U.S. Department of Labor

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

BRB No. 21-0424 BLA

LINDA WATERS, on behalf of GARY E. WATERS	)	
Claimant-Petitioner	)	
v.	)	
FLORENCE MINING COMPANY	)	DATE ISSUED: 9/30/2022
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Matthew A. Gribler and Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Robert P. Normann (Law Office of Cheryl Esposito Kaufman), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Claimant[1] appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits on Remand (2017-BLA-06240) 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 Claimant's request for modification of the denial of the Miner's claim filed on November 14, 2013 and is before the Benefits Review Board for the second time.[2]

The Board previously affirmed the ALJ's determination that the Miner was totally disabled but vacated his findings that the Miner did not have at least fifteen years of coal mine employment and that Claimant could not invoke 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. §718.305. *Waters v. Florence Mining Co*., BRB No. 19-0108 BLA, slip op. at 3 n.5, 5, 9 (Jan. 23, 2020) (unpub). Thus, the Board vacated the denial and remanded the case for the ALJ to redetermine the length of coal mine employment, reconsider Dr. Cohen's medical opinion as to the existence of legal pneumoconiosis, and consider the evidence relevant to disability causation if necessary. *Id*. at 5, 9-10.

On remand, the ALJ determined that granting Claimant's request for modification would serve justice under the Act if she established the Miner was entitled to benefits. He further determined the record established 13.221 years of coal mine employment, and therefore Claimant did not invoke the Section 411(c)(4) presumption. Considering entitlement under 20 C.F.R. Part 718, the ALJ credited Dr. Cohen's diagnosis of legal pneumoconiosis at 20 C.F.R. §718.202(a), but found Claimant failed to establish the Miner's total disability was due to legal pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the ALJ denied benefits.

On appeal, Claimant challenges the ALJ's length of coal mine employment finding and his determination that she failed to establish disability causation. Employer and its

[1] Claimant is the widow of the miner, who died on July 8, 2017. Director's Exhibit 43. She is pursuing the Miner's claim on his behalf. Director's Exhibit 44.

[2] We incorporate by reference the relevant procedural history set forth in our prior decision in this case. *Waters v. Florence Mining Co*., BRB No. 19-0108 BLA (Jan. 23, 2020) (unpub.).

[3] 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

Carrier (Employer) respond, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Entitlement under 20 C.F.R. Part 718

Under 20 C.F.R. Part 718, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Legal Pneumoconiosis

"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). In order to establish legal pneumoconiosis, Claimant must prove that the Miner had a "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).

The ALJ considered four medical opinions. Drs. Cohen, Rasmussen, Basheda, and Rosenberg each diagnosed a totally disabling obstructive impairment based on the results of the Miner's pulmonary function studies. Director's Exhibits 9 at 39, 14 at 22; Claimant's Exhibit 3 at 7; Employer's Exhibit 1 at 3. Drs. Cohen and Rasmussen attributed the Miner's disabling obstruction to chronic obstructive pulmonary disease (COPD)/emphysema caused by both coal dust exposure and smoking, while Drs. Basheda and Rosenberg opined the Miner's disabling COPD is due solely to smoking and asthma. Director's Exhibits 9 at 39-40, 14 at 22; Claimant's Exhibit 3 at 7; Employer's Exhibit 1 at 7-11. The ALJ found Dr. Cohen's opinion well-reasoned and discredited the contrary opinions of Drs. Basheda

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because the Miner performed his coal mine employment in Pennsylvania. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 6.

and Rosenberg. 20 C.F.R. §718.202(a)(4); Decision and Order on Remand at 12, 20-21. We affirm the ALJ's credibility findings as they are unchallenged on appeal.[5] Employer's Brief at 3; *see* 20 C.F.R. §§718.201(b), 718.202(a)(4).

Disability Causation

To establish disability causation, Claimant must prove pneumoconiosis is a "substantially contributing cause" of the Miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(i), (ii); *Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003).

In assessing whether Claimant proved disability causation, the ALJ considered the same medical opinions that he weighed on the issue of legal pneumoconiosis. Despite having credited Dr. Cohen's opinion that the Miner's disabling COPD *is legal pneumoconiosis*, the ALJ found his opinion "insufficient" to establish legal pneumoconiosis substantially contributed to the Miner's respiratory disability because Dr. Cohen's opinion was conclusory and not well reasoned.[6] Decision and Order on Remand at 32. Thus, the ALJ found Claimant did not establish the Miner was totally disabled due to legal pneumoconiosis.[7] *Id.* at 31-32.

We agree with Claimant's argument that the ALJ erred in explaining why he discredited Dr. Cohen's opinion. Claimant's Brief at 10. The ALJ's rejection of Dr. Cohen's opinion on disability causation is inconsistent with his uncontested determination that Dr. Cohen gave a reasoned opinion on the etiology of the Miner's disabling COPD when deciding the issue of legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b),

[5] Employer states, "Respondent submits that the ALJ's analysis of the medical evidence is comprehensive and detailed, and that he correctly came to the conclusion that [C]laimant had established the existence of legal coal workers' pneumoconiosis." Employer's Brief at 2.

[6] Similarly, the ALJ found Dr. Rasmussen's opinion insufficient because it was illogical and inadequately explained. Decision and Order on Remand at 31.

[7] The ALJ permissibly discounted the opinions of Drs. Basheda and Rosenberg because the physicians failed to diagnose legal pneumoconiosis contrary to the ALJ's finding that Claimant proved the disease at 20 C.F.R. §718.202(a)(4). *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); Decision and Order on Remand at 31.

718.204(c)(i), (ii); *see J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248 (3d Cir. 2011); Claimant's Brief at 10. Thus, we vacate the ALJ's finding that Dr. Cohen's opinion is insufficient to support Claimant's burden of proof.

Despite the ALJ's error, it is not necessary to remand this case for further consideration. Where, as here, all medical experts agree that the Miner had disabling COPD, the ALJ's finding that it constitutes legal pneumoconiosis subsumes and resolves the disability causation question. *See Hawkinberry v. Monongalia County Coal Co.*, 25 BLR 1-249, 1-255-57 (2019). While factual determinations are the province of the ALJ, reversal is warranted where no factual issues remain to be determined and no further factual development is necessary. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70 (4th Cir. 2002) (denial of benefits reversed where "only one factual conclusion is possible"); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989) (same). The ALJ rendered the findings essential to disability causation at 20 C.F.R. §718.204(c) when weighing the physicians' opinions as to legal pneumoconiosis at 20 C.F.R. §718.202(4). Because the ALJ credited Dr. Cohen's opinion that the Miner's disabling COPD is legal pneumoconiosis, it necessarily follows that Dr. Cohen's opinion also establishes disability causation at 20 C.F.R. §718.204(c). *See Hawkinberry*, 25 BLR at 1-255-57. As Claimant has established each element of entitlement under 20 C.F.R. Part 718, we reverse the ALJ's denial of benefits.[8] *See Scott*, 289 F.3d at 270; *Adams*, 886 F.2d at 826.

Remand Instructions

As Claimant is entitled to benefits and the ALJ found granting modification would render justice under the Act, we instruct the ALJ on remand to determine the commencement date for benefits taking into consideration whether Claimant has established modification based on a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.503(b).

[8] As Claimant established the Miner's entitlement to benefits under 20 C.F.R. Part 718, any error the ALJ may have made in finding Claimant established less than fifteen years of qualifying coal mine employment and therefore did not invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We therefore need not reach Claimant's challenge to the ALJ's length of coal mine employment finding.

Accordingly, the ALJ's Decision and Order Denying Benefits on Remand is affirmed in part and reversed in part, and this case is remanded for entry of an award of benefits and a determination of the date benefits should commence.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge