U.S. Department of Labor

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

BRB No. 20-0517 BLA

NOEL L. HOLCOMB	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CEDAR COAL COMPANY	)	
	)	
and	)	
	)	
AMERICAN ELECTRIC POWER COMPANY	)	DATE ISSUED: 12/29/2021
	)	
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.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for Claimant.

Mark J. Grigoraci (Robinson & McElwee PLLC), Charleston, West Virginia, for Employer.

Before: ROLFE, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2017-BLA-05128) 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 a subsequent claim[1] filed on October 7, 2015.

The ALJ credited Claimant with fourteen years of underground and substantially similar surface coal mine employment and therefore found he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)(2018).[2] Considering entitlement under 20 C.F.R. Part 718, she found Claimant established clinical and legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment due to pneumoconiosis arising out of his coal mine employment. 20 C.F.R. §§718.202(a), 718.204(b)(2), (c). She therefore found he established a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c), and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established clinical and legal pneumoconiosis. It also argues she erred in finding Claimant's pneumoconiosis arose out of his coal mine employment.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed 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

[1] Claimant filed two prior claims that were destroyed "due to age." Director's Exhibits 1, 2. The district director noted Claimant's most recent prior claim, filed on October 30, 1985, was final and was closed on February 23, 1986. Director's Exhibits 26, 32. Claimant filed the current claim on October 7, 2015. Director's Exhibit 4. The ALJ assumed Claimant's prior claims were denied because he failed to establish any element of entitlement. Decision and Order at 23.

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

[3] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established total disability and a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§725.309, 718.204(b)(2); Decision and Order at 33-34.

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 (1965).

To be entitled to benefits under the Act, 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. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any of them 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).

To establish legal pneumoconiosis,[5] Claimant must demonstrate 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(a)(2), (b). A miner can establish legal pneumoconiosis by showing coal dust exposure contributed "in part" to his respiratory or pulmonary impairment. *See Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311 (4th Cir. 2012); *see also Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (A miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment.").

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 38; Director's Exhibit 6.

[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 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 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 considered the medical opinions of Drs. Sood, Go, Celko, Zaldivar, and Rosenberg. Decision and Order at 36-40. Drs. Sood, Go, and Celko diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD), emphysema, and chronic bronchitis significantly related to Claimant's coal mine dust exposure. Director's Exhibit 14; Claimant's Exhibits 1, 1a, 1b, 4, 4a. Dr. Zaldivar opined he does not have legal pneumoconiosis, but does have longstanding asthma with airway remodeling unrelated to coal mine dust exposure. Employer's Exhibits 1, 6, 7. Dr. Rosenberg opined he does not have legal pneumoconiosis, but does have hyperreactive airways obstruction unrelated to coal mine dust exposure. Employer's Exhibits 5, 8.

The ALJ found Drs. Zaldivar's and Rosenberg's opinions unpersuasive as not well-reasoned and documented. Decision and Order at 40. By contrast, she found Drs. Sood's, Go's, and Celko's opinions well-reasoned, well-documented, and entitled to great weight. *Id*. She therefore found the medical opinion evidence establishes legal pneumoconiosis. *Id*.

Initially, we reject Employer's argument that the ALJ erred in crediting Dr. Sood's opinion because he believed all of Claimant's coal mine employment was "underground in self-reported high-intensity dust exposure." Employer's Brief at 18. Dr. Sood accurately understood Claimant had a combination of underground and surface coal mine employment. He detailed Claimant's coal mine employment from 1954 through 1984 and noted part of his employment took place before the "comprehensive dust regulations came into effect, with high levels of self-reported dust exposure and without respiratory protection." Claimant's Exhibit 4 at 2-5. In addition, he noted Claimant's last coal mine job was "as a high wall drill operator in a surface coal mine" and "he has been credited for [fourteen] years of coal mine employment in both underground and surface mines." *Id*. at 2. Thus, contrary to Employer's assertion, the ALJ acted within her discretion in finding Dr. Sood accurately summarized Claimant's fourteen years of coal mine employment.[6] *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *see also Lane v. Union Carbide Corp.*, 105

[6] Employer also argues the ALJ erred in determining Claimant has seven and one-quarter years of underground coal mine employment, contending "the correct amount of underground coal mine employment is [six] years." Employer's Brief at 9. But the ALJ did not reject or credit any of the physicians' opinions based on their understanding of the specific length of Claimant's underground coal mine employment. Because Employer has not explained why identification of a specific length of underground coal mine employment would have made any difference to the ALJ's credibility findings, the alleged error is harmless. *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).

F.3d 166, 172 (4th Cir. 1997); *Eagle v. Armco, Inc.*, 943 F.2d 509, 512 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 183 (4th Cir. 1991); Decision and Order at 16-17, 39.

We also reject Employer's argument that the ALJ erred in failing to consider that Claimant has "other significant exposures unrelated to coal mining that are contributing to his lung condition." Employer's Brief at 16-17, 19. Contrary to Employer's assertion, the ALJ noted when diagnosing legal pneumoconiosis Dr. Sood considered Claimant's childhood exposure to household air pollution and occupational exposure to sawdust, fly ash, and concrete dust after leaving his coal mine employment. Decision and Order at 39; Claimant's Exhibit 4 at 12, 14, 20. She found Dr. Sood opined Claimant's coal mine dust exposure significantly contributed to his COPD, emphysema, and chronic bronchitis, and his other exposures may also be substantially contributing factors to his chronic lung diseases. *Id*.

Finally, we reject Employer's argument that the ALJ erred in crediting Dr. Sood's opinion. The ALJ found Dr. Sood "provided [a] clear explanation of why he considered Claimant's pulmonary disease to have arisen from coal mine employment." Decision and Order at 39-40. She stated Dr. Sood found Claimant's pulmonary function studies demonstrate "mild to moderate chronic airflow obstruction with significant bronchodilator response as well as a normal to mildly reduced diffusion capacity which [is] [consistent] with chronic bronchitis/COPD." *Id*. at 39. Furthermore, she recognized his reasoning that "most patients with COPD exhibit clinically significant bronchodilator reversibility and . . . there is no factor that favor[s] asthma over COPD in [Claimant's] case." *Id*. at 39 (internal quotations omitted). In addition, she noted Dr. Sood stated "it is not possible to scientifically apportion between the multiple significant contributory causes." *Id*. Contrary to Employer's argument, the ALJ permissibly found Dr. Sood's opinion that Claimant's COPD is significantly related to his coal mine dust exposure reasoned and documented. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); 20 C.F.R. §718.201(b); Decision and Order at 40.

We further reject Employer's argument that the ALJ erred in discrediting Drs. Rosenberg's and Zaldivar's opinions. Employer's Brief at 15-16, 20. Dr. Rosenberg stated Claimant performed all of his coal mine employment after 1970, when dust exposures were lower. Employer's Exhibit 5 at 5. He believed "it is much more likely than not that coal [mine] dust made no contribution to [Claimant's] obstruction" based in part on his lower degree of coal mine dust exposure. Employer's Exhibit 5 at 6. The ALJ permissibly rejected this reasoning, however, because Dr. Rosenberg "failed to consider [Claimant] performed almost all of his underground coal mine employment prior to 1970." Decision

and Order at 40; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *see also Lane*, 105 F.3d at 172; *Eagle*, 943 F.2d at 512; *Walker*, 927 F.2d at 183.

The ALJ also noted that, although Dr. Rosenberg "originally stated the Claimant had never smoked, he provided an explanation" for the abnormalities on Claimant's "pulmonary function studies that included an additive smoking history for the Claimant when there was none." Decision and Order at 40. She therefore permissibly found Dr. Rosenberg's opinion unpersuasive on the issue of legal pneumoconiosis because it "lacks adequate explanation and is conclusory." *Id*.; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *see also Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988).

Similarly, Dr. Zaldivar opined Claimant's pulmonary impairment is entirely due to his uncontrolled asthma with longstanding remodeling of the lungs. Employer's Exhibit 1 at 9-10. He concluded Claimant does not have any pulmonary disease "that could be caused by or related to" his prior coal mine employment "regardless of how much dust he was exposed to." *Id*. at 10. In addition to reviewing medical reports, Dr. Zaldivar examined Claimant and administered objective tests on March 22, 2017, including a pulmonary function study and a blood gas study. *Id*. at 1. Dr. Zaldivar stated Claimant has mild restriction of FVC on his pulmonary function study that improved significantly after a bronchodilator to almost eighty percent of predicted and a mild to moderate airway obstruction with an FEV1 that improved significantly after bronchodilators. *Id*. at 6. He also stated Claimant's "blood gases were entirely normal at rest with what little exercise he was able to do at an oxygen consumption of [forty-six percent] of the predicted." *Id*. "[C]onsidering the mild abnormality of the diffusion," he indicated that the blood gases would have remained normal had he exercised longer." *Id*. at 9.

The ALJ noted Dr. Zaldivar considered Claimant's objective tests. Decision and Order at 37. She found Dr. Zaldivar's conclusion that the March 22, 2017 exercise blood gas study is valid contrary to her finding that the study is entitled to "no weight." *Id*. at 31, 37, 40. Thus she permissibly found Dr. Zaldivar's opinion not well-documented and reasoned.[7] *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

As the trier-of-fact, the ALJ has discretion to assess the credibility of the medical opinions based on the experts' explanations for their diagnoses, and to assign those

[7] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Zaldivar and Rosenberg, we need not address Employer's remaining arguments regarding the weight accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 13-17, 20.

opinions appropriate weight. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Looney*, 678 F.3d at 313-14. Because it is supported by substantial evidence, we affirm the ALJ's determination that Claimant established legal pneumoconiosis based on Dr. Sood's medical opinion.[8] 20 C.F.R. §718.202(a); Decision and Order at 40.

Next, we reject Employer's argument that the ALJ erred in finding the evidence established Claimant's legal pneumoconiosis arose out of his coal mine employment. Employer's Brief at 18-20. Having found Dr. Sood's opinion established the existence of legal pneumoconiosis, the ALJ was not required to separately determine the cause of Claimant's pneumoconiosis at 20 C.F.R. §718.203, as her finding at 20 C.F.R. §718.202(a)(4) necessarily subsumed that inquiry.[9] *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); Decision and Order at 40-41.

As Employer raises no specific allegations of error regarding disability causation, we affirm the ALJ's finding that Claimant established his total respiratory disability is due to legal pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(c); Decision and Order at 41-42.

[8] As the ALJ found Dr. Sood's opinion established the existence of legal pneumoconiosis, we need not address Employer's arguments regarding the opinions of Drs. Celko and Go. *See Larioni*, 6 BLR at 1-1278; Decision and Order at 40; Employer's Brief at 17-18.

[9] Because we affirm the ALJ's finding that the medical opinion evidence established legal pneumoconiosis, we need not address Employer's arguments regarding clinical pneumoconiosis. Employer's Brief at 9-11.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge