U.S. Department of Labor

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

BRB Nos. 22-0161 BLA
and 22-0161 BLA-A

LEON C. METHENY Claimant-Petitioner Cross-Respondent v. F & M COAL COMPANY and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents Cross-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	DATE ISSUED: 01/17/2023 DECISION and ORDER

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

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

Chris M. Green (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals, and Employer and its Carrier (Employer) cross-appeal, Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits (2020-BLA-05681) 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 miner's claim filed on April 19, 2018.

The ALJ credited Claimant with 13.453 years of coal mine employment and thus found he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established the existence of both legal[2] and clinical pneumoconiosis arising out of coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.202(a), 718.203, 718.204(b). But he further found Claimant did not establish pneumoconiosis substantially caused or contributed to his total disability, 20 C.F.R. §718.204(c), and denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability due to pneumoconiosis. Employer responds in support of the denial of benefits. In its cross-appeal, it argues the ALJ erred in discrediting Drs. Zaldivar's and Basheda's

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[1] 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); *see* 20 C.F.R. §718.305.

[2] "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).

disability causation opinions.[3] The Director, Office of Worker's Compensation Programs, has not filed a response brief.

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

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (pneumoconiosis arose out of coal mine 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 of these elements precludes entitlement. *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, 1-2 (1986) (en banc).

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 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).

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[3] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established 13.453 years of coal mine employment, legal and clinical pneumoconiosis arising out of coal mine employment, and total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16, 23.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 28.

The ALJ considered the opinions of Drs. Sood, Celko, Zaldivar, and Basheda.[5] Claimant's Exhibit 6; Employer's Exhibits 1, 8, 9, 10; Director's Exhibit 17. Dr. Sood opined Claimant "could no longer do his last coal mining job because of his pulmonary impairment" and his chronic obstructive pulmonary disease (COPD)/legal pneumoconiosis is a substantially contributing cause of his disabling respiratory or pulmonary impairment. Claimant's Exhibit 6 at 19-20. Dr. Celko opined Claimant is totally disabled from a respiratory standpoint, and that coal mine dust and tobacco smoke exposures are the cause of his disabling pulmonary disease." Director's Exhibit 17 at 1-2. Dr. Zaldivar opined Claimant has episodic disabling hypoxemia caused by allergic alveolitis, and not caused by pneumoconiosis. Employer's Exhibit 9 at 26-27, 31-33. Similarly, Dr. Basheda opined Claimant has disabling hypoxemic respiratory failure not related to coal mine dust exposure. Employer's Exhibits 8 at 36-37; 10 at 26-28, 33.

The ALJ accorded no weight to Dr. Basheda's disability causation opinion because the doctor's opinion that Claimant does not have legal pneumoconiosis is contrary to his finding that Claimant has the disease.[6] Decision and Order at 25. He also accorded no weight to Dr. Zaldivar's disability causation opinion because the doctor's opinion that Claimant does not have a totally disabling respiratory or pulmonary impairment is contrary to his finding that Claimant established total disability.[7] *Id.* In addition, he accorded

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[5] The ALJ also considered Dr. Fino's opinion that Claimant has disabling hypoxemia, but noted the doctor did not render an opinion on the cause of Claimant's impairment. Decision and Order at 25; Claimant's Exhibit 4 at 8. Thus, he found Dr. Fino's opinion "not probative for purposes of total disability causation. *Id.*

[6] On cross-appeal, Employer argues the ALJ inaccurately characterized Dr. Basheda's opinion as failing to include legal pneumoconiosis as a differential diagnosis of Claimant's condition. Employer's Brief at 15-16. Contrary to Employer's argument, the ALJ correctly found Dr. Basheda did not diagnose legal pneumoconiosis. Employer's Exhibits 8 at 37, 10 at 27, 31-33. While Dr. Basheda opined Claimant has disabling hypoxemia, he did not render an opinion on the cause of Claimant's impairment. Employer's Exhibits 8 at 37, 10 at 26-28, 32-33. Further, while Dr. Basheda stated "coal dust will cause [chronic obstructive pulmonary disease (COPD)]," he opined Claimant "does not have [COPD] to explain [his] hypoxemia." Employer's Exhibits 8 at 37, 10 at 27-28, 31-33. Thus, the ALJ permissibly discredited Dr. Basheda's opinion. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order at 23, 25.

[7] Employer also argues the ALJ inaccurately characterized Dr. Zaldivar's opinion as concluding Claimant is not disabled. Employer's Brief at 14-16. As Employer argues, Dr. Zaldivar opined Claimant has disabling hypoxemia. Employer's Exhibit 9 at 26-27.

"little" weight to Dr. Celko's opinion because the doctor did not provide any further discussion or medical citations to support his conclusions. *Id.* He further accorded "little" weight to Dr. Sood's opinion because the doctor did not explain the relation between Claimant's pneumoconiosis and disability. *Id.* Thus he found the medical opinions insufficient to establish total disability due to pneumoconiosis. *Id.*

Claimant argues the ALJ erred in discrediting Dr. Sood's opinion. Claimant's Brief at 3-5. To properly address the disability causation issue Claimant raised, we first must summarize the ALJ's finding that Claimant established legal pneumoconiosis.

Pursuant to 20 C.F.R. §718.202(a)(4), the ALJ considered the opinions of Drs. Sood, Celko, Zaldivar, and Basheda.[8] Drs. Sood and Celko diagnosed legal pneumoconiosis in the form of disabling COPD related to coal mine dust exposure and smoking. Director's Exhibit 17; Claimant's Exhibit 6. In contrast, Dr. Zaldivar opined Claimant does not have legal pneumoconiosis but a variable airway obstruction unrelated to coal mine dust exposure. Employer's Exhibit 1. Dr. Basheda diagnosed asthma unrelated to coal mine dust exposure but "with a possible association to pulmonary sarcoidosis."[9] Employer's Exhibit 8. The ALJ found Drs. Sood's and Celko's opinions persuasive because they are "well-documented and well-supported." Decision and Order at 23. He further found Drs. Zaldivar's and Basheda's opinions unpersuasive because they are not well-documented or

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However, Dr. Zaldivar's opinion that Claimant does not have legal pneumoconiosis is contrary to the ALJ's finding that Claimant established the existence of the disease. Thus, even if the ALJ were to reconsider Dr. Zaldivar's opinion on disability causation, the doctor's opinion would be entitled to little weight at best. *See Epling*, 783 F.3d at 504-05; *Toler*, 43 F.3d at 116 (where physician failed to properly diagnose pneumoconiosis, an ALJ "may not credit" that physician's opinion on causation absent "specific and persuasive reasons," in which case the opinion is nevertheless entitled to at most "little weight"). Thus the ALJ's error in considering Dr. Zaldivar's opinion is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[8] The ALJ correctly noted Dr. Fino did not render an opinion on legal pneumoconiosis. Decision and Order at 23; Claimant's Exhibit 4. He thus found Dr. Fino's opinion "not probative as to whether Claimant suffers from legal pneumoconiosis." *Id.*

[9] Dr. Basheda found "no evidence of [COPD] or restrictive lung disease to define legal pneumoconiosis." Employer's Exhibit 8 at 34.

well-reasoned. *Id.* Thus, he found Claimant established his disabling COPD constitutes legal pneumoconiosis based on Drs. Sood's and Celko's opinions.[10] *Id.*

In assessing whether Claimant proved disability causation, the ALJ considered the same medical opinions that he weighed on the issue of legal pneumoconiosis. Despite having credited Dr. Sood's opinion that Claimant's totally disabling COPD *constitutes legal pneumoconiosis*, the ALJ accorded "little" weight to the doctor's opinion that Claimant's legal pneumoconiosis substantially contributed to his total respiratory disability because he found Dr. Sood's opinion not well-documented or well-reasoned. Decision and Order at 25. We thus agree with Claimant's argument that the ALJ erred in explaining why he discredited Dr. Sood's opinion. Claimant's Brief at 3-5. The ALJ's rejection of Dr. Sood's opinion on disability causation is inconsistent with his uncontested determination that Dr. Sood gave a reasoned opinion on the etiology of Claimant's totally disabling COPD when deciding the issue of legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.204(c)(i), (ii); *see J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248 (3d Cir. 2011); Claimant's Brief at 3-5. We therefore vacate the ALJ's finding that Dr. Sood's opinion is insufficient to support Claimant's burden of proof.

Despite the ALJ's error, it is not necessary to remand this case for further consideration. Where, as here, Dr. Sood opined Claimant has disabling COPD,[11] the ALJ's finding that the disabling COPD constitutes legal pneumoconiosis subsumes and resolves the disability causation question. *See Hawkinberry v. Monongalia County Coal Co.*, 25 BLR 1-249, 1-255-57 (2019). While factual determinations are the province of the ALJ, reversal is warranted where no factual issues remain to be determined and no further factual development is necessary. *See Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187 (4th Cir. 2014) (reversing denial, with directions to award benefits without further administrative proceedings); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70 (4th Cir. 2002) (denial of benefits reversed where "only one factual conclusion is possible"); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989) (same).

The ALJ rendered the findings essential to disability causation at 20 C.F.R. §718.204(c) when weighing the physicians' opinions as to legal pneumoconiosis at 20

[10] Employer has not contested the ALJ's finding that Claimant's COPD constitutes legal pneumoconiosis. *See Skrack*, 7 BLR at 1-711.

[11] The ALJ found Claimant established a total respiratory disability based on Drs. Sood's and Celko's opinions. Decision and Order at 15-16. Employer does not allege Claimant is totally disabled by a respiratory condition from anything other than COPD.

C.F.R. §718.202(a)(4). Because the ALJ credited Dr. Sood's opinion that Claimant's disabling COPD constitutes legal pneumoconiosis, it necessarily follows that Dr. Sood's opinion also establishes disability causation at 20 C.F.R. §718.204(c). *See Hawkinberry*, 25 BLR at 1-255-57. Thus, as Claimant has established each element of entitlement under 20 C.F.R. Part 718, we reverse the ALJ's denial of benefits.[12] *See Scott*, 289 F.3d at 270; *Adams*, 886 F.2d at 826.

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and reversed in part, and this case is remanded for entry of an award of benefits.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[12] In light of our holding that Dr. Sood's opinion establishes total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), we need not address Claimant's contention that the ALJ erred in weighing Dr. Celko's opinion. *See Larioni*, 6 BLR at 1-1278; Claimant's Brief at 3.