U.S. Department of Labor

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

BRB No. 24-0086 BLA

ROCKY D. CRIGGER Claimant-Petitioner v. OLGA COAL COMPANY and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 02/05/2025 DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Cameron Blair, and Donna E. Sonner (Wolfe Williams & Austin), Norton, Virginia, for Claimant.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order on Remand Denying Benefits (2019-BLA-06104) 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 filed on July 27, 2017,[1] and is before the Benefits Review Board for the second time.

In an April 5, 2021 Decision and Order Awarding Benefits, the ALJ found Claimant established sixteen years of underground coal mine employment and 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, 30 U.S.C. §921(c)(4) (2018),[2] and therefore established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.[3] She further found Employer did not rebut the presumption and awarded benefits.

[1] Claimant filed an initial claim on February 9, 2004, which the district director denied on January 27, 2005, because Claimant failed to establish total disability. Director's Exhibit 1.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes 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.

[3] Where a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant failed to establish total disability in his prior claim, he had to submit new evidence establishing this element of entitlement to obtain review of his current claim on the merits. *See* 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3.

Employer and its Carrier (Employer) appealed the award. On appeal, the Board affirmed, as unchallenged, the ALJ's findings that Claimant established sixteen years of underground coal mine employment, total disability, a change in an applicable condition of entitlement, and invocation of the Section 411(c)(4) presumption. *Crigger v. Olga Coal Co.*, BRB No. 21-0385 BLA, slip op. at 2-3 n.4 (Aug. 29, 2022) (unpub.). However, the Board vacated her determination that Employer failed to disprove legal pneumoconiosis and therefore failed to establish rebuttal of the Section 411(c)(4) presumption, holding the ALJ erred in discrediting the medical opinions of Drs. Basheda and Spagnolo. The Board also held the ALJ failed to adequately address Claimant's cigarette smoking history when weighing the conflicting opinions on legal pneumoconiosis. *Id.* at 4-8; 20 C.F.R. §718.305(d)(1)(i)(A). Given the ALJ's errors regarding legal pneumoconiosis affected her credibility findings on the issue of disability causation, the Board also vacated her determination that Employer failed to prove no part of Claimant's respiratory disability was due to legal pneumoconiosis. *Crigger*, BRB No. 21-0385 BLA, slip op. at 8; 20 C.F.R. §718.305(d)(1)(ii). Thus the Board vacated the award of benefits and remanded the case for further consideration of the evidence.

On remand, the ALJ found Employer disproved the existence of legal pneumoconiosis. Having previously found Employer disproved the existence of clinical pneumoconiosis,[4] the ALJ found Employer rebutted the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i). Noting Claimant's prior claim was denied because he failed to establish pneumoconiosis, the ALJ concluded Claimant failed to establish a change in an applicable condition of entitlement and denied benefits.

On appeal, Claimant contends the ALJ erred in finding Employer rebutted the Section 411(c)(4) presumption. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a response brief.

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.[5] 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).

[4] The Board noted in its previous decision that the ALJ found Employer disproved the existence of clinical pneumoconiosis in her April 5, 2021 Decision and Order. *Crigger v. Olga Coal Co.*, BRB No. 21-0385 BLA, slip op. at 3 n.7 (Aug. 29, 2022) (unpub.); Decision and Order at 10.

[5] 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*

20 C.F.R. §725.309: A Change in an Applicable Condition of Entitlement

As an initial matter, we must address the ALJ's error in reconsidering whether Claimant established a change in an applicable condition of entitlement because it is not in accord with the posture of the case on remand and the mandate to the ALJ. 20 C.F.R. §§725.309, 802.404(a), 802.405(a); *see Edd Potter Coal Co. v. Dir., OWCP* [*Salmons*], 39 F.4th 202, 209-10 (4th Cir. 2022). On remand, the ALJ found Claimant's "prior claim was denied for failure to establish the presence of pneumoconiosis." Decision and Order on Remand at 6 (unpaginated). Contrary to the ALJ's finding, Claimant's prior claim was denied due to his failure to establish total disability. Director's Exhibit 1 at 8. In her initial Decision and Order, the ALJ found Claimant established he is totally disabled. Decision and Order at 5-8. Thereafter, in consideration of Employer's appeal, the Board affirmed the ALJ's findings that Claimant established total disability, and thereby established a change in an applicable condition of entitlement. 20 C.F.R. §725.309; *Crigger*, BRB No. 21-0385 BLA, slip op. at 2-3 n.4, *citing Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). The Board's holding on this issue constitutes the law of the case and the ALJ cited no exception to that doctrine. *See Salmons*, 39 F.4th at 209-10; *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989). Consequently, she was bound to proceed in accordance with the Board's determination. *Salmons*, 39 F.4th at 209-10. We therefore vacate the ALJ's finding and reinstate the Board's affirmance of her original determination that Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §718.204(b)(2); *see Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley*, 14 BLR at 1-151.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis, 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 by establishing Claimant does not have pneumoconiosis.[6]

Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 8, 9; Hearing Tr. at 14-15.

[6] Again, the ALJ found Employer disproved the existence of clinical pneumoconiosis. Decision and Order at 9-10.

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).

In her initial Decision and Order, the ALJ considered the opinions of Drs. Basheda, Spagnolo, and Nader. Drs. Basheda and Spagnolo opined Claimant has chronic obstructive pulmonary disease (COPD) and asthma caused by smoking and unrelated to coal mine dust exposure. Director's Exhibit 21; Claimant's Exhibits 1, 2; Employer's Exhibits 6, 7, 10, 11. In contrast, Dr. Nader diagnosed Claimant with legal pneumoconiosis in the form of COPD due to coal mine dust exposure and cigarette smoking. Director's Exhibit 13; Claimant's Exhibits 1, 2. The ALJ discredited the opinions of Drs. Basheda and Spagnolo as inadequately explained and credited Dr. Nader's opinion as well-reasoned. Decision and Order at 10-11. Weighing the evidence together, she found Employer failed to rebut the presumption that Claimant has legal pneumoconiosis. *Id.* at 11.

The Board vacated the ALJ's finding that Drs. Basheda and Spagnolo did not explain how Claimant's coal dust exposure did not contribute to his respiratory impairment as the physicians set forth their bases for excluding legal pneumoconiosis. *Crigger*, BRB No. 21-0385 BLA, slip op. at 4-6. In addition, the Board held the ALJ did not adequately explain how she resolved the conflicting evidence on the length of Claimant's smoking history in evaluating the credibility of the opinions of Drs. Nader, Basheda, and Spagnolo on the issue of legal pneumoconiosis. *Id.* at 6-8. Thus, the Board vacated the ALJ's determination that Employer did not rebut the existence of legal pneumoconiosis and remanded the case for reconsideration.

On remand, the ALJ found each physician's opinion entitled to "some weight" and concluded the medical opinion evidence is sufficient to rebut the existence of legal pneumoconiosis. Decision and Order on Remand at 6 (unpaginated).

Claimant argues the ALJ did not adequately explain her determination that Employer rebutted the presumption of legal pneumoconiosis. Claimant's Brief at 5-19. We agree.

After summarizing the medical opinions of Drs. Nader, Basheda, and Spagnolo, the ALJ's entire analysis consisted of her summarily stating:

> Each opinion is afforded some weight, as each considered the Claimant's symptoms, diagnostic testing, coal mine employment, and smoking history . . . , [and] are adequately reasoned and supported by the evidence reviewed within. Overall, I find that they do not support a finding that the Claimant suffers from a chronic pulmonary disease, or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

Decision and Order on Remand at 6 (unpaginated).[7]

The Board had instructed the ALJ to "reweigh the medical opinion evidence and reconsider whether Employer disproved the existence of legal pneumoconiosis by affirmatively establishing Claimant does not have a chronic lung disease or impairment 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment' by a preponderance of the evidence." *Crigger*, BRB No. 21-0385 BLA, slip op. at 9. Although she found the opinions of Drs. Nader, Basheda, and Spagnolo are each reasoned and documented and entitled to "some weight," Decision and Order on Remand at 6 (unpaginated), she did not explain why she found the opinions of Drs. Basheda and Spagnolo outweigh Dr. Nader's opinion and disprove legal pneumoconiosis as the Administrative Procedure Act (APA)[8] requires. *Sea "B" Mining Co. v. Addison*, 831 F.3d

[7] The ALJ also seemingly considered this evidence to determine if it supported a finding that the Claimant suffers from a chronic pulmonary disease, or respiratory or pulmonary impairment, significantly related to or substantially aggravated by dust exposure in coal mine employment. This is error. As Claimant invoked the presumption of total disability due to pneumoconiosis, the presence of pneumoconiosis is presumed and the burden shifted to Employer to disprove legal pneumoconiosis by establishing Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) (rebuttal inquiry is "whether the employer has come forward with affirmative proof that the [miner] does not have legal pneumoconiosis, because his impairment is not in fact significantly related to his years of coal mine employment").

[8] The Administrative Procedure Act, 5 U.S.C. §§500-591, requires that every adjudicatory decision include "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A),

244, 252-53 (4th Cir. 2016); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); 20 C.F.R. §718.204(b)(2)(iv). The ALJ's unexplained finding that all the medical opinions are entitled to "some weight" and her apparent reliance on a head count of contrary opinions is an insufficient basis to find Employer satisfied its burden to disprove legal pneumoconiosis. *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) (rebuttal inquiry is "whether the employer has come forward with affirmative proof that the [miner] does not have legal pneumoconiosis, because his impairment is not in fact significantly related to his years of coal mine employment"); *Minich*, 25 BLR at 1-155 n.8; Decision and Order on Remand at 6 (unpaginated). The ALJ has a duty to resolve any conflicts in the evidence and explain her basis for doing so. *Addison*, 831 F.3d at 256-57; *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803 (4th Cir. 1998); *Gunderson v. U.S. Dep't of Lab.*, 601 F.3d 1013, 1024 (10th Cir. 2010); *Wojtowicz*, 12 BLR at 1-165.

We also agree with Claimant that the ALJ failed to follow the Board's remand instructions to address his cigarette smoking history when weighing the conflicting opinions on the issue of legal pneumoconiosis. Claimant's Brief at 19-20. When the Board remands a case, the ALJ must comply with its instructions and "implement both the letter and spirit of the . . . mandate," absent an appropriate legal basis for not applying the mandate rule.[9] *See Salmons*, 39 F.4th at 209-10, *quoting United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993); *see also Scott v. Mason Coal Co.*, 298 F.3d 263, 267 (4th Cir. 2007). The Board instructed the ALJ to "first consider all relevant evidence, resolve conflicts in the evidence, and provide definitive findings regarding Claimant's smoking history." *Crigger*, BRB No. 21-0385 BLA, slip op. at 9.

On remand, the ALJ's sole mention of Claimant's smoking history is set forth inside of a parenthetical wherein she stated, "(noting I found the Claimant [sic] smoking history spans 1976 – 2001) . . . ." Decision and Order on Remand at 6 (unpaginated). The ALJ failed to resolve inconsistencies in the record as to Claimant's smoking history, and thereby failed to adequately determine Claimant's smoking history. Consequently, her decision

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as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[9] *See, e.g., Invention Submission Corp. v. Dudas*, 413 F.3d 411, 415 (4th Cir. 2005) ("Deviation from the mandate rule is permitted only in a few exceptional circumstances, which include (1) when 'controlling legal authority has changed dramatically'; (2) when 'significant new evidence, not earlier obtainable in the exercise of due diligence, has come to light'; and (3) when 'a blatant error in the prior decision will, if uncorrected, result in a serious injustice.'") (citations omitted).

does not comport with the requirements of the APA. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Wojtowicz*, 12 BLR at 1-165; *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985) (length and extent of a miner's smoking history is a factual determination for the ALJ). As the Board stated, this finding is necessary for the ALJ to evaluate the credibility of the opinions of Drs. Nader, Basheda, and Spagnolo "on the issue of legal pneumoconiosis insofar as they disagree as to the length of Claimant's smoking history and whether Claimant continued to smoke cigarettes." *Crigger*, BRB No. 21-0385 BLA, slip op. at 8.

In view of the foregoing errors, we vacate the ALJ's finding Employer disproved legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order on Remand 6 (unpaginated). Thus, we further vacate the ALJ's finding Employer established rebuttal at 20 C.F.R. §718.305(d)(1)(i) and the denial of benefits.

Remand Instructions

On remand, the ALJ must first consider all relevant evidence, resolve conflicts in the evidence, and provide definitive findings regarding Claimant's smoking history. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 (4th Cir. 1999) ("[T]he 'substantial evidence' standard is tolerant of a wide range of findings on a given record."); *Maypray*, 7 BLR at 1-685.

The ALJ should then reweigh the medical opinion evidence and reconsider whether, by a preponderance of the evidence, Employer disproved the existence of legal pneumoconiosis by establishing 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); *Smith*, 880 F.3d at 699; *Minich*, 25 BLR at 1-155 n.8. In doing so, she should address whether the medical opinions addressing legal pneumoconiosis are based on an accurate cigarette smoking history. *Bobick*, 13 BLR at 1-54.

Because the ALJ found Employer disproved the existence of clinical pneumoconiosis, if the ALJ finds Employer has disproved the existence of legal pneumoconiosis, Employer has rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i); so she need not reach the issue of disability causation and may reinstate the denial of benefits. If, however, the ALJ finds Employer failed to rebut the presumption of legal pneumoconiosis and thus failed to establish rebuttal at 20 C.F.R. §718.305(d)(1)(i), she should then address whether Employer established "no part of the miner'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).

In weighing the medical opinions on both prongs of rebuttal, the ALJ should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 528; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). Further, she must consider all the relevant evidence in reaching her determinations. *See McCune v. Cent. Appalachian Coal Co*., 6 BLR 1-996, 1-998 (1984) (failure to discuss relevant evidence requires remand). She must also set forth her findings in detail, including the underlying rationale for her decision as the APA requires. *See Wojtowicz,* 12 BLR at 1-165.

Accordingly, the ALJ's Decision and Order on Remand Denying Benefits is vacated and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge