U.S. Department of Labor

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

BRB No. 21-0131 BLA

DARRELL R. SNELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 01/24/2022
	)	
and	)	
	)	
HEALTHSMART CASUALTY CLAIMS	)	
	)	
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 Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge) Bristol, Virginia, 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: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jonathan C. Calianos's Decision and Order Awarding Benefits (2019-BLA-05189) rendered on a claim filed on June 12, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant had less than fifteen years of coal mine employment[1] and therefore could not invoke the rebuttable 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 whether Claimant established entitlement without the benefit of the Section 411(c)(4) presumption, the ALJ found Claimant established legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment due to legal pneumoconiosis. 20 C.F.R. §§718.202, 718.204(b), (c). He therefore awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis and disability causation. Claimant has not responded. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response urging the Benefits Review Board to reject Employer's assertion that coal dust has to be the primary cause of the respiratory or pulmonary impairment to constitute legal pneumoconiosis.

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.[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] The parties stipulated to "at least 10.59 years" of coal mine employment; further, the ALJ noted Claimant alleged, "at most, 11.5 years of coal mine employment." Decision and Order at 5-6.

[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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[3] 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 Virginia. *See Shupe*

Entitlement – 20 C.F.R. Part 718

Without the benefit of the statutory presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability) [4] 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits.[5] *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 (1986) (en banc).

Legal Pneumoconiosis

To prove legal pneumoconiosis,[6] Claimant must establish 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).

---

v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 5; Director's Exhibit 3; Hearing Transcript at 13.

[4] The ALJ found Claimant did not establish the existence of simple clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1). Decision and Order at 9, 13-14. He also noted Claimant submitted no evidence of complicated pneumoconiosis and thus is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 6 n.3.

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2). Decision and Order at 3; Hearing Transcript 6; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] "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).

The ALJ considered the opinions of Drs. Forehand, McSharry, and Fino. All agree Claimant has a disabling obstructive lung impairment but disagree as to its etiology.[7] Decision and Order at 10-15. Dr. Forehand attributed Claimant's respiratory impairment to"[t]he additive effects of smoking cigarettes and the occupational exposure to coal mine dust working as a welder and mechanic on coal mine equipment." Director's Exhibit 12. In contrast, Drs. McSharry and Fino opined Claimant's obstructive impairment is due solely to smoking. Director's Exhibit 17; Employer's Exhibits 1, 8. The ALJ credited Dr. Forehand's opinion as reasoned, documented, and consistent with the science that the Department of Labor (DOL) relied on in the preamble to the 2001 revised regulations. Decision and Order at 14-15. In contrast, he found Drs. McSharry's and Fino's opinions lacked credibility. *Id*. at 15.

Employer argues Dr. Forehand's opinion is legally insufficient to satisfy Claimant's burden of proof. Employer asserts the ALJ improperly presumed Claimant has legal pneumoconiosis, did not adequately consider whether Dr. Forehand's opinion is reasoned, and misinterpreted the preamble in determining the weight to accord the evidence. Employer's Brief at 4-9. We disagree.

In support of its contention that Dr. Forehand's opinion does not satisfy the legal standard, Employer notes Dr. Forehand acknowledged Claimant's "exposure to cigarette smoke had a greater effect than [his] exposure to coal mine dust" in causing his respiratory impairment. Employer's Brief at 7-8, quoting Director's Exhibit 12. To the extent Employer is arguing Claimant must prove coal mine dust is the primary or majority cause of his respiratory impairment, Employer misconstrues the regulations and controlling legal authority. Under the regulations, Claimant need only establish he has a "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); *see* Director's Brief at 2. Moreover, the United States Court of Appeals for the Fourth Circuit, whose law applies to this claim, has held that coal mine dust does not need to be the primary cause of a miner's respiratory or pulmonary impairment in order to qualify as legal pneumoconiosis. *See Lewis Coal Co. v. Director, OWCP*, 373 F.3d 570, 577 (4th Cir. 2004); *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 625 (4th Cir. 1999); *see also Westmoreland Coal Co., Inc. v. Stidham*, 561 Fed. Appx. 280, 284 (4th Cir. 2014).

Here, the ALJ applied the correct standard and considered whether Dr. Forehand's opinion was sufficient to establish that Claimant's respiratory or pulmonary impairment is

[7] The ALJ found Claimant's treatment records include diagnoses of obstructive lung disease but do not address the etiology of his respiratory disease. Decision and Order at 15 n.9.

"significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 6; Employer's Brief at 5; *see* 20 C.F.R. §718.201(b). As the ALJ correctly observed, Dr. Forehand conceded smoking had a greater impact on Claimant's impairment than coal mine dust exposure, and further acknowledged he was unable to "determine the precise overall contribution the [two] factors had on the [C]laimant's lungs." Director's Exhibit 12 at 4. Regardless, Dr. Forehand specifically opined Claimant's condition "[meets] the definition of legal coal workers' pneumoconiosis." *Id*. He also specifically determined Claimant's respiratory impairment was significantly related to coal mine dust exposure. *Id.* Thus, there is no error in the ALJ's conclusion Dr. Forehand's opinion satisfies the legal standard. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003) (physician need not specifically apportion extent to which various causal factors contribute to a respiratory or pulmonary impairment).

We also see no error in the ALJ's finding that Dr. Forehand's opinion is reasoned and documented as it is not based solely on his consideration of the preamble. The ALJ permissibly found Dr. Forehand's opinion on legal pneumoconiosis supported by the totality of his examination and Claimant's accounts of his exposure to large amounts of coal dust.[8] *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Director's Exhibit 12 at 4. In addition, the ALJ acted within his discretion in finding Dr. Forehand's attributing Claimant's impairment to both smoking and coal mine dust exposure persuasive and consistent with the DOL's recognition in the preamble to the 2001 revised regulations that the effects of smoking and coal dust exposure may be additive. 65 Fed. Reg. 79,940, 79,941, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 674 (4th Cir. 2017); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); Decision and Order at 14-15. Thus, for all of these reasons, we affirm the ALJ's

[8] Employer notes Dr. Forehand did not take into account Claimant's work teaching welding at Southwest Virginia Community College in 1998, 2000, 2003, and 2004. Employer's Brief at 8. But the parties stipulated Claimant had 10.59 years of coal mine employment as a welder for Employer from 1974 to 1985 and Dr. Forehand based his opinion on an eleven year coal mine dust exposure history during the same time frame. Decision and Order at 2; Director's Exhibit 12 at 1. Employer has not explained why Dr. Forehand's failure to account for Claimant's non-coal mine employment undermines his opinion that Claimant has legal pneumoconiosis. *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

finding that Dr. Forehand's opinion is reasoned and sufficient to establish Claimant has legal pneumoconiosis.[9]

We further reject Employer's contention that the ALJ did not adequately explain his credibility findings. As the ALJ noted, Drs. McSharry and Fino both acknowledged Claimant has sufficient coal mine dust exposure to cause or contribute to Claimant's respiratory impairment. Decision and Order at 15. Dr. McSharry noted, however, that when coal dust exposure causes an obstructive impairment, it is "generally associated with radiographic evidence of pneumoconiosis." Director's Exhibit 17. He concluded that because Claimant does not have radiographic evidence of clinical pneumoconiosis, Claimant's respiratory impairment is due to cigarette smoking. *Id*. The ALJ permissibly found Dr. McSharry's opinion inconsistent with the regulations which do not require a positive x-ray in order to diagnose legal pneumoconiosis. 20 C.F.R. §718.202(a)(4), (b); *see also* 65 Fed. Reg. at 79,945; *Looney*, 678 F.3d at 313; Decision and Order at 15.

Similarly, the ALJ permissibly found Dr. Fino's opinion unpersuasive as he could state only that it would be "unusual" and "unlikely, but not impossible," for Claimant's respiratory impairment to be due to coal dust exposure based on his work history. Employer's Exhibit 8 at 7-8; *see also* Employer's Exhibit 1. The ALJ permissibly found that, while Dr. Fino opined Claimant's smoking history "could easily cause this degree of airway obstruction and the oxygen transfer abnormality," Dr. Fino did not adequately explain why Claimant's eleven years of coal mine employment was not a contributing or aggravating cause of his respiratory impairment. Decision and Order at 15, *quoting* Employer's Exhibit 8 at 8; *see Looney*, 678 F.3d at 316-17; *Hicks*, 138 F.3d at 528.

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12

[9] Employer contends the ALJ failed to consider that Dr. Forehand interpreted the x-ray he obtained during his examination as positive for clinical pneumoconiosis, when the ALJ found Claimant does not have clinical pneumoconiosis. Employer's Brief at 8; see Decision and Order at 9. Even if true, remand is not required. On the DOL form Dr. Forehand completed for his examination, he noted Claimant had coal workers' pneumoconiosis (clinical pneumoconiosis) based on the positive x-ray. Director's Exhibit 12. He separately diagnosed an obstructive respiratory disease (legal pneumoconiosis) based on Claimant's "shortness of breath, history of exposure to cigarette smoke, history of occupational exposure to coal mine dust, abnormal breath sounds, [and] ventilator study." Director's Exhibit 12 at 4; *see generally Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

BLR 1-111, 1-113 (1989). As the ALJ provided permissible reasons for crediting Dr. Forehand's opinion and discrediting Drs. McSharry's and Fino's opinions, we affirm the ALJ's finding that Claimant established legal pneumoconiosis.[10] 20 C.F.R. §718.202(a)(4); Decision and Order at 15.

Disability Causation

To establish disability causation, Claimant must prove his legal pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 37-38 (4th Cir. 1990).

Because there is no dispute Claimant has a totally disabling obstructive respiratory impairment, its etiology encompasses the issues of legal pneumoconiosis and disability causation. Director's Exhibits 12, 17; Employer's Exhibit 1, 8. As discussed above, the ALJ permissibly relied on Dr. Forehand's opinion in finding it constitutes legal pneumoconiosis. *See Hicks*, 138 F.3d at 533; Decision and Order at 14-15. We therefore see no error in the ALJ's finding that Dr. Forehand's opinion is also sufficient to establish that Claimant's legal pneumoconiosis is a substantially contributing cause of his total disability. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Hawkinberry v. Monongalia County Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); Decision and Order at 16-17.

In addition, the ALJ permissibly discounted the opinions of Drs. McSharry and Fino on the cause of Claimant's respiratory disability because they did not diagnose legal pneumoconiosis.[11] *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (a doctor's opinion as to causation may not be credited unless there are "specific and persuasive reasons" for concluding it is independent of his mistaken belief the miner did

[10] Further, because the ALJ gave valid reasons for discrediting the opinions of Drs. McSharry and Fino, we need not address Employer's other contentions concerning the ALJ's weighing of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 8-9.

[11] Drs. McSharry's and Fino's opinions as to disability causation rested on their assumption that legal pneumoconiosis did not exist.

not have pneumoconiosis); Decision and Order at 17. As substantial evidence supports the ALJ's finding that Claimant is totally disabled due to legal pneumoconiosis, we affirm it. 20 C.F.R. §718.204(c).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge