U.S. Department of Labor

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

BRB No. 20-0515 BLA

COLUMBUS J. MARTIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ONE A COAL COMPANY	)	
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED	)	DATE ISSUED: 3/24/2022
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits (2018-BLA-06212) rendered on

a subsequent claim filed on April 7, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ credited Claimant with thirteen years and nine months 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).[2] Considering entitlement under 20 C.F.R. Part 718, he found Claimant established a totally disabling respiratory or pulmonary impairment, thereby establishing a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309. He further found Claimant established legal pneumoconiosis and total disability due to pneumoconiosis. 20 C.F.R. §§718.202(a)(4), 718.204(c). Thus he awarded benefits.

On appeal, Employer argues the ALJ erred in finding legal pneumoconiosis.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' 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

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[1] Claimant filed two previous claims. On January 21, 2003, the district director denied Claimant's most recent claim because he failed to establish any element of entitlement. Director's Exhibit 1.

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

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b); Decision and Order at 17-18.

[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 Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 9, 10, 13; Hearing Tr. at 20.

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, 1-2 (1986) (en banc).

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(b). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held a miner may establish his lung impairment is significantly related to coal mine dust exposure "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).

The ALJ considered the opinions of Drs. Nader, Rosenberg, and Tuteur that Claimant has chronic obstructive pulmonary disease (COPD). Director's Exhibits 13, 23; Employer's Exhibit 1. Dr. Nader opined Claimant's COPD is due to coal mine dust exposure and cigarette smoking, while Drs. Rosenberg and Tuteur opined it is due to smoking alone and unrelated to coal mine dust exposure. The ALJ found Dr. Nader's opinion well-reasoned and documented, but the opinions of Drs. Rosenberg and Tuteur inadequately reasoned. Decision and Order at 12-16. Thus he found Claimant established legal pneumoconiosis through Dr. Nader's opinion. *Id.*

Employer first argues Dr. Nader's opinion is insufficient to meet the regulatory definition of legal pneumoconiosis. Employer's Brief at 4-11. We disagree. Dr. Nader diagnosed COPD "with definite emphysema" based on Claimant's pulmonary function test results, symptoms of chronic cough, wheezing, and shortness of breath, and thirteen year "exposure to respirable coal and rock dust." Director's Exhibit 13 at 3-4. He further opined Claimant's COPD was caused by both cigarette smoking and coal mine dust exposure, but he could not "distinguish the relative contribution" of each to Claimant's impairment. *Id.* at 4. Nonetheless he concluded Claimant's thirteen-year "history of exposure to respirable coal and rock dust is considered in part as [a] contributing and aggravating factor for the diagnosis of coal worker pneumoconiosis and [COPD]." *Id.* Contrary to Employer's contention, Dr. Nader's opinion satisfies the definition of legal pneumoconiosis because he concluded Claimant's thirteen years of coal dust exposure contributed in part to his disabling COPD. *See Groves*, 761 F.3d at 597-98; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000) (because coal dust need not be the sole cause of a miner's respiratory or pulmonary impairment, legal pneumoconiosis can be proven based on a physician's opinion that coal dust and smoking were both causal factors even where it is impossible to allocate a specific percentage between them); 20 C.F.R. §718.201(b). Thus there is no merit to Employer's argument that the ALJ applied an incorrect standard in

evaluating whether Dr. Nader's opinion established legal pneumoconiosis. Employer's Brief at 4-11.

We also reject Employer's assertion that the ALJ erred in finding Dr. Nader's opinion reasoned and documented. Employer's Brief at 6-10. The ALJ permissibly found Dr. Nader's opinion "supported by the evidence available to him," "consistent with the subsequently developed medical evidence in the record," and that it sufficiently describes his conclusion that coal mine dust exposure, at least in part, caused Claimant's COPD. Decision and Order at 12-13; *see Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. Thus, we affirm the ALJ's determination that Dr. Nader's opinion is sufficiently reasoned and documented to establish legal pneumoconiosis. Decision and Order at 13-16.

Employer also argues the ALJ shifted the burden of proof because crediting Dr. Nadar's opinion resulted in applying a presumption that Claimant's COPD was legal pneumoconiosis. Employer's Brief at 11-13. We disagree. The ALJ correctly stated Claimant bears the burden of establishing legal pneumoconiosis, which 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); Decision and Order at 4, 6. The ALJ permissibly found Dr. Nadar's opinion affirmatively met this standard, Decision and Order at 13-16, and Employer's argument that the ALJ mistakenly presumed legal pneumoconiosis and misconstrued the evidence that it submitted to "rebut both prongs of the § 718.305 presumption" thus mischaracterizes the ALJ's decision and is misplaced.[5] Employer's Brief at 13.

Employer argues the ALJ erred in discrediting the opinions of Drs. Rosenberg and Tuteur. Employer's Brief at 15-18, 24-26. Both Dr. Rosenberg and Dr. Tuteur excluded legal pneumoconiosis based on medical studies identifying the risk of developing COPD among miners who did not smoke and smokers who did not mine; they opined these studies indicate the risk of developing COPD is much greater for cigarette smokers than for coal miners. Director's Exhibit 23 at 7-9; Employer's Exhibit 1 at 5-8. Contrary to Employer's argument, the ALJ permissibly found these opinions unpersuasive because Drs. Rosenberg and Tuteur relied on generalities rather than Claimant's specific condition. *See Island Creek Coal Co. v. Young*, 947 F.3d 399, 408-09 (6th Cir. 2020); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 15-16.

[5] As noted, the ALJ credited Claimant with thirteen years and nine months 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).

Drs. Rosenberg and Tuteur also both opined that Claimant's COPD is unrelated to his coal mine dust exposure because his smoking history can explain the degree of his COPD. Director's Exhibit 23; Employer's Exhibit 1. The ALJ correctly noted the preamble to the 2001 revised regulations cites studies, which the Department of Labor found credible, concluding that the risks of smoking and coal mine dust exposure may be additive. 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000) (risk of clinically significant airways obstruction and chronic bronchitis associated with coal mine dust exposure can be additive with cigarette smoking); Decision and Order at 15. Although Dr. Rosenberg did discuss the possibility of an additive effect, but found it highly unlikely (and therefore not medically reasonable) in Claimant's case, the ALJ acted within his discretion in finding Dr. Tuteur's opinion unpersuasive because he failed to "acknowledge and determine whether coal [mine] dust [and cigarette smoking] had an additive effect on" Claimant's COPD. Decision and Order at 16; *see* 20 C.F.R. §718.201(a)(2), (b); *Young*, 947 F.3d at 403-07; *Barrett*, 478 F.3d at 356.

Dr. Rosenberg also excluded legal pneumoconiosis, in part, because Claimant's pulmonary function testing showed a markedly reduced FEV_1/FVC ratio, which he opined is consistent with cigarette smoking and not coal mine dust exposure. Director's Exhibit 23 at 6-7. The ALJ permissibly discredited Dr. Rosenberg's opinion as also conflicting with the scientific evidence cited in the preamble to the 2001 revised regulations that coal mine dust exposure can cause clinically significant obstructive lung disease, which can be shown by a reduction in the FEV_1/FVC ratio. *See Cent. Ohio Coal Co v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801 (6th Cir. 2012); 65 Fed. Reg. at 79,943; Decision and Order at 14-15.

Because the ALJ acted within his discretion in crediting Dr. Nader's opinion and rejecting Drs. Rosenberg's and Tuteur's opinions,[6] we affirm his finding that Claimant established the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 16.

Employer does not challenge the ALJ's finding that Claimant's total disability is due to pneumoconiosis. Decision and Order at 16-18. Therefore we affirm this determination. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(c). Consequently, we affirm the award of benefits.

[6] Because the ALJ provided valid reasons for discrediting Dr. Tuteur's opinion, any error in discrediting his opinion for other reasons is harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address Employer's remaining arguments regarding the weight accorded to his opinion. Employer's Brief at 25.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge