U.S. Department of Labor

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

BRB No. 21-0286 BLA

MART MCKAMEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RIVER BASIN COAL COMPANY	)	
	)	DATE ISSUED: 7/29/2022
and	)	
	)	
ARROWOOD INDEMNITY	)	
	)	
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 Larry W. Price, Administrative Law Judge, United States Department of Labor.

Mart McKamey, Caryville, Tennessee.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Ann Marie Scarpino (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:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Larry W. Price's Decision and Order Denying Benefits (2020-BLA-05150), rendered on a miner's subsequent claim filed on April 26, 2018,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant has 12.04 years of coal mine employment, and therefore found he could not invoke the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4) (2018). The ALJ also accepted the parties' stipulation that Claimant is totally disabled. 20 C.F.R. §718.204(b)(2). Furthermore, the ALJ found Claimant established he has clinical pneumoconiosis,[4] but did not establish legal pneumoconiosis.[5] 20 C.F.R. §§718.201, 718.202(a). Based on the finding of clinical pneumoconiosis, the ALJ determined Claimant established a change in an applicable condition of entitlement. 20 C.F.R.

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the ALJ's decision on Claimant's behalf, but is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant's two previous claims were denied and both denials are final. Director's Exhibits 1, 2. ALJ Pamela J. Lakes denied Claimant's second claim on October 27, 2014, for failure to establish the existence of pneumoconiosis. Director's Exhibit 2 at 278.

[3] 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[4] "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).

[5] "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).

§725.309.[6] However, the ALJ denied benefits because he found Claimant failed to establish he is totally disabled due to pneumoconiosis. 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.[7] The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to vacate the denial of benefits and remand the case for the ALJ to reconsider whether Claimant has legal pneumoconiosis and whether his disability is due to pneumoconiosis.

In an appeal filed without representation, the 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.[8] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Section 411(c)(4) Presumption—Length of Coal Mine Employment

Although Claimant alleged nineteen years of coal mine employment, Director's Exhibit 5, at the hearing he stipulated to only 12.04 years of coal mine employment.

[6] When a miner files a claim for benefits more than one year after the denial of a previous claim, 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)(1); *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 Claimant did not establish the existence of pneumoconiosis in his prior claim, he had to submit evidence establishing that element to obtain review of the merits of his current claim. *See id.*; Director's Exhibit 2.

[7] We affirm, as unchallenged, the ALJ's findings that Claimant has clinical pneumoconiosis, is totally disabled, and established a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[8] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 7; Hearing Transcript at 11.

Hearing Tr. at 9. Considering Claimant's stipulation,[9] which 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 14.

Entitlement Under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3)[10] and (c)(4) presumptions, Claimant must establish disease (pneumoconiosis), disease causation (it 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, 718.204. 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

To establish legal pneumoconiosis, Claimant must demonstrate he has 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(b). The United States Court of Appeals for the Sixth Circuit has held that a claimant can satisfy this burden "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

[9] Claimant's lay representative stipulated to 12.04 years of coal mine employment. Hearing Tr. at 9. The ALJ asked whether Claimant was "arguing for more than that," to which the representative responded "No." *Id*. The record reflects the ALJ in Claimant's prior claim credited Claimant with 12.04 years of coal mine employment based on his earnings records, coal mine employment history forms, and testimony. Director's Exhibit 2 at 266-70.

[10] The ALJ correctly found the record contains no evidence of complicated pneumoconiosis. Decision and Order at 14. We therefore affirm the ALJ's finding that Claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 14.

The ALJ considered the medical opinions of Drs. Ajjarapu, Hughes, Banick, and McSharry. Decision and Order at 16-18; 20 C.F.R. §718.202(a)(4).

Dr. Ajjarapu diagnosed Claimant with legal pneumoconiosis in the form of chronic bronchitis due to coal mine dust exposure. Director's Exhibit 18 at 6. Dr. Hughes, Claimant's treating physician, diagnosed Claimant with moderate to severe occupational chronic obstructive lung disease (COPD) and "obvious" coal workers' pneumoconiosis (CWP) based on post-pneumonectomy[11] pathology. Director's Exhibit 27 at 26; Claimant's Exhibit 7 at 12.

Based on pulmonary function studies, Dr. Banick diagnosed Claimant with "severe restriction with a possible component of obstructive airways disease." Director's Exhibit 29 at 16. He opined that "occupational exposures (CWP, silicosis, anthrasilicosis)" likely contribute to the average rate of decline in Claimant's FVC and FEV_1 values on pulmonary function testing after also considering his age, smoking history, and pneumonectomy. *Id.* at 10-11. Further, he opined "it is likely that coal dust exposure contributed to [Claimant's] pulmonary dysfunction and impairment" and, as a result, Claimant "meets the definition of legal pneumoconiosis." *Id.* at 9.

Dr. McSharry opined Claimant does not have legal pneumoconiosis, but instead has moderate restrictive lung disease and a minimal obstructive lung defect due to his pneumonectomy and the effects of aging. Employer's Exhibit 1 at 6, 11, 13.

The ALJ discredited the opinions of Drs. Ajjarapu, Hughes, and Banick. Decision and Order at 16-17. As the ALJ found, Dr. Ajjarapu incorrectly assumed Claimant underwent a lobectomy, a removal of part of his left lung, instead of a pneumonectomy, a removal of his entire left lung. Director's Exhibit 18 at 7. The ALJ therefore found that although Dr. Ajjarapu opined that coal mine dust and tobacco smoke combined to affect Claimant's lung function despite his lung cancer and "'lobectomy,' it is impossible to know whether [she] would still be so certain had she known that Claimant had an entire lung removed" due to his cancer diagnosis. Decision and Order at 17. Consequently, the ALJ permissibly accorded her opinion less weight. *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993) (ALJ may discredit a physician's opinion that is based on an inaccurate or incomplete picture of the miner's health); Decision and Order at 17.

Although Dr. Hughes diagnosed Claimant with occupational COPD, Director's Exhibit 27 at 26, the ALJ found his opinion not well-reasoned because he failed "to explain what he saw in Claimant's medical records pointed to [legal] pneumoconiosis," and failed

[11] Claimant was diagnosed with lung cancer in 2001, which was treated by removal of his left lung, followed by chemotherapy. Director's Exhibits 27 at 118-19; 29 at 113.

to provide his treatment history with Claimant. Decision and Order at 17-18. The ALJ therefore permissibly discredited Dr. Hughes' opinion. *See* 20 C.F.R. §718.104(d)(5) (ALJ must consider treating physician's opinion "in light of its reasoning and documentation"); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2002) (treating physicians get "the deference they deserve based on their power to persuade"); Decision and Order at 17-18.

The ALJ found Dr. Banick's opinion not well-reasoned because it lacked certainty, pointing to his conclusion that abnormalities on Claimant's computed tomography (CT) scans are "possibly consistent" with simple coal workers' pneumoconiosis. Decision and Order at 16-17. The Director contends the ALJ erred in discrediting Dr. Banick's diagnosis of legal pneumoconiosis because the ALJ confused Dr. Banick's opinion on clinical pneumoconiosis with his opinion on legal pneumoconiosis. Director's Brief at 1-2. We agree. The record reflects that Dr. Banick diagnosed both clinical pneumoconiosis and legal pneumoconiosis. Director's Exhibit 29 at 8-9. He opined Claimant's impairment "meets the definition of legal pneumoconiosis" because coal mine dust exposure is likely a contributing cause of Claimant's declining pulmonary function. *Id.* at 9. Because the ALJ erroneously relied on Dr. Banick's separate opinion on whether clinical pneumoconiosis was present on Claimant's CT scan as a basis to discredit his opinion on legal pneumoconiosis, we vacate the ALJ's credibility determination. *See* 20 C.F.R. §718.201(a); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 492 (6th Cir. 2014) (distinguishing clinical pneumoconiosis and legal pneumoconiosis as different diagnoses). We therefore vacate the ALJ's conclusion that Claimant did not establish legal pneumoconiosis.

Disability Causation

To establish total disability due to pneumoconiosis, Claimant must establish that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); *Groves*, 761 F.3d at 599. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it: (i) has a material adverse effect on the miner's respiratory or pulmonary condition; or (ii) materially 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); *Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 611 (6th Cir. 2001).

Because we have vacated the ALJ's finding that Claimant failed to establish legal pneumoconiosis, we also vacate his finding that Claimant failed to establish disability causation. *See* 20 C.F.R §718.204(c); Decision and Order at 18-20. On remand, the ALJ must reconsider that issue after he has reconsidered whether Claimant has established legal pneumoconiosis.

On the issue of whether Claimant's clinical pneumoconiosis is a substantially contributing cause of his total disability, the ALJ again considered the medical opinions of Drs. Ajjarapu, Hughes, Banick, and McSharry.[12] Decision and Order at 19-20.

Dr. Ajjarapu, having diagnosed Claimant with clinical pneumoconiosis based on chest x-rays, opined that "despite lobectomy and lung cancer diagnosis and extensive smoking history," Claimant's exposure to coal dust "together with tobacco smoking had [a] synergistic effect" on his pulmonary disability. Director's Exhibit 18 at 6-7. Dr. Hughes opined Claimant has an "open and shut case proven by pathology," but did not further address whether clinical pneumoconiosis contributes to Claimant's disability. Claimant's Exhibit 7 at 12.

Dr. Banick analyzed the pulmonary function studies and opined that the rate of decline of Claimant's FVC and FEV_1 values is "greater than would be expected" from his pneumonectomy, age, and smoking alone, and opined that "[o]ccupational exposures (CWP/silicosis/anthracosis) are likely also a contributing factor" to Claimant's impairment. Director's Exhibit 29 at 10-11. On the other hand, Dr. McSharry opined that Claimant's pulmonary impairment is completely due to his pneumonectomy and aging. Employer's Exhibit 1 at 6. Based on his analysis of Claimant's pulmonary function studies, he opined that Claimant's lung function did not change significantly over the eighteen years since his pneumonectomy. *Id*. He further supported his opinion with the non-qualifying results of the arterial blood gas studies[13] and concluded there is no evidence indicating pneumoconiosis contributed to Claimant's pulmonary impairment. *Id.*

The ALJ permissibly discredited Dr. Ajjarapu's opinion since he found she may not have reached the same conclusion about the cause of Claimant's total disability had she known Claimant is missing his entire left lung rather than only part of it. *See Sellards*, 17 BLR at 1-80-81; Decision and Order at 19. In addition, the ALJ accurately found Dr. Hughes did not specifically address disability causation. *See Williams*, 338 F.3d at 513; Decision and Order at 19.

[12] The ALJ also considered the medical opinions from Claimant's previous claim filed in 2010 but reasonably accorded them less weight due to their age. *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 739-40 (6th Cir. 2014); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993); Decision and Order at 20.

[13] A "qualifying" blood gas study yields results equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

The ALJ discredited Dr. Banick's opinion on disability causation because he found it equivocal as to the existence of clinical pneumoconiosis, Decision and Order at 19-20, but the ALJ has not adequately explained his reasoning. Dr. Banick noted his opinion on the existence of Claimant's clinical pneumoconiosis could change if he were able to personally review images from Claimant's CT scans, but he nevertheless concluded Claimant has clinical pneumoconiosis and it likely contributed to Claimant's pulmonary impairment. Director's Exhibit 29 at 8-9, 11. Because the ALJ found Claimant has clinical pneumoconiosis, Decision and Order at 16, the issue is no longer the existence of clinical pneumoconiosis but "rather the cause of [C]laimant's total respiratory disability."[14] *See Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-71, 1-75 (2004) (where ALJ found total disability established, he erred in finding a doctor's opinion attributing a miner's mild impairment to pneumoconiosis was not probative of whether the disability was due to pneumoconiosis). We therefore vacate the ALJ's finding that Claimant did not establish that clinical pneumoconiosis is a substantially contributing cause of his total disability.

Remand Instructions

On remand, the ALJ must reconsider whether the evidence establishes Claimant has legal pneumoconiosis. 20 C.F.R. §718.201(a)(2); *Groves*, 761 F.3d at 598-99. The ALJ must consider Dr. Banick's opinion together with all medical evidence relevant to the issue of legal pneumoconiosis.[15] *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). If the ALJ finds Claimant has legal pneumoconiosis, he must consider whether legal pneumoconiosis, clinical pneumoconiosis, or both, are a substantially contributing cause of Claimant's total disability. 20 C.F.R. §718.204(c). When weighing the conflicting evidence to determine disability causation, the ALJ must consider the effect of Dr. McSharry's failure to diagnose

[14] As the Director points out, the ALJ "focuses on what he believes to be equivocation in Dr. Banick's opinion, while failing to recognize that the opinion is consistent with his findings that the radiological evidence establishes that the Miner has clinical pneumoconiosis." Director's Brief at 1 n.2.

[15] The ALJ found Dr. McSharry's opinion well-reasoned because "he acknowledges the possibility of clinical pneumoconiosis" and "engages with other physicians' opinions and contextualizes them with Claimant's pneumonectomy and history." Decision and Order at 18. Because the ALJ's credibility determination addresses only Dr. McSharry's opinion on clinical pneumoconiosis, on remand the ALJ must address the weight to accord Dr. McSharry's opinion on legal pneumoconiosis when weighing the conflicting evidence. *See* 20 C.F.R. §718.201(a); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

clinical or legal pneumoconiosis.[16] *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233 (6th Cir. 1993), *vac'd sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15 (6th Cir. 1995).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[16] The ALJ found Dr. McSharry's opinion the only well-reasoned opinion regarding disability causation. Decision and Order at 20.