U.S. Department of Labor

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

BRB No. 21-0403 BLA

GARLAND J. STREET	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
B&B MINING, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 01/17/2023
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Garland J. Street, Honaker, Virginia.

Michael A. Pusateri (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals, without representation, Administrative Law Judge (ALJ) Francine L. Applewhite's[1] Decision and Order Denying Benefits (2014-BLA-05353) 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 November 29, 2012.[2]

The ALJ found Claimant established twelve years of qualifying coal mine employment, based on the parties' stipulation, and thus found he was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] She further found pneumoconiosis and total disability established based on Employer's stipulations and thus found a change in

[1] A hearing was held on May 19, 2016, before ALJ Clement J. Kennington, who found the case was not ready for decision and continued the hearing. 2016 Hearing Transcript; Order Postponing Hearing. The case was reassigned to ALJ Morris D. Davis, who held a hearing on June 17, 2017. 2017 Hearing Transcript. Thereafter, the case was reassigned to the ALJ, after Employer's Motion for Reassignment based on the United States Supreme Court's ruling in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). Jan. 23, 2019 Notice of Assignment and Order. The ALJ notified the parties she intended to issue a decision and order on the existing record unless she received a request for a supplemental hearing. *Id.* No such request was received; thus, the ALJ issued her decision. Decision and Order at 2.

[2] This is Claimant's fifth claim for benefits. Director's Exhibits 1-3, 5. The district director denied Claimant's prior claim, filed in 2009, for failing to establish any element of entitlement. Director's Exhibit 3. When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must deny the subsequent claim unless she finds "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); *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 the district director denied Claimant's prior claim for failure to establish any element of entitlement, Claimant must submit new evidence establishing at least one element to warrant a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 3.

[3] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption that he 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); 20 C.F.R. §718.305.

applicable condition of entitlement. 20 C.F.R. §725.309. Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant did not establish his total disability was due to pneumoconiosis and therefore denied benefits. 20 C.F.R. §718.204(c).

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer responds in support of the denial.[4] The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed without representation, the Benefits Review Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). 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).

Entitlement - 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3)[6] and (c)(4) presumptions,[7] Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine

[4] We affirm, as unchallenged on appeal, the ALJ's findings that simple clinical pneumoconiosis and a totally disabling respiratory impairment are established based on Employer's stipulations. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-5; 20 C.F.R. §§718.202(a), 718.204(b)(2).

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); 2017 Hearing Transcript at 21.

[6] While the ALJ did not make a specific finding, there is no evidence of complicated pneumoconiosis in the record; thus, Claimant cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304.

[7] The ALJ found Claimant could not invoke the Section 411(c)(4) presumption based on the parties' stipulation of twelve years of coal mine employment. Decision and Order at 4-5. The record indicates Claimant worked in coal mine employment from 1974 through 1986. Director's Exhibits 8-10; 2016 Hearing Transcript at 32. Claimant initially indicated that he had fourteen years of coal mine employment, but would agree to twelve years, as Employer stipulated. 2016 Hearing Transcript at 5-6; 2017 Hearing Transcript at 10-11, 18-19. Even if Claimant's initial allegation of fourteen years is correct, this length of employment would be insufficient to invoke the presumption. Because the stipulation

employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 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. *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

We have affirmed the ALJ's finding that Claimant established simple clinical pneumoconiosis,[8] thus establishing the required element of disease.[9] Decision and Order at 4; 20 C.F.R. §718.201(a)(1). However, legal pneumoconiosis is also relevant to the issue of disability causation.[10] *Id.*

The ALJ did not address whether the evidence established the presence of legal pneumoconiosis, addressing only disability causation. Decision and Order at 7-9. It appears the ALJ operated under the assumption that Employer stipulated not only to the presence of clinical pneumoconiosis, but also to legal pneumoconiosis. *See* Decision and Order at 4-5 (indicating Employer stipulated to "pneumoconiosis" without distinguishing

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as to the length of Claimant's coal mine employment is supported by substantial evidence, we affirm the ALJ's determination that Claimant could not invoke the Section 411(c)(4) presumption. *See Richardson v. Director, OWCP*, 94 F.3d 164, 167 (4th Cir. 1996); 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i); Decision and Order at 4-5.

[8] "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[9] As Claimant established more than ten years of coal mine employment and Employer does not point to any evidence rebutting the presumption, we also affirm the ALJ's finding that Claimant's clinical pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *Skrack*, 6 BLR at 1-711; Decision and Order at 7-8.

[10] "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).

between the two types). Employer, however, specified it was stipulating to "simple pneumoconiosis" given the pathology evidence demonstrating the same.[11] 2017 Hearing Transcript at 8; Closing Argument at 16-20. As the ALJ failed to explain whether she found legal pneumoconiosis established by stipulation, and her basis for doing so, we vacate her determination on that issue. Decision and Order at 4-5. And, even assuming the ALJ did not err in finding Employer stipulated to legal pneumoconiosis, as discussed below the ALJ's dependent findings regarding disability causation are erroneous.[12]

Disability Causation

To establish disability causation, Claimant must prove 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 of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or "[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).

The ALJ considered the opinions of Drs. Fino, Rosenberg, and Rasmussen. Decision and Order at 8-9. None of the experts opined that Claimant's clinical pneumoconiosis contributes to his disabling respiratory impairment. Director's Exhibit 19; Employer's Exhibits 1, 8-9. Dr. Rasmussen opined that factors contributing to Claimant's chronic lung disease include his smoking history, coal mine employment history, and previous lung surgery. Director's Exhibit 19. While he opined that Claimant's smoking history was the "most potent cause" of Claimant's lung disease, he also opined that Claimant's twelve years of coal mine dust exposure would also contribute, "probably to a significant degree." *Id.* Drs. Fino and Rosenberg opined Claimant is not totally disabled due to pneumoconiosis, but is totally disabled due to bullous emphysema[13] caused by

[11] Claimant had his upper right lung resected in 1994 as part of his treatment for lung cancer. Director's Exhibit 1; 2016 Hearing Transcript at 31. The pathology reports showed small cell carcinoma, emphysema, interstitial fibrosis, and fibroanthracotic nodules consistent with simple clinical pneumoconiosis. Director's Exhibit 1 at 670, 765 (unpaginated); Employer's Exhibits 1, 8.

[12] Employer argues the ALJ found legal pneumoconiosis was not established and urges us to affirm that finding, but she made no such finding. Employer's Brief at 3.

[13] Claimant's treatment records also include diagnoses of bullous emphysema and chronic obstructive pulmonary disease (COPD), but none indicate the etiology of these diseases. Employer's Exhibit 6; Claimant's Exhibit 6.

smoking, and unrelated to coal mine dust exposure. Employer's Exhibits 1, 4, 7, 9 at 15-16, 18-19, 23. They further opined that while there is pathological evidence of clinical pneumoconiosis, it does not contribute to any impairment. Employer's Exhibit 8 at 11-12; Employer's Exhibit 9 at 25.

The ALJ accorded greater weight to the opinions of Drs. Fino and Rosenberg, finding them better documented and supported. Decision and Order at 8. The ALJ found Dr. Rasmussen's opinion equivocal. *Id.* Thus, the ALJ concluded that Claimant failed to establish total disability due to pneumoconiosis. *Id.* at 9.

Initially, insofar as the ALJ assumed that Employer stipulated to legal pneumoconiosis and thus that the disease was established, she failed to explain how Drs. Fino's and Rosenberg's opinions regarding disability causation could be well-reasoned when they found no such disease. *See Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995) (an ALJ who has found the disease and disability elements established may not credit an opinion denying disability causation without providing "specific and persuasive" reasons for concluding it does not rest upon a disagreement with those elements). The ALJ simply found their opinions "refute[] a finding of disability due to pneumoconiosis" and summarily concluded "they are well documented and supported." Decision and Order at 9.

Moreover, the ALJ confused the analysis of legal pneumoconiosis and disability causation when discussing Dr. Rasmussen's opinion. She began her analysis of the medical opinions by setting forth the standard for establishing disability causation, not legal pneumoconiosis, and in finding Dr. Rasmussen's opinion equivocal, she addressed whether his opinion was sufficient to establish that pneumoconiosis significantly contributed to Claimant's lung disease. *See* Decision and Order at 8 (Because Dr. Rasmussen opined coal dust is "probably" a significant contributor to Claimant's lung disease, it is equivocal and thus "neither supports nor refutes a finding of disability due to pneumoconiosis.").[14]

[14] While the ALJ found Dr. Rasmussen's use of the term "probably" to be equivocal, we note that the Fourth Circuit, within whose jurisdiction this claim arises, has held that "refusal to express a diagnosis in categorical terms is candor, not equivocation." *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763 (4th Cir. 1999) (opinion that pneumoconiosis "could be" a complicating factor in the miner's death was not equivocal); *see also Jackson v. Black Butte Coal Co.*, No. 20-9652, 2022 WL 211622, slip op. at 2, 4 (10th Cir. Jan. 25, 2022) (summarizing circuit courts' approaches to whether physicians' use of "qualifiers" constitutes equivocation, and holding the ALJ failed to explain why one physician's use of the term "likely" was equivocation but another physician's use of the term "could" was not).

However, when addressing disability causation, the question is whether *legal pneumoconiosis*, a disease the ALJ apparently found established by stipulation, albeit incorrectly, is a "substantially contributing cause" of Claimant's totally disabling impairment. 20 C.F.R. §718.204(c)(1). Thus, we also vacate the ALJ's findings regarding disability causation.

Remand Instructions

On remand, the ALJ must first consider whether Claimant established legal pneumoconiosis. 20 C.F.R. §718.201(b). To establish legal pneumoconiosis, Claimant must prove he has a "chronic pulmonary disease or respiratory impairment, significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). The Fourth Circuit, whose law applies to this claim, has held a claimant can establish legal pneumoconiosis by showing coal dust exposure contributed "in part" to a miner's respiratory or pulmonary impairment. *See Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 309, 314 (4th Cir. 2012); *see also Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment"). The ALJ should consider the medical opinion evidence, addressing the medical opinions in their entirety[15] to determine their credibility and legal sufficiency.

[15] In addition to concluding coal dust exposure "probably" contributed "to a significant degree" to Claimant's lung disease, Dr. Rasmussen provided other statements on its etiology that the ALJ did not consider. *See Piney Mountain Coal Co.*, 176 F.3d at 763 (physician's opinion must be evaluated "in the full context of his report"). He indicated legal pneumoconiosis "could be considered" on the basis of COPD caused "at least minimally" by coal mine dust exposure. Director's Exhibit 19. Further, he opined that Claimant's "cigarette smoking is by far the most potent cause [of the severe chronic lung disease] with his coal mine dust exposure likely causing minimal further damage." *Id.* He additionally stated that "[c]oal mine dust exposure is probably a minimal co-contributor." *Id.*

Then, if the ALJ finds legal pneumoconiosis established, she must determine if the evidence is sufficient to establish that it is a substantially contributing cause of Claimant's totally disabling impairment. 20 C.F.R. §718.204(c)(1). In weighing the experts' opinions, the ALJ must consider the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See 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). In so doing, she must set forth her findings in detail, including the underlying rationale. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits and remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge