U.S. Department of Labor

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

BRB No. 21-0102 BLA

LENN C. LENGEL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HELVETIA COAL COMPANY	)	
	)	
and	)	
	)	
ROCHESTER & PITTSBURGH COAL COMPANY	)	DATE ISSUED: 01/24/2022
	)	
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.

Deanna Lyn Istik (Sutter Williams, LLC), Pittsburgh, Pennsylvania, for Employer.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE 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 (2019-BLA-06260) rendered on a claim filed on April 12, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established sixteen years and three months of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore 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 failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding the Section 411(c)(4) presumption unrebutted.[2] Claimant responds, urging affirmance 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 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).

[1] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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 has sixteen years and three months of underground coal mine employment, is totally disabled from a pulmonary or respiratory impairment, and invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Employer's Brief at 4.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3 n.4; Director's Exhibits 4-9.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal[4] nor clinical pneumoconiosis,[5] 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 failed to rebut the presumption by either method.[6] Decision and Order at 22, 24.

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 Co.*, 25 BLR 1-149, 1-159 (2015).

Employer relies on the medical opinions of Drs. Rosenberg and Basheda to disprove legal pneumoconiosis. Dr. Rosenberg opined Claimant has chronic obstructive pulmonary disease (COPD) due to smoking and unrelated to coal mine dust exposure. Employer's Exhibits 2, 7. Dr. Basheda diagnosed Claimant with tobacco-smoke induced COPD with an asthmatic component, unrelated to his coal mine dust exposure. Employer's Exhibits 3-4, 6. Contrary to Employer's contention, we see no error in the ALJ's finding their

[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).

[5] "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).

[6] The ALJ found Employer rebutted the presence of clinical pneumoconiosis. Decision and Order at 22.

opinions inadequately reasoned to support its burden of proof and contrary to the principles underlying the regulations. Decision and Order at 20-22.

As the ALJ observed, Dr. Rosenberg opined Claimant's COPD is due to cigarette smoking and unrelated to coal mine dust exposure because pulmonary function testing revealed a reduced FEV1/FVC ratio, which he indicated is inconsistent with legal pneumoconiosis. Decision and Order at 20; Employer's Exhibits 2, 7 at 21-24. The ALJ permissibly found this rationale conflicts with the medical science set forth in the preamble that "a reduction in the FEV1/FVC ratio is a marker for obstructive lung disease, including that caused by coal mine employment." Decision and Order at 20; *see Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); 20 C.F.R. §718.204(b)(2)(i)(C). Further, in light of the Department of Labor's recognition that the effects of smoking and coal mine dust can be additive, the ALJ permissibly found Dr. Rosenberg failed to adequately explain why Claimant's history of coal mine dust exposure did not significantly contribute, along with his cigarette smoking, to his obstructive lung disease. *See Obush*, 650 F.3d at 257; 65 Fed. Reg. at 79,940; Decision and Order at 20. She also permissibly found Dr. Rosenberg's reasoning inconsistent with the regulations' acknowledgment that pneumoconiosis can be a "latent and progressive disease which may first become detectable only after cessation of coal mine dust exposure."[7] *See* 20 C.F.R. §718.201(c); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); 65 Fed. Reg. at 79,971; Decision and Order at 20-21.

Similarly, Dr. Basheda opined Claimant's impairment is unrelated to coal mine dust exposure in part because his impairment is partially reversible with bronchodilators; however, Dr. Basheda also acknowledged Claimant has some fixed obstruction, which remains disabling even after the use of bronchodilators.[8] Decision and Order at 21;

[7] Dr. Rosenberg reasoned Claimant did not have legal pneumoconiosis because the record does not document respiratory complaints when he left coal mining in 1991. Employer's Exhibit 2 at 11.

[8] Dr. Basheda testified:

> Q. So, Doctor, this man is disabled from a pulmonary standpoint from his last coal mining employment?
>
> A. He is.
>
> Q. And that's even with any improvements that happened with bronchodilator response?

Employer's Exhibits 3-4; 6 at 23, 27. The ALJ permissibly discredited his opinion because he failed to adequately explain how he eliminated Claimant's coal mine dust exposure as a significant contributor to this fixed obstructive impairment when, "by Dr. Basheda's own definition, Claimant shows some 'fixed' obstruction because he only shows partial reversibility."[9] *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 21.

Employer's arguments on legal pneumoconiosis are a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ permissibly discredited the opinions of Drs. Rosenberg and Basheda, we affirm her finding that Employer did not disprove legal pneumoconiosis.[10] *See* 20 C.F.R. §718.305(d)(2)(i)(A); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211 (3d Cir. 2002); *Balsavage*, 295 F.3d at 396; Decision and Order at 22. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

Disability Causation

The ALJ next considered whether Employer established that "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); Decision and Order at 23-24. Contrary to Employer's assertion, she permissibly discredited the disability causation opinions of Drs. Basheda and Rosenberg because they did not diagnose legal

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A. Correct.

Q. So his fixed obstruction is such that he is disabled?

A. Correct.

Employer's Exhibit 6 at 27.

[9] As the ALJ gave a valid reason for discrediting Dr. Basheda's opinion, we need not address Employer's other arguments regarding the additional reasons she gave for discrediting his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[10] We need not address Employer's arguments regarding Dr. Zlupko's opinion because it does not assist Employer in proving that Claimant does not have legal pneumoconiosis. Employer's Brief at 12-14.

pneumoconiosis, contrary to her finding Employer failed to disprove Claimant has the disease. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Epling*, 783 F.3d at 504-05; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 24. Therefore, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge