U.S. Department of Labor

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

BRB No. 22-0183 BLA

LONNIE COX, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BOB & TOM COAL COMPANY	)	DATE ISSUED: 9/22/2023
	)	
Employer -Petitioner	)	
	)	
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 Heather C. Leslie, Administrative Law Judge, United States Department of Labor.

Michael A. Pusateri and Brian D. Straw (Greenberg Traurig LLP), Washington, D.C., for Employer.

Olgamaris Fernandez (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor, Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, BUZZARD, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Heather C. Leslie's Decision and Order Awarding Benefits (2020-BLA-05399) rendered on a claim filed on December

3, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant had 9.76 years of coal mine employment, and therefore found Claimant could not invoke 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] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established he is totally disabled due to legal pneumoconiosis and awarded benefits.

On appeal, Employer argues the removal provisions applicable to ALJs violate the separation of powers doctrine and render the ALJ's appointment unconstitutional. On the merits, Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis and that his totally disabling respiratory impairment is due to his pneumoconiosis. Claimant has not filed a response. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing the ALJ had authority to decide the case and urging rejection of Employer's argument that the ALJ erred by referring to the regulatory preamble in weighing the medical opinion evidence. In a reply brief, Employer reiterates its contentions.[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).

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[1] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground coal mine employment 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 established clinical pneumoconiosis arising out of coal mine employment and has a total disabling respiratory impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5-6, 12-13.

[3] The Board will apply the law of the 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); Hearing Transcript at 53.

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded ALJs.[4] Employer's Brief at 18-23; Employer's Reply Brief at 4-9. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*, 138 S. Ct. 2044. *Id.* In addition, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). *Id.* For the reasons set forth in *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-312-18 (Oct. 18, 2022), we reject Employer's arguments.

Part 718 Entitlement

Without the benefit of any statutory presumption, Claimant must establish disease (pneumoconiosis); disease causation (pneumoconiosis 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); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

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[4] We reject Employer's assertion that the Board lacks authority to decide constitutional issues. Employer's Brief at 18-19 (citing *Carr v. Saul*, 141 S. Ct. 1352 (2021)). Employer's reliance on *Carr* is misplaced. In *Carr*, the United States Supreme Court held that Social Security procedures did not require claimants for Social Security disability benefits to raise their Appointments Clause challenges to their respective Social Security Administration ALJs. 141 S. Ct. at 1356, 60-62. Contrary to Employer's assertion, the Board has both the inherent authority and vested authority to consider constitutional questions arising in cases before it. *See McCluseky v. Zeigler Coal* Co., 2 BLR 1-1248, 1-1258-62 (1981); *see also Gibas v. Saginaw Mining Co.*, 748 F.2d 1112 (6th Cir. 1984); *Carozza v. U.S. Steel Corp.*, 727 F.2d 74 (3d Cir. 1984). In addition, the United States Court of Appeals for the Sixth Circuit has held that the Board may address timely-raised Appointment Clause challenges. *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 753 (6th Cir. 2019).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has 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(b). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held a miner may establish his lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The ALJ considered the medical opinions of Drs. Harris and Dahhan. Decision and Order at 6-10, 12. Dr. Harris opined that Claimant has legal pneumoconiosis, in the form of an obstructive lung disease due to cigarette smoking[5] and coal mine dust exposure. Director's Exhibits 11, 19. Dr. Dahhan opined that Claimant does not have legal pneumoconiosis but instead has obstructive lung disease due to solely to cigarette smoking. Employer's Exhibits 1, 5, 8. The ALJ found Dr. Harris's opinion well-reasoned and documented and accorded it substantial weight. Decision and Order at 10. Conversely, she found Dr. Dahhan's opinion not adequately explained, and accorded it little weight. Decision and Order at 6-8. She therefore determined the medical opinion evidence establishes that Claimant's obstructive impairment is due in part to his coal mine dust exposure, i.e., legal pneumoconiosis. *Id.* at 12.

Employer argues the ALJ erred in her weighing of the medical opinion evidence. Employer's Brief at 9-18. We disagree.

Contrary to Employer's arguments, the ALJ was not required to discredit Dr. Harris's opinion because he could not apportion the contribution from coal dust to Claimant's impairment. Employer's Brief at 11. A physician need not apportion a specific percentage of a miner's lung disease to coal mine dust as opposed to cigarette smoke or other factors in order to establish the existence of legal pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000) (because coal dust need not be the sole cause of the miner's respiratory or pulmonary impairment, legal pneumoconiosis can be proven based on a physician's opinion that coal dust and smoking were both causal factors and that it was impossible to allocate between them); *see also Groves*, 761 F.3d at

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[5] The ALJ found Claimant had a cigarette smoking history of 102.5 pack-years. Decision and Order at 4.

598-99. Rather, a physician need only credibly diagnose a chronic respiratory or pulmonary impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Dr. Harris examined Claimant as part of his Department of Labor sponsored examination on March 19, 2019. Director's Exhibit 11. She noted Claimant's medical, social, and work histories and recorded symptoms of a daily productive cough, daily wheezing, dyspnea on exertion, orthopnea, and nightly paroxysmal nocturnal dyspnea. *Id.* A physical examination revealed rhonchi respirations bilaterally, while an x-ray showed clinical pneumoconiosis, a patchy density, and emphysema. *Id.* Dr. Harris further found that Claimant has a severe obstruction with a significant but incomplete response to bronchodilators on pulmonary function testing with possible concomitant restrictive lung disease. *Id.* Dr. Harris diagnosed clinical pneumoconiosis as well as legal pneumoconiosis in the form of obstructive lung disease, chronic bronchitis, and emphysema due to cigarette smoking and coal mine dust exposure. *Id.*

After considering a lesser history of coal mine employment of 9.76 years, Dr. Harris again opined that Claimant's obstructive lung disease, emphysema, and chronic bronchitis are due to smoking and coal mine dust exposure. Director's Exhibit 19. She explained that, although Claimant has an extensive smoking history, he also had "heavy exposure to coal mine dust" as he worked as a roof bolter and ran a continuous miner in "VERY low coal (26 inches for part of his career) without the use of personal protective equipment." *Id.* With this intense occupational exposure and evidence of clinical pneumoconiosis on x-ray, Dr. Harris stated it would not be possible to distinguish the relative contribution of coal mine dust exposure and cigarette smoking, but that coal mine dust was a significantly contributing factor to his impairment. *Id.* The ALJ permissibly found Dr. Harris's diagnosis of legal pneumoconiosis well-documented and reasoned, as it was supported by the objective evidence and adequately took into account Claimant's significant smoking history as well as his specific exposure to coal mine dust. *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 10.

Dr. Dahhan opined that Claimant's obstructive impairment was due solely to smoking because smoking causes a more significant loss in lung function than coal mine dust exposure, Claimant's smoking history was sufficient to cause his impairment regardless of other risk factors, and he was at a higher risk for developing COPD because he began smoking as a child. Employer's Exhibits 1, 5, 8. He further opined that the fluctuation in severity of Claimant's impairment and his response to bronchodilators are not consistent with coal mine dust exposure. *Id.*

Contrary to Employer's argument, the ALJ did not reject Dr. Dahhan's opinion because he failed to "rule out" coal mine dust exposure as a cause of Claimant's impairment. Employer's Brief at 14. Rather, she permissibly found his opinion completely excluding coal dust as a causative factor inadequately reasoned because Dr. Dahhan failed to explain why coal mine dust exposure was not additive along with smoking in causing or aggravating Claimant's obstructive impairment. *See* 20 C.F.R. §718.201(a)(2), (b); *Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 8. The ALJ further permissibly found his explanation unpersuasive in light of the DOL's recognition in the preamble of credible scientific studies showing coal dust exposure may cause clinically significant airways obstruction in the absence of smoking and that the risks of smoking and coal dust exposure are additive.[6] *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); 65 Fed. Reg. 79,920, 79,939-42 (Dec. 20, 2000); Decision and Order at 8.

Employer is correct that, in the same section of her opinion discussing legal pneumoconiosis, the ALJ stated at one point that Employer was required to "demonstrate[e] that no part of [Claimant's] disability was caused by pneumoconiosis," which is the standard for rebutting disability causation had the Section 411(c)(4) presumption been invoked. Decision and Order at 12. However, it is clear from the context of the ALJ's decision that this was a misstatement that did not affect her underlying findings, as she at no point analyzed the evidence with the burden of proof on Employer to disprove legal pneumoconiosis.

Rather, the ALJ held that Claimant was required to establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, and that he is totally disabled due to pneumoconiosis. Decision and Order at 3. In evaluating legal pneumoconiosis, she required Claimant to establish that he has a lung disease "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *Id.* at 5. The ALJ reiterated that there is no presumption that all chronic obstructive lung diseases are legal pneumoconiosis and that the mere possibility of a connection between a lung disease and coal mine employment is not substantial evidence sufficient to establish the disease. *Id.* 12. Finally, she explained that she simply found that Dr. Harris provided a better reasoned and more persuasive opinion than that of Dr. Dahhan, and that this opinion

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[6] As the ALJ gave permissible reasons for discrediting Dr. Dahhan's opinion, we need not address Employer's remaining challenges to the ALJ's weighing of his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

establishes that Claimant's totally disabling obstructive impairment is due in part to coal mine dust exposure and is therefore legal pneumoconiosis. *Id*.

Because the ALJ did not find that Employer failed to rebut the existence of legal pneumoconiosis, but instead found Dr. Harris's diagnosis of legal pneumoconiosis to be more persuasive and better reasoned than Dr. Dahhan's opinion, her reference to the wrong standard is harmless under the facts of this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Consequently, we affirm the ALJ's determination that Claimant established he suffers from legal pneumoconiosis in the form of an obstructive impairment due to cigarette smoking and coal mine dust exposure. 20 C.F.R. §718.202(a)(4); Decision and Order at 6-12. Consequently, Claimant has established that his legal pneumoconiosis arose out of his coal mine employment. *See Kiser v. L & J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); 20 C.F.R. §718.203.

Disability Causation

Because the ALJ permissibly found Dr. Harris's opinion reasoned and documented, and therefore sufficient to prove Claimant's totally disabling mixed restrictive-obstructive lung disease constitutes legal pneumoconiosis, the ALJ rationally found the physician's opinion also establishes Claimant is totally disabled due to the disease; it is the only logical conclusion from the facts. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013) (where COPD caused the miner's total disability, the legal pneumoconiosis inquiry "completed the causation chain from coal mine employment to legal pneumoconiosis which caused [the miner's] pulmonary impairment that led to his disability"); *Hawkinberry v. Monongalia County Coal Co.*, 25 BLR 1-249 (2019). Consequently, we affirm the ALJ's determination that Claimant is totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(c).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge