U.S. Department of Labor

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

BRB No. 24-0181 BLA

CURTIS W. GIBSON Claimant-Respondent v. CONSOL MINING COMPANY, LLC and CONSOL ENERGY, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 06/24/2025 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

Jeffrey S. Goldberg (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits (2021-BLA-05016) rendered on a subsequent claim filed on September 18, 2024,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 14.59 years of coal mine employment and thus 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).[2] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant failed to establish clinical pneumoconiosis.[3] He further found, however, that Claimant established legal pneumoconiosis and total disability due to legal pneumoconiosis.[4] 20 C.F.R. §§718.201(a)(2), 718.202(a),

[1] Claimant filed three prior claims for benefits. He withdrew his first two claims. Director's Exhibits 1, 2. A withdrawn claim is "considered not to have been filed." 20 C.F.R. §725.306(b). On June 18, 2014, the district director denied his prior claim, filed on November 14, 2013, for failing to establish total disability. Director's Exhibit 3 at 4.

[2] 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); 20 C.F.R. §718.305.

[3] "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).

[4] "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).

718.204(b), (c). Consequently, he found Claimant established a change in an applicable condition of entitlement,[5] 20 C.F.R. §725.309(c), and awarded benefits.

On appeal, Employer argues the ALJ's delay in issuing his Decision and Order prejudiced it and thus liability for the payment of benefits should be transferred to the Black Lung Disability Trust Fund (Trust Fund). On the merits of entitlement, Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis.[6] Claimant has not filed a response brief. The Acting Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging the Benefits Review Board to reject Employer's arguments that liability for the payment of benefits should transfer to the Trust Fund.

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.[7] 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, 361-62 (1965).

Procedural Challenge: 20 C.F.R. §725.476

Employer contends the ALJ erred by failing to timely issue his Decision and Order. Employer's Brief at 5-8. Specifically, Employer points to 20 C.F.R. §725.476, which states

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[5] 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); *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 did not establish total disability in his prior claim, Claimant had to submit new evidence establishing that element of entitlement to obtain review of the claim on the merits. *See* 20 C.F.R. §725.309(c)(3); *White*, 23 BLR at 1-3; Director's Exhibit 3.

[6] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established 14.59 years of coal mine employment and a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 8.

[7] 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); Hearing Transcript at 11.

"the [ALJ] shall issue a decision and order with respect to the claim" within twenty days after a hearing is officially terminated. *Id.* at 5. Employer argues the ALJ's delay in issuing his Decision and Order was prejudicial,[8] as Claimant underwent treatment related to his respiratory or pulmonary condition and the resulting computed tomography (CT) scan report and office notes were not disclosed to it as 20 C.F.R. §725.413(c) requires. Employer's Brief at 6-8. We are not persuaded by Employer's arguments.

The ALJ held a telephonic hearing on April 1, 2022. Hearing Transcript at 1, 4. Although the ALJ closed the evidentiary record upon the receipt of Employer's closing brief on June 22, 2022, he did not issue his Decision and Order until January 26, 2024. Decision and Order at 1; Hearing Transcript at 21; Employer's Post-Hearing Brief. Per the records submitted with Employer's Brief, Claimant underwent a CT scan on March 2, 2022, and attended an in-office visit on March 23, 2022, as well as a virtual visit on April 27, 2022, both with Danielle Mote, NP. Employer's Brief Attachment A.

But all of the records submitted with Employer's brief are dated before the ALJ closed the evidentiary record on June 22, 2022. Hearing Transcript at 21; Employer's Post-Hearing Brief; Employer's Brief Attachment A. Employer has not explained how records developed before the closing of the evidentiary record caused it to be prejudiced by the ALJ's delay in issuing his Decision and Order.[9] *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); *see also Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"). Moreover, Employer has not established a due process violation or otherwise explained how it was prejudiced by the delay in a manner that would warrant transfer of the claim to the Trust Fund.[10] *See Arch*

[8] Although Section 725.476 does not specify any recourse in cases where the 20-day period is not followed, the Board has held a delay in issuing a decision may warrant remand for a new hearing if "the aggrieved party shows prejudice caused by the delay." *Williams v. Black Diamond Coal Mining Co.*, 6 BLR 1-188, 1-191 (1983); *Tobin v. Pagnotti Enterprises*, 5 BLR 1-16, 1-22 (1982); *see* 20 C.F.R. §725.476.

[9] Because the records submitted with Employer's brief are all dated prior to the date on which the ALJ closed the hearing, Employer's general assertions that interrogatories could have been updated or that the records could have been relevant to the credibility of its experts have no relation to whether it was prejudiced by the delay in issuing the ALJ's Decision and Order. *See* Employer's Brief at 7-8.

[10] Employer asserts, without citation to authority, that "medical information . . . developed in connection with medical treatment approved in a claim by the [Department of Labor]" meets the definition of "medical information" subject to disclosure. Employer's

of Ky., Inc. v. Director, OWCP [*Hatfield*], 556 F.3d 472, 478 (6th Cir. 2009) ("The basic elements of procedural due process are notice and opportunity to be heard."); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *Consolidation Coal Co. v. Borda,* 171 F.3d 175, 184 (4th Cir. 1999) (to establish a due process violation, party must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807-08 (4th Cir. 1998) (delay in notifying the employer of a claim deprived it of due process and warranted the transfer of liability to the Trust Fund). We thus reject Employer's arguments.

Entitlement Under 20 C.F.R. Part 718

To be entitled to benefits under the Act, 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, 718.203, 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 prove 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(a)(2), (b). The United States Court of Appeals for the Sixth Circuit has held a claimant can satisfy this burden "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. 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.'").

The ALJ considered the medical opinion of Dr. Forehand, who diagnosed legal pneumoconiosis, and the contrary opinions of Drs. McSharry and Jarboe that he does not have the disease. Director's Exhibits 19 at 6; 29 at 12, 15; Employer's Exhibits 1 at 2-3; 4

Brief at 7. However, as the Director notes, Director's Response Brief at 2-3, the relevant regulation expressly excludes "[a]ny record of a miner's hospitalization or medical treatment" from mandatory disclosure, 20 C.F.R. §725.413, and Employer has provided no authority supporting its assertion that the treatment records in question should be excepted from this exclusion.

at 8-9; 5 at 36-37. The ALJ found Dr. Forehand's opinion well-reasoned and gave it great weight, whereas he discredited Drs. McSharry's and Jarboe's opinions as unreasoned. Decision and Order at 7. Thus, crediting Dr. Forehand's opinion over the contrary opinions of Drs. McSharry and Jarboe, the ALJ found Claimant established legal pneumoconiosis. *Id.*; *see* 20 C.F.R. §718.201(b).

Initially, we reject Employer's contention that the ALJ erred by considering whether Claimant established total disability at 20 C.F.R. §718.204(b) before he addressed whether Claimant established pneumoconiosis at 20 C.F.R. §718.201. Employer's Brief at 8. Claimant filed a previous claim, which the district director denied for failure to establish total disability. Director's Exhibit 3 at 4. Claimant was thus required to establish total disability to obtain review of this subsequent claim on the merits. *See* 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Furthermore, nothing in in the Act or 20 C.F.R. Part 718 mandates the ALJ must address the issues in any particular order, and Employer has cited no authority supporting its assertion that any such mandated order of consideration of the elements of entitlement exists.[11] Employer's Brief at 8-9.

Employer next contends the ALJ erred in crediting Dr. Forehand's opinion. Employer's Brief at 10-11. We disagree.

Dr. Forehand diagnosed obstructive lung disease and asthma. Director's Exhibit 19 at 6. He opined coal mine dust exposure significantly contributed to Claimant's obstructive lung disease and aggravated his asthma. *Id.* While noting Claimant had a significant response to bronchodilators on pulmonary function testing, thus suggesting asthma, he explained that there was a residual component to Claimant's obstructive disease even after the administration of bronchodilators. Director's Exhibit 29 at 9-11, 28-29. He acknowledged that additional medical records recounting Claimant's lung function in the years after he left the mines would be helpful in evaluating Claimant's condition but nevertheless diagnosed legal pneumoconiosis based on the medical information available to him. *Id.* at 12-16. The ALJ credited Dr. Forehand's opinion as documented and well-reasoned, noting it is consistent with the evidence available to him at the time of his

[11] Employer argues the ALJ's order of addressing the elements of entitlement caused him to erroneously shift the burden of proof to Employer to "rule out" coal mine dust exposure as a cause of Claimant's impairments. Employer's Brief at 8-9. As is explained below, we reject Employer's assertion that the ALJ shifted the burden of proof to Employer.

examination and consistent with the later-developed evidence. Decision and Order at 12-13.

Contrary to Employer's contention, Employer's Brief at 10-11, the ALJ permissibly credited Dr. Forehand's opinion on the basis that it is consistent with the evidence available to him at the time of his examination. *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); Decision and Order at 13. Employer correctly observes Dr. Forehand testified that his opinion regarding whether Claimant is totally disabled would change if later pulmonary function testing showed improvement in the FEV1 to sixty or sixty-five percent of the predicted values after the administration of bronchodilators, as they did in Drs. McSharry's and Jarboe's pulmonary function testing. Employer's Brief at 11 (citing Director's Exhibit at 33-34; Employer's Exhibits 1 at 11; 4 at 12). But Employer's argument that this concession undermines Dr. Forehand's diagnosis of legal pneumoconiosis conflates the issues of total disability, legal pneumoconiosis, and disability causation. A physician may provide a reasoned opinion that a miner is totally disabled distinct from his opinion regarding the existence of pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b)(2)(iv). Further, contrary to Employer's contention, the ALJ correctly found Dr. Forehand's opinion "consistent with subsequently developed medical evidence," Decision and Order at 13, as both Drs. McSharry and Jarboe acknowledge, consistent with Dr. Forehand's opinion, that some part of Claimant's impairment is irreversible even after the administration of bronchodilators. *See Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356 (6th Cir. 2007); *Rowe*, 710 F.2d at 255; Director's Exhibit 29 at 9-11, 28-29; Employer's Exhibits 1 at 3; 4 at 10; Employer's Brief at 10. We thus affirm the ALJ's crediting of Dr. Forehand's opinion as documented and well-reasoned. Decision and Order at 13.

Employer further contends the ALJ erred in discrediting the opinions of Drs. McSharry and Jarboe and impermissibly shifted the burden of proof by requiring it to "rule out" legal pneumoconiosis. Employer's Brief at 9, 12-13. We are not persuaded.

As an initial matter, we reject Employer's assertion that the ALJ did not apply the proper standard of proof and erred in shifting the burden to Employer to "rule out" a contribution from coal mine dust exposure. Employer's Brief at 9. The ALJ accurately stated it is Claimant's burden to prove his respiratory impairment is "significantly related to, or aggravated by," his exposure to coal mine dust. Decision and Order at 11-12 (quoting *Groves*, 761 F.3d at 598). In addition, the ALJ did not discredit Drs. McSharry's and Jarboe's opinions because they failed to "rule out" a contribution from coal mine dust exposure to Claimant's impairment. Rather, the ALJ found their opinions were not reasoned because they did not adequately explain their conclusions that all of Claimant's

respiratory impairment is due to non-coal-dust related asthma. Decision and Order at 13-14.

Drs. McSharry and Jarboe diagnosed asthma unrelated to coal mine dust exposure and opined Claimant does not have legal pneumoconiosis. Employer's Exhibits 1 at 4-5; 4 at 7-8; 5 at 36-37. Dr. McSharry opined Claimant's condition does not constitute legal pneumoconiosis because it is unlikely for an obstructive impairment to be related to coal mine dust exposure in the absence of a positive chest x-ray. Employer's Exhibits 1 at 4-5; 5 at 19. The ALJ permissibly found this explanation inconsistent with the regulations that legal pneumoconiosis can exist in the absence of positive x-ray evidence. 20 C.F.R. §718.202(a)(4), (b); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); Decision and Order at 13. Further, the ALJ permissibly discredited Dr. McSharry's opinion because he failed to adequately explain why coal mine dust exposure could not have contributed to or exacerbated Claimant's asthma. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 350, 356 (6th Cir. 2007); *Barrett*, 478 F.3d at 356; Decision and Order at 14.

Drs. McSharry and Jarboe also opined the partial reversibility of Claimant's condition with bronchodilators on pulmonary function testing demonstrates his condition is caused by asthma and is completely unrelated to coal mine dust exposure. Employer's Exhibits 1 at 4; 4 at 10; 5 at 15-16, 23. The ALJ permissibly discredited this rationale because it fails to adequately explain why the irreversible portion of Claimant's pulmonary impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure.[12] *See Barrett*, 478 F.3d at 356; Decision and Order at 13-14. Employer's argument amounts to a request to reweigh the evidence, which we are not empowered to do. *See Anderson*, 12 BLR at 1-113.

[12] Because the ALJ provided a valid reason for discrediting Dr. Jarboe's opinion that Claimant did not have a chronic lung disease or impairment significantly related to, or substantially aggravated by, coal mine dust exposure, we need not consider Employer's remaining arguments concerning the ALJ's weighing of the doctor's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 12-13.

Because we reject Employer's contentions, we affirm the ALJ's determination that the medical opinion evidence establishes legal pneumoconiosis.[13] 20 C.F.R. §718.202(a)(4); Decision and Order at 14-15.

Finally, because Employer does not specifically challenge the ALJ's finding that Claimant established disability causation beyond its arguments we already addressed regarding legal pneumoconiosis, we also affirm his finding that Claimant established legal pneumoconiosis substantially contributes to his totally disabling respiratory or pulmonary impairment. Decision and Order at 15; *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 255-56 (2019).

[13] Employer further generally argues the ALJ demonstrated bias in his consideration of the medical opinions. Employer's Brief at 3, 9. A charge of bias against an ALJ is not substantiated by a mere allegation but must be established by concrete evidence of prejudice against a party's interest. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992). Employer has not explained how the ALJ was biased or how this alleged bias made any impact on his decision and, therefore, because it has failed to demonstrate concrete evidence of prejudice, we reject its argument. *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Cochran*, 16 BLR at 1-107.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge