U.S. Department of Labor

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

BRB No. 20-0539 BLA

NICHOLAS J. SIMKO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL PENNSYLVANIA COAL CO.	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 09/27/2021
	)	
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 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 (Sutter Williams, LLC) Pittsburgh, Pennsylvania, for Employer and its Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD 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-05775) rendered on a claim filed on September 6, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 34.6 years of qualifying coal mine employment 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).[1] The ALJ further found Employer failed to 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. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a brief.[2]

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.[3] 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 legal

[1] 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); 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

[3] The record reflects that Claimant performed his most recent coal mine employment in Kentucky. Decision and Order at 3; Director's Exhibits 20; Hearing Transcript at 17. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

nor clinical pneumoconiosis,[4] 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 establish rebuttal under either method. Employer challenges the ALJ's findings that it did not disprove legal pneumoconiosis or disability causation.[5]

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*, 25 BLR at 1-159. The United States Court of Appeals for the Sixth Circuit holds Employer can "disprove the existence of legal pneumoconiosis by showing that [the miner'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). "An 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)).

Employer relies upon the opinions of Drs. Basheda and Rosenberg. Dr. Basheda examined Claimant and indicated his pulmonary function studies showed "evidence of intermittent airway obstruction." Employer's Exhibit 2 at 10. Noting Claimant's "clinical history of intermittent respiratory symptoms," Dr. Basheda diagnosed him with intermittent asthma and opined it is "not related to his coal mining work or coal dust exposure." *Id.* at 11. He excluded a diagnosis of legal pneumoconiosis, in part, because Claimant did not exhibit asthmatic symptoms while he was working in the mines. *Id.*

[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). "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).

[5] The ALJ found that Employer disproved clinical pneumoconiosis. Decision and Order at 14.

Contrary to Employer's contention, the ALJ permissibly rejected Dr. Basheda's opinion as inadequately explained in light of the regulation recognizing pneumoconiosis as a latent and progressive disease which may first become detectable only after the cessation of coal mine employment.[6] 20 C.F.R. §718.201(c); *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); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490-91 (6th Cir. 2014); Decision and Order at 15.

Dr. Rosenberg noted Claimant had negative x-rays and opined Claimant has a restrictive impairment without any evidence of obstruction. Employer's Exhibit 4 at 4. He explained that "[r]estriction only relates to past coal mine dust exposure if one has advanced parenchymal changes within the lungs causing them to become stiff." *Id.* He noted Claimant did not have any parenchymal changes consistent with coal mine dust exposure or coal workers' pneumoconiosis. *Id.* The ALJ permissibly found Dr. Rosenberg's opinion unpersuasive because he excluded a diagnosis of legal pneumoconiosis based on the absence of radiographic evidence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4) ("A determination of the existence of pneumoconiosis may . . . be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray."); 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 15.

Employer's arguments 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). Because it is supported by substantial evidence, we affirm the ALJ's finding that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(a); Decision and Order at 15.

Disability Causation

In order to disprove disability causation, Employer must establish "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). The ALJ found the opinions of Drs. Basheda and Rosenberg not credible as to the cause of Claimant's respiratory disability because neither physician diagnosed legal pneumoconiosis. Decision

[6] Because the ALJ gave a valid reason for discrediting Dr. Basheda's opinion, we need not address Employer's argument the ALJ misstated the preamble to the revised 2001 regulations as recognizing that all diagnoses of chronic obstructive pulmonary disease, including asthma, constitute legal pneumoconiosis. Employer's Brief 6-7; *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); *see also Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

and Order at 24-25; *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). Employer raises no specific allegations of error regarding the ALJ's findings on disability causation, other than its general contention that Claimant does not have legal pneumoconiosis, which we have rejected. We therefore affirm the ALJ's determination that Employer failed to establish no part of Claimant's respiratory disability was due to legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 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

MELISSA LIN JONES
Administrative Appeals Judge