

U.S. Department of Labor

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



BRB No. 21-0253 BLA

JOHN T. ROBERTS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	
)	DATE ISSUED: 3/24/2022
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 and Order Denying Employer's Motion for Reconsideration of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Steven Winkelman (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), 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 Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits and his Order Denying Employer's Motion for Reconsideration (2018-BLA-05723) rendered on a claim filed on January 31, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with twenty-one years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.¹ 30 U.S.C. §921(c)(4) (2018). He 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 contends the ALJ erred in finding it did not rebut the presumption.² Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, filed a response urging the Benefits Review Board to reject Employer's constitutional argument.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order and his Order Denying Employer's Motion for Reconsideration if they are rational, supported by substantial evidence, and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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 findings that Claimant established twenty-one years of underground coal mine employment, total disability at 20 C.F.R. §718.204(b)(2), and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2, 15, 17, 20-21.

³ 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 3; Hearing Tr. at 15.

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 4-6. 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, the burden shifted to Employer to establish Claimant has neither legal⁴ nor clinical pneumoconiosis,⁵ or that “no part of [his] 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)(i), (ii); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). The ALJ found Employer failed to establish rebuttal by either method.

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*, 25 BLR at 1-155 n.8. The Sixth Circuit holds this standard requires Employer to show the miner’s “coal mine employment did not contribute, in part, to his alleged pneumoconiosis.” *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). “An employer may prevail under the not ‘in part’ standard by showing

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).

⁵ “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).

that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id.* at 407, citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

Employer relied on Drs. McSharry's and Sargent's medical opinions. Director's Exhibit 22; Employer's Exhibits 1, 4, 5. Dr. McSharry opined Claimant has a moderate obstructive respiratory impairment on pulmonary function testing and an exercise arterial desaturation impairment on blood gas testing. Employer's Exhibit 1. He opined both conditions were caused by a combination of asthma and the "removal of a part of [Claimant's] lung in treatment for lung cancer," and are unrelated to coal mine dust exposure. *Id.* Dr. Sargent also opined Claimant has a mild obstructive impairment and hypoxemia. Director's Exhibit 22. He opined Claimant's obstructive impairment is due to cigarette smoking and asthma, and unrelated to coal mine dust exposure. Director's Exhibit 22; Employer's Exhibit 4 at 11-14. The ALJ found Drs. McSharry's and Sargent's opinions unpersuasive, inconsistent with the regulations, and insufficient to satisfy Employer's burden of proof. Decision and Order at 22-25; Order Denying Recons. at 5.

Employer argues the ALJ erred in discrediting the opinions of Drs. McSharry and Sargent. Employer's Brief at 9-14. We disagree.

Both doctors opined Claimant does not have legal pneumoconiosis, in part, because his obstructive impairment is partially reversible after the administration of bronchodilators on pulmonary function testing. Director's Exhibit 22 at 2 (unpaginated); Employer's Exhibits 1 at 2-3; 4 at 11-13. Dr. Sargent opined Claimant's impairment improved from moderate to mild after bronchodilators. Director's Exhibit 22. Dr. McSharry stated there was significant reversibility after bronchodilators, but acknowledged there is still some persistent obstruction. Employer's Exhibits 1, 5 at 21. Both doctors explained coal mine dust exposure does not cause a reversible obstructive impairment; thus the obstruction is caused by asthma, a condition that reverses with bronchodilators. Director's Exhibit 22; Employer's Exhibits 1, 5. The ALJ permissibly found their reasoning unpersuasive because they failed to adequately explain why the irreversible portion of Claimant's impairment remaining after bronchodilation is not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 22-25.

Further, both Dr. McSharry and Dr. Sargent opined coal mine dust exposure aggravates asthma only during actual dust exposure. Employer's Exhibits 4 at 12-13; 5 at 20-21. They stated Claimant stopped working in the coal mines in 1990, and there is no reason to believe coal mine dust exposure aggravated his asthma approximately thirty years

after the cessation of that exposure. *Id.* The ALJ found both physicians' opinions inadequately explained in light of the regulations which recognize pneumoconiosis as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); see *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); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012); Decision and Order at 22-25; Order Denying Recons. at 4-5.

Dr. McSharry also opined "when coal [mine] dust exposure injures the lungs enough to cause blood gas or pulmonary function test abnormalities of significance, there is almost all (sic) clear radiographic evidence of this disease. This is not evident on a review of the records." Employer's Exhibit 1 at 3. The ALJ permissibly found his reasoning unpersuasive because the regulations provide that legal pneumoconiosis may be present even in the absence of a positive x-ray for clinical pneumoconiosis. See *Banks*, 690 F.3d at 488-89; *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 313 (4th Cir. 2012); 20 C.F.R. §718.202(a)(4), (b); 65 Fed. Reg. at 79,940, 79,943 (Dec. 20, 2000); Decision and Order at 24; Order Denying Recons. at 4.

Dr. Sargent further stated Claimant "could [have] some degree of emphysema" based on reduced diffusion capacity. Employer's Exhibit 4 at 13-14. He opined Claimant's cigarette smoking can explain this emphysema. The ALJ permissibly found Dr. Sargent's reasoning fails to address why coal mine dust exposure could not have contributed along with smoking to Claimant's emphysema. See *Young*, 947 F.3d at 408-09; *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74 n.4 (4th Cir. 2017) (ALJ permissibly discredited medical opinions that "solely focused on smoking" as a cause of obstruction and "nowhere addressed why coal dust could not have been an additional cause"); 20 C.F.R. §718.201(b); Decision and Order at 23; Order Denying Recons. at 4. The ALJ also permissibly discredited Dr. Sargent's opinion because the doctor "did not address the cause of the Claimant's disabling hypoxemia, or whether it was related to his significant history of coal mine dust exposure." Decision and Order at 23; see *Young*, 947 F.3d at 408-09; *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185.

Employer argues the ALJ's legal pneumoconiosis finding "is not supported by the substantial evidence of record, as both Dr. McSharry and Dr. Sargent do offer adequate, well-reasoned, and well-documented explanations for why the Claimant's coal dust exposure was not a factor in his totally disabling respiratory impairment." Employer's Brief at 9. Employer's argument is a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Because the ALJ acted within his discretion in rejecting the opinions of Drs. McSharry and Sargent, and his findings are supported by substantial evidence,⁶ we affirm his determination that Employer did not disprove legal pneumoconiosis.⁷ See 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 25; Order Denying Recons. at 5.

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); see *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015). Therefore, we need not address Employer's contentions of error regarding the ALJ's finding that it did not disprove clinical pneumoconiosis. See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 6-8.

Disability Causation

The ALJ next considered whether Employer established "no part of the miner'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). Contrary to Employer's argument, he permissibly discredited the disability causation opinions of Drs. McSharry and Sargent because neither diagnosed legal pneumoconiosis, contrary to his finding that Employer failed to disprove Claimant has the disease. See *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 25-26; Order Denying Recons. at 5; Employer's Brief at 14-15. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii) and the award of benefits.

⁶ The ALJ also found the opinions of Drs. Ajarapu and Smith diagnosing legal pneumoconiosis well-reasoned and documented. Decision and Order at 21; Director's Exhibits 15, 17. Employer does not challenge this finding. Thus we affirm it. See *Skrack*, 6 BLR at 1-711.

⁷ As the ALJ gave valid reasons for discrediting Drs. McSharry's and Sargent's opinions, we need not address Employer's other arguments regarding the additional reasons he 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 9-14.

Accordingly, the ALJ's Decision and Order Awarding Benefits and his Order Denying Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

GREG J. BUZZARD

Administrative Appeals Judge

DANIEL T. GRESH

Administrative Appeals Judge

MELISSA LIN JONES

Administrative Appeals Judge