U.S. Department of Labor

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

BRB No. 23-0010 BLA

PATRICK C. TAJC	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL MINING COMPANY, LLC	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 9/27/2023
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

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

Toni J. Williams (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2021-BLA-05017) rendered on a claim filed on August 30, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with thirty-four years of underground coal mine employment based on the parties' stipulations and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found 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). She further found Employer did not 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.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a response brief.

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

[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 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 thirty-four years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, and therefore 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 4-5, 7, 26-27.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 16, 31-32.

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal 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). The ALJ found Employer rebutted the presumption of clinical pneumoconiosis but failed to rebut the presumption of legal pneumoconiosis and disability causation. Decision and Order at 39-41.

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 v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the opinions of Drs. Basheda and Manaker to disprove Claimant has legal pneumoconiosis. Decision and Order at 30-35; Employer's Exhibits 5, 5a, 6, 6a, 7, 8. Dr. Basheda diagnosed a "[m]ild non-pulmonary restriction" due to obesity and an elevated right hemidiaphragm. Employer's Exhibits 5 at 25; 5a at 5. He opined Claimant's intermittent obstruction was consistent with asthma and diagnosed moderate persistent asthma. Employer's Exhibits 5 at 22, 24-25; 5a at 5. Dr. Basheda opined coal mine dust exposure only causes "occupational asthma" that resolves with the cessation of exposure. Employer's Exhibits 5 at 24-25; 7 at 25, 27-28, 39-40. He excluded coal mine dust exposure as a cause of Claimant's asthma because it developed "years after leaving the coal mines" and because Claimant's symptoms were intermittent. Employer's Exhibits 5 at 24-25; 7 at 25, 27-28, 39-40. Dr. Manaker opined Claimant's respiratory symptoms were due to his numerous medical issues and unrelated to coal mine dust exposure. Employer's Exhibits 6 at 7-9; 6a at 2; 8 at 53-54.

[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).

The ALJ found Drs. Basheda's and Manaker's opinions inadequately explained and contrary to the regulations and, therefore, insufficient to satisfy Employer's burden of proof. Decision and Order at 32-35, 39-40.

Employer contends the ALJ erred in rejecting Dr. Basheda's opinion based on the preamble to the 2001 revised regulations and in failing to adequately consider his specific explanations for why Claimant's asthma does not constitute legal pneumoconiosis.[5] Employer's Brief at 11-16. We disagree.

Initially, we reject Employer's contentions that the ALJ impermissibly shifted the burden of proof and substituted her opinion for Dr. Basheda's by evaluating his opinion in conjunction with the preamble. Employer's Brief at 12-13, 15. Rather, she permissibly consulted the preamble as a statement of credible medical research findings the Department of Labor accepted when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); *see also Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 830-31 (10th Cir. 2017); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); Decision and Order at 35. Nor did the ALJ presume that the preamble "links all diagnoses of [chronic obstructive pulmonary disease]/asthma to coal mine dust exposure . . . ." Employer's Brief at 13. She simply, and accurately, stated the "[p]reamble lists asthma as a type of chronic obstructive pulmonary disease." Decision and Order at 35, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000).

In considering the credibility of Dr. Basheda's opinion, the ALJ noted he excluded coal mine dust exposure as a cause of Claimant's asthma because it developed after Claimant was no longer exposed to coal mine dust and he denied coal mine dust exposure can cause asthma apart from temporary aggravation that resolves after cessation of exposure. Decision and Order at 35; Employer's Exhibits 5 at 24-25; 7 at 25, 27-28, 39-40. The ALJ permissibly discounted Dr. Basheda's opinion because it is inconsistent with the regulatory definition of pneumoconiosis as a latent and progressive disease that "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);

[5] We affirm, as unchallenged on appeal, the ALJ's determination that Dr. Manaker's opinion is entitled to little weight. *See Skrack*, 6 BLR at 1-711; Decision and Order at 32-33, 35; Employer's Brief at 11-16.

Consolidation Coal Co. v. Kramer, 305 F.3d 203, 209-10 (3d Cir. 2002); Decision and Order at 35.

Additionally, the ALJ permissibly found Dr. Basheda's opinion internally inconsistent and equivocal based on his varying discussion of Claimant's asthma as both intermittent and persistent. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); Decision and Order at 34-35; Employer's Exhibits 5 at 22, 24-25; 5a at 5; 7 at 38-42.

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 the ALJ acted within her discretion in rejecting Dr. Basheda's opinion, we affirm her finding that Employer did not disprove legal pneumoconiosis.[6] *See Kertesz*, 788 F.2d at 163; Decision and Order at 34-35, 39-40. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 39-40.

Disability Causation

The ALJ next considered whether Employer established "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); *see* Decision and Order at 40-41. She permissibly discredited the opinions of Drs. Basheda and Manaker on the cause of Claimant's respiratory disability because they did not diagnose legal pneumoconiosis, contrary to her finding that Employer did not disprove the disease.[7] *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); Decision and Order at 41. As Employer does not identify any specific error in the ALJ's credibility finding, we affirm it. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Consequently, we affirm the ALJ's finding that Employer failed to establish no

[6] Because the ALJ gave permissible reasons for rejecting Dr. Basheda's opinion, we need not address Employer's additional challenges to the ALJ's evaluation of his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 34-35; Employer's Brief at 11-16.

[7] Drs. Basheda and Manaker did not offer an explanation with respect to whether legal pneumoconiosis caused Claimant's total respiratory disability independent of their conclusions that he does not have the disease.

part of Claimant's total respiratory disability is caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Minich*, 25 BLR at 154-56.

We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge