U.S. Department of Labor

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

BRB No. 21-0619 BLA

JOE A. HICKS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MILL BRANCH COAL COMPANY	)	
	)	DATE ISSUED: 01/30/2023
and	)	
	)	
OLD REPUBLIC GENERAL INSURANCE CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Revised Decision and Order Awarding Benefits Following Remand of Jodeen M. Hobbs, Administrative Law Judge, United States Department of Labor.

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

David Casserly (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor).

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jodeen M. Hobbs's Revised Decision and Order Awarding Benefits Following Remand (2016-BLA-05672) (Revised Decision and Order on Remand) rendered on a subsequent claim filed on September 20, 2013, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1] This case is before the Benefits Review Board for the second time.[2]

On August 1, 2018, ALJ Morris D. Davis found Claimant has at least thirty years of underground coal mine employment and determined the new evidence established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. 718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[3] and demonstrated a change in an applicable condition of entitlement.[4] 20 C.F.R. §§718.305, 725.309. However, he found Employer rebutted the presumption and denied benefits.

[1] Claimant filed three prior claims, most recently on June 21, 2011, which the district director denied for failure to establish total disability. *See Hicks v. Mill Branch Coal Co.*, BRB No. 18-0546 BLA, slip op. at 2 n.2 (Nov. 25, 2019) (unpub.); Director's Exhibit 1.

[2] We incorporate the procedural history of the case as set forth in the Board's prior decision. *Hicks*, BRB No. 18-0546 BLA.

[3] Section 411(c)(4) 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.

[4] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "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). Because Claimant's prior claim was denied for failure to establish total disability, Claimant had to submit new evidence establishing this element of entitlement to obtain review of his current claim on the merits. 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3; Director's Exhibit 1.

In consideration of Claimant's appeal, the Board vacated ALJ Davis's award of benefits, finding he erred in concluding Employer rebutted the Section 411(c)(4) presumption.[5] *Hicks v. Mill Branch Coal Corp.*, BRB No. 18-0546 BLA (Nov. 25, 2019) (unpub.). Because ALJ Davis was no longer with the Office of Administrative Law Judges, the case was reassigned to ALJ Hobbs (the ALJ).[6] She found the opinions of Drs. McSharry and Rosenberg insufficient to satisfy Employer's burden to establish rebuttal and awarded benefits.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because the removal provisions applicable to ALJs render her appointment[7] unconstitutional. On the merits, Employer asserts the ALJ's findings that it did not rebut the Section 411(c)(4) presumption are erroneous. The Director, Office of Workers'

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[5] The Board held that "[i]n crediting the opinions of Drs. McSharry and Rosenberg on legal pneumoconiosis, [ALJ Hobbs] focused exclusively on their opinion that claimant's disabling hypoxemia is due to rheumatoid arthritis" and did not adequately address whether they "credibly explained why rheumatoid arthritis was the sole cause of claimant's disabling blood gas impairment and why claimant's thirty years of underground coal mine dust exposure did not significantly contribute to, or substantially aggravate, his hypoxemia." *Hicks*, BRB No. 18-0546 BLA, slip op. at 4. Furthermore, the Board held [ALJ Hobbs] failed to consider whether Drs. McSharry and Rosenberg rebutted the presumption that Claimant's chronic obstructive pulmonary disease constitutes legal pneumoconiosis. *Id*.

[6] The ALJ issued an initial Decision and Order Awarding Benefits Following Remand dated May 17, 2021. Because Employer asserted it did not receive service of the May 17, 2021 decision, the ALJ allowed additional briefing and issued a revised decision. Revised Decision and Order on Remand at 1-2 & n.1.

[7] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

Compensation Programs, responds, asserting the ALJ had the authority to decide the case and properly found Employer failed to establish rebuttal. Employer filed a reply brief reiterating its arguments. Claimant did not file a response brief.[8]

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.[9] 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).

Removal Provisions Challenge

Employer challenges the constitutionality of the removal protections afforded Department of Labor (DOL) ALJs. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[10] Employer's Brief at 12-17; Employer's Reply Brief at 2-6. In addition, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 12-17. For the reasons set forth in *Howard v. Apogee*

[8] In its prior decision, the Board affirmed, as unchallenged on appeal, the ALJ's findings that Claimant invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *Hicks*, BRB No. 18-0546 BLA, slip op. at 3 n.6. Additionally, the Board affirmed as supported by substantial evidence the ALJ's finding that Employer rebutted the Section 411(c)(4) presumption by establishing that Claimant does not have clinical pneumoconiosis. *Hicks*, BRB No. 18-0546 BLA, slip op. at 5-7.

[9] Claimant's coal mine employment was performed in Virginia. *Hicks*, BRB No 18-0546 BLA, slip op. at 2 n.3; Director's Exhibit 5; Hearing Transcript at 29. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[10] *Lucia* involved an Appointments Clause challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held, similar to Special Trial Judges at the United States Tax Court, that SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

Coal Co., BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022), we reject Employer's arguments.[11]

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,[12] 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).

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),

[11] Even if there were merit to Employer's argument, it forfeited any challenge to the propriety of ALJ Hobbs's appointment by raising it for the first time on appeal in its reply brief to the Board. *See Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) (the employer forfeited its Appointments Clause argument by failing to raise it in its opening brief); Employer's Reply Brief at 2-6; Employer's Petition for Review and Brief at 12-17. It also forfeited any challenge to ALJ Davis's appointment or removal protections by failing to raise them in its previous appeal to the Board. *Edd Potter Coal Co. v. Director, OWCP* [*Salmons*], 39 F.4th 202, 210 (4th Cir. 2022) ("On remand, parties may not raise whatever new issues they would like if they have previously failed to bring those issues to the attention of the ALJ and the Board. The mere fact of remand does not wipe the whole slate clean.").

[12] "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). "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).

718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the opinions of Drs. McSharry and Rosenberg, who both concluded Claimant does not have legal pneumoconiosis. Dr. McSharry opined Claimant's severe hypoxemia is due to rheumatoid arthritis and his obstructive impairment is due to smoking. Employer's Exhibits 1, 8. Similarly, Dr. Rosenberg opined Claimant's severe hypoxemia and obstructive lung disease are due to rheumatoid arthritis and smoking. Director's Exhibit 16; Employer's Exhibits 3, 9. The ALJ found their opinions not adequately reasoned.

Employer contends the ALJ did not consider that the opinions of its medical experts are "uncontradicted" regarding the cause of Claimant's chronic obstructive pulmonary disease (COPD). Employer's Brief at 28-31; Employer's Reply Brief at 12-13. However, an ALJ is not required to credit an "uncontradicted" medical opinion if she otherwise finds it not well-reasoned. *See Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-296 (1985) (the ALJ may refuse to credit even an uncontradicted medical opinion if there is a legitimate reason); *Blackledge v. Director, OWCP*, 6 BLR 1-1060 (1984) (same). Employer has the burden to rebut the presumed existence of legal pneumoconiosis; the ALJ therefore properly considered the credibility of the medical opinions Employer proffered on that issue.

Further, Employer's general contention that the ALJ did not specifically discuss all of the arguments it raised in its remand brief is unavailing. Revised Decision and Order on Remand at 2. The ALJ's task is to evaluate and weigh the evidence according to the applicable laws and regulations. *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). Employer has not demonstrated that the ALJ failed to identify and resolve the relevant issues in this case.[13]

We also reject Employer's argument that the ALJ applied the wrong legal standard to the extent she effectively required it to "rule out" any possibility of legal pneumoconiosis. Employer's Brief at 21-22. The ALJ stated the correct legal standard when she observed Employer must establish Claimant does not have legal pneumoconiosis, defined as a respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Revised Decision and Order on Remand at 4; *see* 20 C.F.R. §718.201(a)(2), (b). Moreover, as explained below, the ALJ rejected the opinions of Drs. McSharry and Rosenberg because she found their opinions

[13] Employer does not identify any argument the ALJ did not consider and which required a response.

insufficiently reasoned[14] and not because they failed to satisfy an incorrect legal standard. Revised Decision and Order on Remand at 5-12.

Dr. McSharry opined Claimant has lung abnormalities from rheumatoid arthritis and COPD and excluded a diagnosis of legal pneumoconiosis because "[t]here is no radiographic evidence of pneumoconiosis and no reason to suspect that pneumoconiosis is involved." Employer's Exhibit 1 at 3. The ALJ permissibly rejected Dr. McSharry's opinion because he "attempts to avoid classifying Claimant's COPD as legal pneumoconiosis by pointing to the lack of radiographic evidence. However, lack of supporting x-rays is not dispositive of the issue of legal pneumoconiosis." Revised Decision and Order on Remand at 7; *see* 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000) ("A physician's opinion ruling out the presence of the disease based solely on a negative x-ray would be similarly insufficient [to establish legal pneumoconiosis]; such an opinion would amount to no more than a repetition of the x-ray findings."); *Looney*, 678 F.3d at 313 (the regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that no claim for benefits shall be denied solely on the basis of a negative chest x-ray") (internal quotations omitted); Employer's Exhibit 1 at 3.

Additionally, the ALJ permissibly found that to the extent Dr. McSharry indicated Claimant's lung disease had multiple causes, he failed to adequately explain why it was not substantially aggravated by Claimant's "[t]hirty-five years of underground coal mining with significant exposure to coal and coal dust." Revised Decision and Order on Remand at 8; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Employer's Exhibit 1 at 3, 6.

Dr. Rosenberg similarly attributed Claimant's respiratory impairment to rheumatoid arthritis and smoking. Employer's Exhibit 3 at 7. He acknowledged the latent and progressive nature of legal pneumoconiosis but indicated that "when coal mine dust exposure is below 2mg/m^3, . . . it is unlikely that a miner who has no impairment when he leaves coal mining will suddenly develop an obstruction related to coal dust years after the last exposure." *Id*. Because the ALJ found no evidence in the record to support Dr. Rosenberg's assumption that Claimant's coal mine dust exposure was below 2 mg/m, we

[14] We reject Employer's contention that the ALJ erred in consulting the preamble to the revised 2001 regulations in addressing the credibility of its medical experts. An ALJ may evaluate expert opinions in conjunction with the scientific evidence found credible by the DOL in the preamble. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012).

see no error in the ALJ's determination that Dr. Rosenberg's opinion is not adequately reasoned. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Revised Decision and Order on Remand at 8; Employer's Exhibit 3 at 7.

Additionally, the ALJ permissibly found that in identifying Claimant's smoking as a possible contributor to his impairment, while excluding coal dust, Dr. Rosenberg failed to sufficiently address the potential additive effects of smoking and coal mine dust exposure.[15] *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 674 (4th Cir. 2017) (ALJ permissibly discredited medical opinions that "solely focused on smoking" as a cause of obstruction and "nowhere addressed why coal dust could not have been an additional cause"); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Revised Decision and Order on Remand at 8 n.2, 9-10; Employer's Exhibit 3. Further the ALJ noted correctly that while Dr. Rosenberg pointed to the latency of Claimant's obstructive impairment as evidence he does not have legal pneumoconiosis, Dr. Rosenberg's opinion is contradicted by Claimant's treatment records indicating he was diagnosed with COPD around the time he left the mines. Revised Decision and Order on Remand at 8, *citing* Director's Exhibit 16; Employer's Exhibit 3; s*ee Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

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 BLR 1-111, 1-113 (1989). Because the ALJ explained her rejection of Drs. McSharry's and Rosenberg's opinions as the Administrative Procedure Act[16] requires, and her credibility findings are supported by substantial evidence, we affirm her conclusion that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.

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

[15] In excluding a diagnosis of legal pneumoconiosis, Dr. Rosenberg attributed Claimant's impairment primarily to rheumatoid arthritis, but also noted "he continues to smoke." Employer's Exhibit 3 at 7; *see also* Director's Exhibit 16 at 6.

[16] The Administrative Procedure Act (APA) provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); Revised Decision and Order on Remand at 12-13. She permissibly discredited the disability causation opinions of Drs. McSharry and Rosenberg because they failed to diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove Claimant has the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Toler v. Eastern 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 causation without providing "specific and persuasive" reasons for concluding it does not rest upon a disagreement with those elements); Revised Decision and Order on Remand at 12-13. We therefore affirm the ALJ's finding that Employer failed to rebut the presumption by establishing no part of Claimant's respiratory or pulmonary disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge