U.S. Department of Labor

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

BRB No. 20-0193 BLA

CAROL SPATAFORE (o/b/o JOHN R. SPATAFORE, SR., deceased) Claimant-Respondent v. CONSOLIDATION COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/21/2021 DECISION and ORDER on RECONSIDERATION EN BANC

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

Evan B. Smith (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for Claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer.

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

BUZZARD, Administrative Appeals Judge:

Claimant has filed a timely Motion for Reconsideration by the Panel and by the Board En Banc, requesting the Benefits Review Board reconsider its Decision and Order dated May 25, 2021, with regard to a miner's claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). *See Spatafore v. Consolidation Coal Co.*, BRB No. 20-0193 BLA (May 25, 2021) (unpub.).

This claim has been pending now for over ten years.[1] In *Spatafore v. Consolidation Coal Co.* [*Spatafore I*], 25 BLR 1-179 (2016), the Board held Administrative Law Judge (ALJ) Drew A. Swank erred in finding the Miner's work as a state mine safety trainer constituted the work of a "miner" for purposes of invoking the Section 411(c)(4) presumption.[2] It thus remanded the claim for the ALJ to consider whether Claimant established entitlement without benefit of the presumption. In *Spatafore II*, BRB No. 17-0428 BLA (September 27, 2018) (unpub.), the Board held the ALJ erred in finding Claimant did not establish the existence of clinical or legal pneumoconiosis, and thus remanded the claim for him to reconsider these issues and explain his findings with respect to the credibility of the physicians' opinions. Finally, in *Spatafore III*, BRB No. 20-0193 BLA, which is the subject of Claimant's pending motion for reconsideration en banc, a majority of the three-judge panel vacated the ALJ's award and remanded the case for him to re-determine whether the opinions of Drs. Sood and Rasmussen were documented and reasoned to support a finding of legal pneumoconiosis. *Id*. The majority instructed the ALJ to address whether their diagnoses of legal pneumoconiosis were credible in view of their understanding of the Miner's work history and the length of his coal mine employment. *Id*.

Judge Rolfe issued a dissenting opinion, asserting he would affirm the ALJ's award as the ALJ complied with the Board's prior remand instructions in *Spatafore II*, BRB No. 17-0428 BLA. Judge Rolfe would have held the ALJ appropriately determined Drs. Sood's and Rasmussen's opinions were documented and reasoned, and support a finding of legal pneumoconiosis. Moreover, Judge Rolfe would have held that, although the ALJ did not discuss the three-year difference between the ten years of coal mine employment Dr. Sood

[1] The Miner filed this claim on March 25, 2011. He died on September 14, 2016, shortly after the Board vacated the ALJ's award of benefits in *Spatafore v. Consolidation Coal Co.* [*Spatafore I*], 25 BLR 1-179 (2016). Claimant, the Miner's widow, has continued to pursue this claim on his behalf for the past five years.

[2] Under Section 411(c)(4), Claimant is entitled to a rebuttable presumption that the Miner was totally disabled 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.

relied on to diagnose legal pneumoconiosis and the seven years of coal mine employment the ALJ found, the difference was not significant.

On reconsideration Claimant asserts, consistent with Judge Rolfe's dissent, that the ALJ complied with the Board's instructions in *Spatafore II*, BRB No. 17-0428 BLA, by independently determining Drs. Sood's and Rasmussen's opinions were documented and reasoned to support a finding of legal pneumoconiosis. Claimant's Motion for Reconsideration at 1-4. Moreover, Claimant asserts the difference between the ten year coal mine employment history that Dr. Sood relied on and the seven year history that the ALJ found established cannot warrant reversing the ALJ's crediting of Dr. Sood's opinion. *Id*. at 4-5, *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311 n.2 (4th Cir. 2012) and *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984).

Employer responds, asserting the majority in *Spatafore III*, BRB No. 20-0193 BLA, properly vacated the ALJ's finding of legal pneumoconiosis because the ALJ did not independently determine, on remand, whether the opinions of Drs. Sood and Rasmussen were documented and reasoned.[3] Employer asserts the ALJ viewed the Board's previous decision in *Spatafore II*, BRB No. 17-0428 BLA, as a mandate that he find the opinions of Drs. Sood and Rasmussen credible on remand, without considering the discrepancy in the length of coal mine employment that the ALJ found established and what Dr. Sood relied on. The Director, Office of Workers' Compensation Programs, did not file a response to Claimant's motion for reconsideration.

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 Associates, Inc.*, 380 U.S. 359 (1965).

Claimant is correct that the ALJ's award of benefits should be affirmed. In its previous decision in *Spatafore II*, the Board instructed the ALJ to determine whether the opinions of Drs. Sood and Rasmussen were documented, reasoned, and persuasive. *Spatafore II*, BRB No. 17-0428 BLA, slip op. at 10. On remand, the ALJ complied with

[3] Employer filed its response with a motion to accept it "out of time." We accept Employer's late-filed response. 20 C.F.R. §802.217(e).

[4] Because the Miner performed his coal mine employment in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 5.

this instruction. He found their opinions were "sufficiently reasoned and documented" because they were based on "the Miner's relevant histories, symptoms and objective diagnostic test results as well as consideration of relevant medical literature."[5] Decision and Order on Remand at 21; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08, 211 (4th Cir. 2000); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 21-22 (1987) (a reasoned opinion is one in which the ALJ finds the underlying documentation adequate to support the physician's conclusions).

Clear precedent dictates the one specific error that Employer alleges on appeal -- that the ALJ did not consider Dr. Sood overestimated Claimant's coal dust exposure by three years -- does not justify remanding this claim again.[6] *See Rickey*, 7 BLR at 1-108 (discrepancy between seven years of coal mine employment that the adjudicator found established and the eleven year coal mine employment history a doctor assumed did not affect the weight given to the doctor's opinion); *see also Looney*, 678 F.3d at 311 n.2 (characterizing a four year difference in the length of coal mine employment that a physician relied on and the length that the ALJ found established as "relatively insignificant," and did not compel rejection of the physician's opinion based on the higher length). Remanding this case for a third time in light of this precedent, and thereby further delaying a final resolution for months or even years, will impose a cost that greatly outweighs any procedural benefit to having the ALJ clarify an inevitable conclusion

[5] Dr. Rasmussen examined the Miner on May 7, 2012. Claimant's Exhibit 2. He recorded the Miner's symptoms, past medical history, psychiatric history, smoking history, medications, family history, and occupational history. *Id.* He obtained pulmonary function and blood gas studies. *Id.* He noted three risk factors for Claimant's impairment: an ongoing smoking habit (forty-seven pack-years); coal mine employment (initially working underground with "pretty minor" dust exposure after 1983, when he stopped working for Employer and began working as a state mine safety instructor); and a history of asthma. *Id.*; Employer's Exhibit 13 at 8-14.

Dr. Sood reviewed "the Miner's medical records, including the reports from Drs. Celko, Rasmussen, Basheda and Bellotte, that detailed his employment history, smoking history, clinical evaluations, and diagnostic tests." Decision and Order on Remand at 19; *see* Claimant's Exhibit 7. Dr. Sood attributed the Miner's impairment to smoking and asthma but also opined his exposure to coal mine dust was of "sufficient duration . . . [and] intensity" to be a "substantial contributory cause to his COPD [chronic obstructive pulmonary disease]." *Id.* at 9.

[6] Claimant established seven years of coal mine employment. *See Spatafore I*, 25 BLR at 1-183 n.6; April 19, 2017 Decision and Order on Remand at 4. Dr. Sood relied on a ten year coal mine employment history. Claimant's Exhibit 7 at 9.

dictated by unambiguous precedent. Reviewing entities, such as the Board, are not obligated to remand every alleged error to the ALJ, but have the authority to affirm an award where the outcome is preordained. *See Mancia v. Director, OWCP*, 130 F.3d 579, 593 (3d Cir. 1997); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269 (4th Cir. 2002); *Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 524 (4th Cir. 1995); *Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995).

Even in opposition to reconsideration, Employer and our dissenting colleagues still have not attempted to articulate how the three additional years of exposure Dr. Sood relied on could make a difference in the outcome of this case. *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). Consequently, for these and the other reasons that Judge Rolfe articulated in his dissent, we hold the ALJ independently and permissibly determined on remand that the opinions of Drs. Sood and Rasmussen were documented and reasoned, and he committed no reversible error in relying on Dr. Sood's opinion.

Accordingly, Claimant's Motion for Reconsideration by the Panel and by the Board En Banc, and the relief requested, are granted; the Board's Decision and Order of May 25, 2021 is vacated; and the ALJ's award of benefits on remand is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

We concur.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, dissenting:

In *Spatafore II*, BRB No. 17-0428 BLA, slip op. at 8-9, the Board vacated the ALJ's finding that Claimant did not establish legal pneumoconiosis, and directed the ALJ, on remand, to first determine whether the medical opinions were reasoned and documented. On remand, the ALJ stated:

> Consistent with the Board's findings and instructions in *Spatafore II* [BRB No. 17-0428 BLA], the undersigned now concludes that the diagnosis of legal pneumoconiosis by Drs. Rasmussen and Sood are sufficiently reasoned and documented to be credited as they are based on the Miner's relevant histories, symptoms and objective diagnostic test results as well as consideration of relevant medical literature, and because Drs. Rasmussen and Sood adequately explained why they concluded that the Miner's exposure to

> coal dust more likely than not significantly caused or aggravated his disabling COPD.

Decision and Order on Remand Awarding Benefits at 21.

In *Spatafore III*, BRB No. 20-0193 BLA, I was part of the majority which concluded the ALJ apparently misapprehended the Board's holding that Drs. Rasmussen's and Sood's opinions are "facially sufficient" to support Claimant's burden to prove legal pneumoconiosis as a mandate on remand that he find their opinions credible to establish legal pneumoconiosis. The ALJ failed to follow the Board's instruction that he independently determine whether the opinions of Drs. Rasmussen and Sood are sufficiently reasoned and documented, based on their respective rationales for why Claimant has legal pneumoconiosis. He needed to address whether Drs. Rasmussen's and Sood's diagnoses of legal pneumoconiosis were credible in view of their understanding of the Miner's work history and the length of his coal mine employment. As the ALJ did not conduct this necessary analysis, the panel vacated the ALJ's finding that Claimant established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and his finding that the Miner's total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). It therefore vacated the ALJ's award of benefits on remand and remanded this case for further deliberation.

Upon consideration of Claimant's motion for reconsideration, I would still vacate the ALJ's award of benefits on remand. The ALJ did not independently analyze whether the opinions of Drs. Sood and Rasmussen were documented and reasoned, and did not address the discrepancy between the ALJ's length of coal mine employment at seven years and Dr. Sood's reliance on ten years. *See W. Va. CWP Fund v. Mullins*, 623 F. App'x 59 (4th Cir. Sept. 10, 2015) (unpub.) (holding an overestimate of five years by Dr. Gaziano was "problematic"); Claimant's Exhibit 7 at 9. The evaluation of the evidence is for the ALJ to make on remand. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). The Board does not have the authority to award benefits merely because of a lengthy delay in the adjudicatory process of a claim. *See Lango v. Director, OWCP*, 104 F.3d 573, 575-76 (3d Cir. 1997); *Mancia v. Director, OWCP*, 130 F.3d 579, 593 (3d Cir. 1997); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269 (4th Cir. 2002); *Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 524 (4th Cir. 1995); *Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995). Although a remand in this case would cause delay in its ultimate disposition, the delay is caused by the law's requirement that the ALJ properly perform his duties and

not because the Board enforces that requirement. If the case were remanded, I would urge prompt action by the ALJ to avoid additional delay.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur.

MELISSA LIN JONES
Administrative Appeals Judge