U.S. Department of Labor

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

BRB No. 23-0496 BLA

LEROY A. NEARHOOD	)	
	)	
v.	)	
	)	
JAMES M. STOTT COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	**NOT-PUBLISHED**
AMERICAN BUSINESS & MERCANTILE INSURANCE, c/o INSURANCE MUTUAL INCORPORATED	)	
	)	DATE ISSUED: 01/30/2025
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Christopher L. Wildfire (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

William M. Bush (Emily Su, Deputy Solicitor for the National Office; Jennifer Feldman Jones, Acting Associate Solicitor; Andrea J. Appel,

Counsel for Administrative Appeals), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2022-BLA-05733) rendered on a claim filed on September 27, 2021, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with at least twenty years of qualifying coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she 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).[1] The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer contends Claimant's refusal to attend its employer-sponsored medical evaluation violated its due process rights. It also argues the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[2] Claimant responds in support of the award of benefits. The Acting Director, Office of Workers' Compensation Programs (the Director), filed a limited response arguing Employer's due process rights were not violated.

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

[1] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established more than fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment and thus invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6, 15.

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).

Due Process: Employer-Sponsored Examination

While the case was pending with the district director, Employer's counsel scheduled a March 31, 2022 medical examination for Claimant to attend in Pittsburgh, Pennsylvania, with its chosen expert, Dr. Basheda. Director's Exhibit 28 at 2. Pittsburgh, Pennsylvania, is approximately 137 miles from Claimant's home. *See* Director's Exhibit 1; Director's Response at 2, 8. Before the examination, Claimant indicated he would not attend because he could not travel due to his poor health. *Id.* In response, Employer offered to provide travel arrangements and cover associated expenses, but Claimant maintained his position. Employer filed a motion for abandonment arguing Claimant should be required to show cause why his claim should not be denied under 20 C.F.R. §725.409,[4] requesting that the district director instruct Claimant to attend the examination, and asserting Claimant's actions denied it due process by preventing the development of a "full and proper" defense. *Id.* at 2-4. The district director subsequently advised Claimant to comply with Employer's reasonable requests to develop evidence or to otherwise show cause, but he did not compel Claimant's attendance at an examination. Director's Exhibit 29.

Claimant responded with correspondence and records from his primary care doctor and his treating pulmonologist indicating he is dependent on supplemental oxygen, his medical condition is "end stage," and he is transitioning to palliative care and hospice. Director's Exhibit 30. Both doctors opined such lengthy travel was inappropriate considering his severe lung disease. *Id.* at 2-9. In reply, Employer argued Claimant provided insufficient evidence to justify failing to attend the examination. Director's Exhibit 31. It also suggested an alternative site for the examination, approximately seventy-six miles from Claimant's home, with Dr. Pickerill in Johnstown, Pennsylvania. *Id*. Employer indicated, however, it would not schedule it until the district director made his determination. *See id.*; Director's Response at 8.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 4.

[4] The district director may deny a claim by reason of abandonment if the claimant fails to undergo a required medical examination without good cause. 20 C.F.R. §725.409(a)(1).

Subsequently, the district director found the evidence demonstrated that traveling 137 miles or seventy-six miles for an examination would be "detrimental" to Claimant's condition, and asked Employer to develop evidence by other means. Director's Exhibit 32. Thus, the district director effectively found good cause for Claimant's failure to attend Employer's examination and denied Employer's motion to dismiss the claim on the basis that it had been abandoned. *Id.* Employer responded to the district director by stating that it believed its due process rights were being denied and would like to "preserve [the] issue for purposes of appeal." Director's Exhibit 33.

As the ALJ noted, Employer did not file a new motion for abandonment or a motion to compel examination while the claim was before the ALJ, but it again asked to preserve the issue for appeal. Hearing Transcript at 7; Decision and Order at 2 n.2.

Now, on appeal, Employer argues its due process rights under the Fifth Amendment of the United States Constitution[5] were violated when Claimant refused to attend its medical evaluation. Employer's Brief at 16. We find the district director acted within his discretion to find Claimant demonstrated good cause for not attending Employer's examination and thus to neither dismiss the claim nor compel Claimant to attend. Moreover, we find Employer forfeited any further due process challenge by failing to seek to compel a medical examination while the case was before the ALJ.

Initially, we find the district director acted within his discretion in determining that the evidence does not demonstrate Claimant unreasonably refused to attend Employer's requested examination. *See* 20 C.F.R. §725.414(a)(3)(i) (district director may only dismiss a claim for benefits due to abandonment if a miner "*unreasonably* refuses" to attend to an evaluation requested by the employer) (emphasis added). As Claimant argues, contrary to Employer's contention that he provided "no justification" for failing to attend the examination, there is evidence from which the district director permissibly found he was too ill to travel to the examination sites Employer proposed. Claimant's Response at 5-6; Employer's Brief at 16.

[5] Employer stated that its due process rights were violated under Section One of the Fourteenth Amendment, but the Fourteenth Amendment's provisions do not apply in this case, as it does not involve state law or action. *See* U.S. Const., Am. XIV, § 1 ("No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law."). Rather, the Fifth Amendment protects Employer's due process rights in adjudication of a claim under the Act. *See N. Am. Coal Co. v. Miller*, 870 F.2d 948, 950 (3d Cir. 1989).

Employer initially scheduled Claimant to be examined 137 miles from Claimant's home[6] and later offered to schedule an examination approximately seventy-six miles from his home. *See* Director's Exhibit 31; Director's Response at 8. At either distance, contrary to Employer's argument, Employer's Brief at 16, evidence of Claimant's prior appointments with treating physicians located twenty-four miles from his home does not necessarily demonstrate he could travel at least seventy-six miles at the time of Employer's requested examination, particularly given his treating doctors' indication that his condition was "end stage" and it would be difficult to leave his home. Director's Exhibits 30 at 2-9; 31. Of note, Dr. Ruff, Claimant's treating pulmonologist, suggested telehealth or virtual visits may be more appropriate even for any future treating appointments. *Id.* at 3.

As the evidence supports a finding that Claimant's refusal to attend Employer's sponsored examination was not unreasonable given Claimant's condition, we find the district director acted within his discretion in declining to compel Claimant's attendance or dismiss his claim for abandonment. *See* 20 C.F.R. §725.414(a)(3)(i); Director's Exhibit 32.

While Employer requested that its objection to the district director's findings be preserved before the ALJ, at no time did it pursue this argument or request any relief from the ALJ. Parties must raise issues before the ALJ to be entitled to review by the Board. 20 C.F.R. §802.301(a); *see also Edd Potter Coal Co. v. Director, OWCP* [*Salmons*], 39 F.4th 202, 207-08 (4th Cir. 2022); *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 588 (6th Cir. 2021); *Martin v. Island Creek Coal Co.*, 2 BLR 1-276, 1-280 (1979). The parties can continue to develop evidence at the Office of Administrative Law Judges; an ALJ may admit not only the evidence submitted to the district director, but also additional evidence subject to the limitations of 20 C.F.R. §725.414, and the ALJ can "entertain the objections of any party to the evidence." 20 C.F.R. §725.455(b). Further, the regulations provide that the ALJ may allow parties to file motions, compel discovery, and compel attendance at physical examinations. 29 C.F.R. §§18.33, 18.57, 18.62. As Employer failed to use any of the available remedies to seek to compel an examination or otherwise substantially raise the issue before the ALJ, it forfeited its argument that Claimant's refusal to be examined violated its due process rights. *See Davis*, 937 F.3d at 591; *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018) (party forfeits

[6] As the Director notes, an Employer may not schedule a Claimant for an examination more than 100 miles from his home (or the distance traveled for the Department of Labor-sponsored examination, if greater) without the district director's written authorization. 20 C.F.R. §725.414(a)(3)(i); Director's Response at 8 n.4.

argument when it "cho[oses] to identify the issue but not to press it"); *Martin*, 2 BLR at 1-280.

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,[7] or "no part of [his] respiratory or pulmonary total disability is 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 rebut the presumption of legal pneumoconiosis.[8] Decision and Order at 21.

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

Employer relies on Dr. Basheda's opinion to rebut the presumption that Claimant has legal pneumoconiosis. Employer's Brief at 21-24. Dr. Basheda diagnosed Claimant with pulmonary fibrosis in the form of usual interstitial pneumonitis (UIP), which Dr. Basheda indicated can be idiopathic or related to Sjogren's syndrome, but is unrelated to

[7] "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).

[8] The ALJ found that Employer failed to rebut the presence of clinical pneumoconiosis but also found that Claimant did not establish that his clinical pneumoconiosis arose out of his coal mine employment under 20 C.F.R. §718.203. Decision and Order at 22.

coal mine dust exposure.[9] Employer's Exhibit 1 at 13-16. Dr. Basheda opined Claimant's radiographic and pulmonary findings are inconsistent with coal workers' pneumoconiosis but typical of UIP. *Id.* at 14. Specifically, he noted pneumoconiosis begins in the upper lung zones and "progresses inferiorly with disease," while UIP begins in the lower lung zones and progresses superiorly. *Id.* He further noted Claimant's disease rapidly progressed from 2015 to 2021 and he found no evidence of rounded opacities, both features uncharacteristic of coal workers' pneumoconiosis. *Id.* The ALJ found Dr. Basheda's opinion undermined for various reasons, including that he did not address whether "Claimant's [twenty] years of coal mine dust exposure could have aggravated or worsened his interstitial lung disease." Decision and Order at 19.

Employer does not directly challenge this finding but contends Dr. Basheda "continually stated that Claimant does not have pneumoconiosis and therefore does not have a compensable disease under the Act." Employer's Brief at 23. Although Dr. Basheda differentiated Claimant's interstitial disease from coal mine dust-induced lung disease demonstrated radiographically, the ALJ permissibly found Dr. Basheda did not adequately explain why Claimant's interstitial disease was not "aggravated or worsened" by his exposure to coal mine dust exposure and thus does not constitute legal pneumoconiosis. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *see also Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74 n.4 (4th Cir. 2017); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012) (legal pneumoconiosis can exist in the absence of clinical pneumoconiosis); 20 C.F.R. §718.201(b); Decision and Order at 19.

Because the ALJ provided a valid reason for discrediting Dr. Basheda's opinion, the only medical opinion supportive of Employer's burden, we affirm her finding that Employer failed to disprove legal pneumoconiosis.[10] *See Minich*, 25 BLR at 1-155 n.8;

[9] Dr. Basheda indicated that Sjogren's syndrome is a collagen vascular disease that can affect the lungs and can manifest as interstitial lung disease. Employer's Exhibit 1 at 14-15.

[10] We need not address Employer's other arguments regarding the ALJ's analysis of Dr. Basheda's opinion, as the ALJ has provided a valid reason for discrediting it. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 21-24. We also decline to address Employer's arguments that the ALJ erred in crediting Dr. Zlupko's opinion because, as the ALJ found, his opinion diagnosing legal pneumoconiosis does not support Employer's burden. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); Employer's Brief at 18-21; Decision and Order at 19, 21.

Decision and Order at 21. Therefore, we affirm her finding that Employer failed to rebut the Section 411(c)(4) presumption by establishing Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 21. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).[11]

Disability Causation

To disprove disability causation, Employer must establish "no part of [Claimant's] respiratory or pulmonary disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii). Employer argues Dr. Basheda's opinion adequately addresses the etiology of Claimant's disabling interstitial fibrosis based on a "wealth of evidence" and thus contends the ALJ erred in discrediting his opinion for being inconsistent with "her own" diagnosis of pneumoconiosis. Employer's Brief at 23-24.

Contrary to Employer's contention, the ALJ permissibly discounted Dr. Basheda's disability causation opinion because he did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove that Claimant has the disease. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 23. We therefore affirm the ALJ's conclusion that Employer failed to establish no part of Claimant's respiratory or pulmonary disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

[11] While the ALJ found Claimant failed to establish that his clinical pneumoconiosis arose out of his coal mine employment, it is Employer's burden to establish Claimant's clinical pneumoconiosis did not arise out of his coal mine employment, as Claimant has established sufficient coal mine employment to invoke the presumption at 20 C.F.R. §718.203(b). Although the ALJ applied an incorrect legal standard in evaluating the existence of clinical pneumoconiosis on rebuttal at 20 C.F.R. §718.305(d)(1)(i)(B), her error is harmless as she found Employer did not rebut the existence of legal pneumoconiosis; thus, in either event, Employer failed to rebut the presence of pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge