U.S. Department of Labor

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

BRB No. 21-0365 BLA

DONALD SEIBER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY, c/o HEALTHSMART CCS	)	
	)	DATE ISSUED: 7/13/2022
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

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

PER CURIAM:

Employer appeals District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order Awarding Benefits (2019-BLA-05204) rendered on a subsequent claim[1] filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established seventeen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he 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),[2] and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, it argues the ALJ erred in finding it failed to rebut the presumption. Claimant has not responded to Employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, urging rejection of Employer's constitutional challenge.

[1] Claimant filed his first claim for benefits on October 24, 2014. Director's Exhibit 1. The district director denied benefits on June 3, 2016, because Claimant did not establish total disability. *Id*. Claimant did not take any further action prior to filing this subsequent claim on July 14, 2017. Director's Exhibit 3.

[2] 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); *see* 20 C.F.R. §718.305(b).

[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 also deny the subsequent claim unless he 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); *see 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 failed to establish total disability in his prior claim, he had to submit new evidence establishing this element to obtain a review of his subsequent claim on the merits. *Id.*

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).

Constitutionality of the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 4-5. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption,[5] the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[6] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); ALJ Exhibit 6 at 12.

[5] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established seventeen years of underground coal mine employment, a totally disabling respiratory or pulmonary impairment, invocation of the Section 411(c)(4) presumption, and a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19-21.

[6] "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 that is 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).

[20 C.F.R] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to rebut the presumption by either method.[7]

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." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on Drs. Dahhan's and Sargent's opinions to establish Claimant does not have legal pneumoconiosis. Director's Exhibit 22; Employer's Exhibits 1, 6, 7. The ALJ found their opinions "poorly-documented, poorly-reasoned, and thus entitled to little probative weight." Decision and Order at 26. Employer argues the ALJ "failed to consider the breadth of the evidence" indicating Claimant's respiratory impairment is unrelated to coal mine dust exposure. Employer's Brief at 7-9. We disagree.

Dr. Dahhan examined Claimant and noted his accelerated pulmonary impairment. Director's Exhibit 22 at 5. He diagnosed "severe advanced rheumatoid arthritis," which affects "various parts of the respiratory system including the pleura resulting in pleural thickening and effusion of the lung resulting in pulmonary fibrosis of the small airways resulting in bronchiolitis obliterans." *Id*. Further, he diagnosed an obstructive impairment which he attributed to Claimant's "lengthy smoking habit." *Id*. Though he agreed pneumoconiosis can be latent and progressive, he testified that pneumoconiosis did not contribute to Claimant's impairment given the absence of coal dust exposure since 1991 and because "there [were] no abnormalities on the x-ray [that are] consistent with pulmonary disease caused by inhalation of coal dust." Employer's Exhibit 7 at 10, 15-16.

Dr. Sargent diagnosed Claimant with a severe restrictive impairment due to progressive rheumatoid lung disease. Employer's Exhibit 1 at 2. He excluded coal dust exposure as a causative factor, pointing to Claimant's rapid deterioration in lung function between 2014 and 2017. *Id*. During his deposition, Dr. Sargent agreed pneumoconiosis can be latent and progressive; however, he testified "[i]t would be highly unlikely for someone to have normal respiratory function twenty (20) years after they come out of the mines, and then develop a disabling impairment in a short period of time after that." Employer's Exhibit 6 at 16. Dr. Sargent acknowledged there is an obstructive component to Claimant's impairment but testified that the "major problem" is the severe restrictive

[7] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 22.

impairment. *Id*. at 11. He did not offer an opinion as to the cause of the obstructive impairment.[8] *See* Employer's Exhibit 1; Employer's Exhibit 6 at 11.

Contrary to Employer's assertion, the ALJ properly considered that Drs. Dahhan and Sargent attributed Claimant's respiratory impairment to rheumatoid arthritis. Decision and Order at 26. However, the ALJ permissibly found that "while rheumatoid lung disease may explain the severe restriction that rapidly developed between 2014 and 2018, it does not persuasively demonstrate the obstructive component of Claimant's lung impairment is not significantly related to or aggravated by coal mine dust exposure." *Id*.; *see* 20 C.F.R. §§ 718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); Employer's Brief at 6-10. He also permissibly found their opinions inconsistent with the Department of Labor's recognition that coal mine dust-induced diseases may be progressive in nature despite the amount of time that has passed since a miner was last exposed to coal dust exposure. 20 C.F.R. §718.201(c) (recognizing that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure"); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014); Decision and Order at 25-26; Employer's Exhibits 6 at 16, 7 at 10. Further, the ALJ permissibly discredited their opinions because he found they failed to adequately explain why Claimant's obstructive impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure.[9] *See Banks*, 690 F.3d at 489; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 25-26.

Employer's arguments on appeal are a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-

[8] Dr. Sargent speculated Claimant "may have mild asthma." Employer's Exhibit 6 at 11.

[9] The ALJ accurately noted Dr. Dahhan attributed the obstructive component of Claimant's impairment to his "lengthy smoking habit" and speculated "it could be related to bronchiolitis obliterans caused by rheumatoid arthritis." Decision and Order at 24-25, *quoting* Director's Exhibit 22. The ALJ found "Dr. Dahhan did not identify any specific objective data that would convincingly establish that tobacco smoke and/or (potential) bronchiolitis obliterans caused all of the obstruction observed on pulmonary function testing, particularly the obstruction that did not resolve following the administration of bronchodilators." Decision and Order at 25. In addition, the ALJ correctly observed Dr. Sargent did not address the cause of Claimant's obstructive impairment. Decision and Order at 25; Employer's Exhibits 1, 6 at 11-12.

111, 1-113 (1989). Further, because Employer has the burden of proof, we need not address its contention that the ALJ erred in crediting Dr. Forehand's opinion that Claimant had legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 10-12. Because it is supported by substantial evidence, we affirm the ALJ's determination that Employer did not disprove legal pneumoconiosis.[10] *See* 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 26. 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).

Disability Causation

The ALJ next considered whether Employer established that "no part of [Claimant's] 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)(ii); Decision and Order at 26. The ALJ permissibly discounted Drs. Dahhan's and Sargent's opinions regarding the cause of Claimant's respiratory disability because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the existence of the disease.[11] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 27; Employer's Brief at 28. We therefore affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Consequently, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits.

[10]As the ALJ gave valid reasons for discrediting Drs. Dahhan's and Sargent's opinions, we need not address Employer's arguments regarding the additional reasons the ALJ gave for rejecting their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 9.

[11] Drs. Dahhan's and Sargent's opinions as to whether Claimant's respiratory disability was related to legal pneumoconiosis rest on their findings that legal pneumoconiosis did not exist.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge