U.S. Department of Labor

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

BRB No. 21-0122 BLA

JOSEPH PALUCH, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KEYSTONE COAL MINING CORPORATION	)	
	)	
	)	
and	)	DATE ISSUED: 01/31/2022
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	
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 Granting Benefits of Susan Hoffman, Administrative Law Judge, United States Department of Labor.

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

Kara L. Jones (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for Employer and its Carrier.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Susan Hoffman's Decision and Order Granting Benefits (2019-BLA-05962) rendered on a claim filed on March 6, 2018 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with twenty-two-and-one-half years of underground coal mine employment and accepted Employer's concession Claimant has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore determined 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 by disproving legal pneumoconiosis. It also argues she applied an incorrect rebuttal standard in finding it did not disprove disability causation.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response asserting the ALJ applied the correct standard in determining Employer did not rebut disability causation. In a reply brief, Employer reiterates its contentions on appeal.

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] 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 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 Claimant established twenty-two-and-one-half years of underground coal mine employment, total disability, and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16-17.

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 and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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 nor clinical pneumoconiosis,[4] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20

[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); Claimant's Exhibit 2 at 5.

[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). "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).

C.F.R.] §718.201."[5] 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to rebut the presumption by either method.[6]

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." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the opinions of Drs. Rosenberg and Fino that Claimant does not have legal pneumoconiosis. Employer's Exhibits 4, 6, 7, 16. Both doctors acknowledged Dr. Sood diagnosed chronic bronchitis based on symptoms of cough and sputum production. Employer's Exhibits 6 at 17-18, 21-22; 7 at 21-22. They both opined any chronic bronchitis Claimant may have is unrelated to coal mine dust exposure because symptoms of chronic bronchitis typically resolve after dust exposure ceases, and Claimant stopped working in the mines sixteen to twenty years before their examinations. *Id.* Contrary to Employer's argument, the ALJ permissibly discredited their opinions because the regulations recognize pneumoconiosis as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R.

[5] We reject Employer's argument that the ALJ applied an incorrect legal standard when evaluating whether it established rebuttal. Employer's Brief at 16-18. As the Director correctly notes, Employer conflates the two distinct grounds for rebuttal and their respective standards. Legal pneumoconiosis and disability causation are separate, independent grounds for rebuttal under the Section 411(c)(4) presumption. Director's Letter Brief at 2. Contrary to Employer's contention, there is no conflict in the standards for rebutting the presumption between the circuit courts or the Board. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 667 (6th Cir. 2015); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331 (10th Cir. 2014); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013) (employer must establish that the miner's respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine); *see also Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-156 (2015) ("under 20 C.F.R. §718.305(d)(1)(ii), employer must establish that no part of the miner's respiratory or pulmonary disability is due to pneumoconiosis").

[6] The ALJ found Employer rebutted the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 19-20.

§718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Consol. Coal Co. v. Kramer*, 305 F.3d 203, 209-10 (3d Cir. 2002); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738 (6th Cir. 2014); Decision and Order at 21.

Dr. Rosenberg also diagnosed Claimant with a blood gas exchange impairment due to obesity and focal scarring, unrelated to coal mine dust exposure. Employer's Exhibit 4. In addition, Dr. Fino concluded Claimant has a restrictive pulmonary impairment and blood gas exchange impairment due to obesity and unrelated to coal mine dust exposure. Employer's Exhibit 16 at 5. The ALJ permissibly found both doctors did not "adequately explain why coal mine dust exposure could not have been a contributing or aggravating factor to Claimant's impairment[s]" along with obesity and focal scarring. Decision and Order at 21; *see Balsavage* v. *Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); 20 C.F.R. §718.201(a)(2), (b).

Because the ALJ permissibly discredited the opinions of Drs. Rosenberg and Fino,[7] the only opinions supportive of Employer's burden on rebuttal, we affirm her finding Employer did not disprove legal pneumoconiosis.[8] Decision and Order at 21. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

Upon finding Employer did not disprove pneumoconiosis, the ALJ addressed 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). The ALJ rationally discounted the opinions of Drs. Rosenberg and Fino regarding the cause of Claimant's disability because they failed to diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove Claimant has the disease. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Resources, Inc.*

[7] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Rosenberg and Fino, we need not address Employer's additional arguments regarding the weight the ALJ assigned their opinions. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 4-14.

[8] As Dr. Sood diagnosed legal pneumoconiosis, his opinion cannot support Employer's burden to disprove the disease; we therefore need not address Employer's contentions regarding the ALJ's weighing of his opinion. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 15.

v. Ogle, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 22-23. We therefore affirm the ALJ's conclusion that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge