8] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

Because it is supported by substantial evidence, we affirm the ALJ's finding that Employer failed to disprove Claimant has legal pneumoconiosis.[9] 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); Decision and Order at 17. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of the miner'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); Decision and Order at 25-26. He rationally discounted the disability causation opinions of Drs. Jarboe and Castle because neither physician diagnosed legal pneumoconiosis, contrary to his finding that Employer failed to disprove the existence of the disease. *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); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 25-26. 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)(1)(ii), and the award of benefits.

[9] As the ALJ provided valid reasons for discrediting the opinions of Drs. Castle and Jarboe, we need not address Employer's remaining arguments regarding the weight accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 6-20. Further, because Employer has the burden of proof and we have affirmed the ALJ's rejection of its medical experts, we need not address Employer's contention that Dr. Mettu's opinion that Claimant has legal pneumoconiosis is not credible. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 15-17.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge