U.S. Department of Labor

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

BRB No. 21-0552 BLA

RICHARD L. WINNING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ICG ILLINOIS, LLC	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH/AIG	)	DATE ISSUED: 9/27/2022
	)	
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 Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for Claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for Employer.

Jessica E. Matthis (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), 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 appeals Administrative Law Judge (ALJ) Larry A. Temin's Decision and Order Awarding Benefits (2019-BLA-05078) rendered on a claim filed on January 30, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with twenty-nine 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). Further, he found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues that the ALJ erred in admitting Dr. Istanbouly's supplemental medical opinion and that the ALJ erred in finding Employer did not rebut the Section 411(c)(4) presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director) filed a response, urging rejection of Employer's evidentiary challenge and affirmance of the award of benefits.

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).

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that the miner's total disability is due to pneumoconiosis if he had 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); 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); Employer's Brief at 12; Decision and Order at 14-15.

[3] The Board will apply the law of the United States Court of Appeals for the Seventh Circuit because Claimant performed his last coal mine employment in Illinois. *See Shupe*

Evidentiary Issue

ALJs are afforded significant discretion in rendering evidentiary orders. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc). Such orders may be overturned only if the party challenging them demonstrates the ALJ's action represented an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). Employer argues the ALJ erred in admitting Dr. Istanbouly's supplemental medical report, obtained as part of the Department of Labor's (DOL) pilot program,[4] contending the development of supplemental reports exceeds the DOL's regulatory authorization to provide each miner with a complete pulmonary evaluation. Employer's Brief at 4-11. We need not resolve this issue.

The sole argument Employer raises regarding the merits of entitlement is whether it rebutted the Section 411(c)(4) presumption, Employer's Brief at 11-18. Even if we were to agree with Employer that Dr. Istanbouly's supplemental medical report should not have been admitted into evidence, the doctor's report does not support Employer's burden at rebuttal. *See* Director's Exhibits 14, 24. Thus, it has not shown why remand would be required. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Director's Response at 8-9. We therefore decline to address Employer's assertion of evidentiary error.

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 nor clinical pneumoconiosis,[5] or that "no part of [his] respiratory or pulmonary total

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v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 17-19; 37-38; Director's Exhibit 3.

[4] The Department of Labor (DOL) established the Pilot Program under the Act to provide for the supplementation of a miner's complete pulmonary examination in claims where the miner had fifteen or more years of coal mine employment, the DOL-sponsored pulmonary evaluation indicated the miner is entitled to benefits, and the employer submitted evidence contrary to a claims examiner's initial proposed finding of entitlement. *See* BLBA Bulletin 14-05 (Feb. 24, 2014); Director's Response at 4-5. The program became standard procedure in 2019. *See* BLBA Bulletin No. 20-01 (Oct. 24, 2019); Director's Response at 4.

[5] "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

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] Decision and Order at 17, 20-21.

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); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). Employer relies on the opinions of Drs. Tuteur and Vuskovich to disprove the existence of legal pneumoconiosis. Dr. Tuteur opined Claimant has chronic obstructive pulmonary disease (COPD) caused by smoking and unrelated to coal mine dust exposure. Director's Exhibit 22 at 5-6; Employer's Exhibits 1 at 4; 2 at 2; 3 at 17, 5 at 2, 9 at 3. Dr. Vuskovich opined Claimant has undiagnosed asthma complicated by ongoing smoking and unrelated to coal mine dust exposure. Employer's Exhibit 4 at 18. The ALJ found neither opinion sufficiently reasoned to meet Employer's burden. Decision and Order at 18-19.

Employer contends the ALJ erred in discrediting the opinions of Drs. Tuteur and Vuskovich.[7] We disagree.

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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).

[6] We affirm, as unchallenged, the ALJ's finding that Employer failed to rebut the presumed existence of clinical pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 17. Employer is thus precluded from rebutting the presumption of pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). However, because the ALJ's findings regarding legal pneumoconiosis are relevant to his findings regarding disability causation, we will evaluate Employer's arguments that he erred in finding it failed to rebut legal pneumoconiosis.

[7] Employer conflates its arguments regarding legal pneumoconiosis and disability causation, and the burden of proof required to rebut each, when referring to its experts ruling out coal mine dust exposure as a contributor to Claimant's obstruction. *See* Employer's Brief at 14-15, 17-18. However, Employer is only required to "rule out"

As the ALJ observed, Dr. Tuteur excluded coal mine dust exposure as a causative factor for Claimant's COPD in part by citing statistics regarding the percentages of smoking and non-smoking miners who develop the disease. Decision and Order at 18; Director's Exhibit 22 at 3-5; Employer's Exhibits 3 at 17-18, 5 at 2, 9 at 2. The ALJ permissibly discounted Dr. Tuteur's reasoning because it is based on generalities and not the specifics of Claimant's case. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 18; Director's Exhibit 22 at 3-5; Employer's Exhibits 3 at 17-18; 5 at 2; 9 at 2. The ALJ also permissibly found that while Dr. Tuteur relies on Claimant's significant smoking history in opining Claimant does not have legal pneumoconiosis, he failed to adequately explain why Claimant's twenty-nine years of coal mine dust exposure was not an additive factor along with smoking in causing his respiratory impairment. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Beeler*, 521 F.3d at 726; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 18; Director's Exhibit 22; Employer's Exhibits 1-3, 4, 9.

Dr. Vuskovich opined Claimant does not have legal pneumoconiosis in part because his pulmonary function study results showed reversibility of his respiratory impairment after the administration of bronchodilators and asserted that any non-reversible impairment was caused by asthma-induced airway remodeling unrelated to coal mine dust exposure. Employer's Exhibit 4 at 18-19. The ALJ permissibly found this rationale unpersuasive because Dr. Vuskovich failed to provide any evidence supporting his assertion that the non-reversible portion of Claimant's impairment is caused by airway remodeling as opposed to coal mine dust. *See Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 336 (7th Cir. 2002); Decision and Order at 19. Further, the ALJ permissibly discounted Dr. Vuskovich's opinion because he did not explain why Claimant's history of coal mine dust exposure has not contributed to or aggravated his impairment. *See Beeler*, 521 F.3d at 726; *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895 (7th Cir. 1990); Decision and Order at 19.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Poole*, 897 F.2d at 895; *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988). Employer's arguments amount to a request to reweigh the evidence, which we are not permitted to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ permissibly discredited Drs. Tuteur's and Vuskovich's opinions, the only opinions supportive of a finding that Claimant does not have legal

pneumoconiosis as a cause of Claimant's totally disabling impairment. 20 C.F.R. §718.305(d)(1)(ii).

pneumoconiosis,[8] we affirm his determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 20.

Disability Causation

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."[9] 20 C.F.R. §718.305(d)(1)(ii). The ALJ rejected Dr. Vuskovich's opinion that Claimant was not disabled due to pneumoconiosis because he failed to find Claimant totally disabled, contrary to the weight of the evidence. Decision and Order at 21. Because Employer does not contest this finding, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). The ALJ further permissibly discounted Drs. Vuskovich's and Tuteur's opinions on the cause of Claimant's total disability because their conclusions were tied to their erroneous belief that Claimant does not have legal pneumoconiosis, contrary to the ALJ's findings. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735 (7th Cir. 2013); Decision and Order at 21. Thus, we affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

[8] Because we affirm the ALJ's rejection of Employer's experts, we need not address Employer's arguments concerning the ALJ's weighing of Dr. Go's opinion that Claimant has legal pneumoconiosis. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); Decision and Order at 19; Employer's Brief at 12-14; Director's Exhibits 14, 24; Claimant's Exhibits 4-6.

[9] As the ALJ observed, the "no part" disability causation standard requires Employer to rule out the existence of a causal relationship between Claimant's pneumoconiosis and his total disability. Decision and Order at 20 (citing *W. Va. CWP Fund v. Bender*, 782 F.3d 129 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015)). Thus, insofar as Employer argues that the ALJ used an incorrect burden of proof in analyzing disability causation, Employer's Brief at 14, we reject its argument.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge