U.S. Department of Labor

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

BRB No. 21-0306 BLA

CAROL RAGER (o/b/o RONALD E. RAGER) Claimant-Respondent v. KINGWOOD COAL COMPANY and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/30/2023 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2019-BLA-05648) rendered on a miner's claim filed on August 28, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that the Miner had seventeen years of surface coal mine employment in conditions substantially similar to those in an underground mine. He further found Claimant[1] established the Miner had a totally disabling respiratory impairment, and therefore invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4). Finally, he determined Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it did not rebut the presumption.[3] Claimant responds urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe* v. *Smith, Hinchman & Grylls Assoc., Inc.*, 380 U.S. 359 (1965).

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[1] Claimant is the widow of the Miner, who died on January 18, 2018. Director's Exhibit 10. She is pursuing the miner's claim on his behalf. *Id*.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability was due to pneumoconiosis if he had at least fifteen years of underground coal mine employment or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe* v. *Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 6; Director's Exhibit 4.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal 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 did not establish rebuttal by either method.[6]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did 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).

The ALJ considered the opinions of Drs. Werntz, Rosenberg, and Spagnolo, all of whom opined the Miner did not have legal pneumoconiosis.[7] Decision and Order at 17-19. Dr. Werntz diagnosed the Miner with emphysema due to smoking and a restrictive lung impairment and a gas exchange impairment due to lung cancer and chemotherapy with a possible small contribution from coal mine dust exposure. Director's Exhibits 12, 16. Dr. Rosenberg diagnosed the Miner with chronic obstructive pulmonary disease (COPD) and emphysema due to cigarette smoking, and a blood gas impairment due to his medications. Employer's Exhibits 10, 14. Similarly, Dr. Spagnolo opined the Miner had an obstructive impairment due to asthma, lung cancer and chemotherapy, and a gas exchange impairment due to the Miner's medications. Director's Exhibit 20; Employer's

[5] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the condition 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). "Legal pneumoconiosis" refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[6] The ALJ found Employer rebutted the existence of clinical pneumoconiosis. Decision and Order at 11.

[7] The ALJ also considered the medical opinions of Drs. Go and Sood that the Miner had legal pneumoconiosis, but accurately found they do not assist Employer in rebutting the presumption. Decision and Order at 17; Claimant's Exhibit 6, 7.

Exhibits 9, 13. The ALJ found their opinions not sufficiently reasoned to meet Employer's burden, and therefore found their opinions did not rebut the existence of legal pneumoconiosis. Decision and Order at 17-19.

Employer initially argues the ALJ failed to make a specific finding concerning the Miner's smoking history other than to state he had a "long smoking history." Employer's Brief at 6-7. It thus asserts the case should be remanded for the ALJ to make a more exact finding prior to reassessing the credibility of the medical opinions. *Id*. All of the experts relied on a smoking history of up to 180 pack years. Director's Exhibits 12, 16, 20; Claimant's Exhibits 6, 7; Employer's Exhibits 9, 10, 13, 14. But as set forth below, the ALJ did not credit or discredit any physician based on the length of the Miner's smoking history. Rather, the ALJ discredited the opinions of Employer's experts for failing to adequately explain why coal mine dust did not significantly contribute to, or substantially aggravate, the Miner's respiratory disease. Decision and Order at 17-18. Consequently, Employer has not shown how the ALJ's failure to make a more specific smoking history finding undermined the validity of his credibility determinations. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (the appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

We further reject Employer's argument that the ALJ erred in discrediting the opinions of Drs. Werntz, Spagnolo, and Rosenberg. Employer's Brief at 6-15.

Dr. Werntz opined the Miner had emphysema based upon a CT scan and attributed it to his "considerable smoking history." Director's Exhibit 12. He further diagnosed the Miner with restrictive lung disease and impaired gas exchange primarily due to his lung cancer and its treatment, while noting there may be a "small contribution" to those conditions from his coal mine dust exposure. *Id.* In a supplemental report, Dr. Werntz reiterated his diagnoses of an impairment due to lung cancer and smoking-induced emphysema; he also opined that while it was "possible that there was a very small contribution" from the Miner's coal mine employment to his pulmonary impairment, there was "no meaningful contribution." Director's Exhibit 16. Contrary to Employer's arguments, the ALJ permissibly found Dr. Werntz's opinion conclusory and accorded it no weight as he "gave no rationale or explanation" for his determination that the Miner's emphysema was due solely to cigarette smoking with no meaningful contribution to his impairment from coal mine dust exposure. *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); Decision and Order at 17-18; Employer's Brief at 8-9.

Dr. Rosenberg opined that the Miner's chronic bronchitis is unrelated to coal mine dust exposure because it developed after he left coal mine employment. Employer's

Exhibit 10. Similarly, although Dr. Spagnolo believed the Miner's symptoms could be related to heart disease, he opined that if the Miner had chronic bronchitis, it was due solely to cigarette smoking as it developed after he left coal mine employment. Employer's Exhibit 13 at 35-36. The ALJ found their opinions unpersuasive, as they are inconsistent with the regulations which 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. §718.201(c)(1); *see* 65 Fed. Reg. 79,971 (Dec. 20, 2000) ("[I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period."); *Mullins Coal Co. of Va. V. Director, OWCP*, 484 U.S. 135, 151 (1987); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (medical opinion not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); Decision and Order at 18. As Employer has not challenged these findings, they are affirmed.[8] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Dr. Rosenberg also opined that the Miner's COPD and emphysema were unrelated to coal mine dust exposure based, in part, on his opinion that cigarette smoking causes a more severe loss in the FEV1 value on pulmonary function testing than coal mine dust exposure and the Miner's smoking history could account for all of this loss. Employer's Exhibit 10. Contrary to Employer's arguments, the ALJ permissibly found his opinion unpersuasive as it was based on generalities and not the specifics of the Miner's condition. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 312-13 (4th Cir. 2012) (substantial evidence supported ALJ's discrediting of medical opinion where doctor relied "heavily on general statistics rather than particularized facts about" the miner); Decision and Order at 18; Employer's Brief at 12-15.

Finally, contrary to Employer's arguments, the ALJ did not discredit the opinions of Drs. Werntz, Spagnolo, and Rosenberg based on a "blind reliance" on the preamble to the revised 2001 regulations or create a presumption that all obstructive impairments constitute legal pneumoconiosis. Employer's Brief at 7-8. Rather, as discussed above, the ALJ gave permissible reasons for discrediting the physicians' opinions that the Miner's COPD was unrelated to coal mine dust exposure, and in so doing permissibly consulted the preamble as a statement of credible medical research findings the DOL accepted when it revised the definition of pneumoconiosis to include obstructive impairments arising out

[8] As the ALJ gave a permissible reason for discrediting Dr. Spagnolo's opinion that the Miner's chronic bronchitis did not constitute legal pneumoconiosis, we need not address Employer's argument that the ALJ erred in discrediting Dr. Spagnolo's opinion that the Miner's asthma did not constitute legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 10-12.

of coal mine employment. *See Looney*, 678 F.3d at 314-16; *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012). Because the ALJ adequately explained his credibility findings, we affirm his determination that Employer did not disprove the Miner had legal pneumoconiosis. *See Looney*, 678 F.3d at 316-17; *Hicks*, 138 F.3d at 533; Decision and Order at 18-19. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered 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); Decision and Order at 27-32. Contrary to Employer's arguments, the ALJ permissibly found their opinions that the Miner's totally disabling COPD was not due to legal pneumoconiosis undermined by their failure to diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the Miner had the disease.[9] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (such an opinion "may not be credited at all" on disability causation absent "specific and persuasive reasons" for concluding the physician's view on disability causation is independent of his erroneous opinion on pneumoconiosis); Decision and Order at 37; Employer's Brief at 15-18. We therefore 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) and the award of benefits.

[9] Employer raises its disability causation arguments with respect to the opinions of Drs. Spagnolo and Rosenberg only. Employer's Brief at 15-18. We thus affirm, as unchallenged on appeal, the ALJ's determination that Dr. Werntz's opinion is not sufficient to rebut the presumption of disability causation. *Skrack*, 6 BLR at 1-711; Decision and Order at 32.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge