U.S. Department of Labor

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

BRB No. 21-0206 BLA

TANA S. OWENS (on behalf of DONALD P. OWENS)	)	
Claimant-Respondent	)	
v.	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 5/24/2022
and	)	
HEALTH SMART CASUALTY	)	
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 Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Paul R. Almanza's Decision and Order Awarding Benefits (2018-BLA-05866) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a Miner's subsequent claim filed on February 17, 2015.[1]

The ALJ found Claimant established the Miner had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. He therefore found Claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309, and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.[3]

On appeal, Employer argues the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption. Neither Claimant, nor the Director, Office of Workers' Compensation Programs, have filed a response.

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

[1] The Miner filed two previous claims for benefits. Director's Exhibit 1. His most recent prior claim was denied on October 26, 1994, because he did not establish any element of entitlement. *Id*. The Miner did not take any further action prior to filing the current subsequent claim. Director's Exhibit 3. Claimant is the widow of the Miner, who died on May 13, 2019, and she is pursuing this claim on his behalf. Claimant's Exhibit 9.

[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.

[3] At the end of his Decision and Order, the ALJ concluded Claimant is derivatively entitled to survivor's benefits pursuant to 20 C.F.R. §718.205(b). Decision and Order at 13. However, there is no indication Claimant's survivor's claim was consolidated with the miner's claim or that it was properly before the ALJ for adjudication. Therefore, we limit our review to the ALJ's findings as they apply to the miner's claim.

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).

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 the Miner had neither legal nor clinical pneumoconiosis,[6] or "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). The ALJ found Employer failed to establish rebuttal by either method.

Clinical Pneumoconiosis

To disprove clinical pneumoconiosis, Employer must establish the Miner did not have any of the "diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[5] We affirm, as unchallenged on appeal, the ALJ's findings that the Miner had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, and Claimant therefore established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §725.309; Decision and Order at 10.

[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).

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).

The ALJ considered nine interpretations of four x-rays.[7] He found the readings of each film either positive or in equipoise for clinical pneumoconiosis and thus found Employer failed to satisfy its burden of proof. Decision and Order at 5, 11; Director's Exhibits 12, 18, 19; Claimant's Exhibits 1, 2, 3, 4. Employer contends the ALJ did not properly analyze the conflicting x-ray readings, but also concedes the positive and negative readings of each film are, at best, in equipoise. Employer's Brief at 4-5. As the ALJ correctly noted, because Claimant invoked the Section 411(c)(4) presumption, the Miner is presumed to have had clinical pneumoconiosis and a finding that the x-rays are equally balanced does not satisfy Employer's burden to affirmatively establish by a preponderance of the evidence that he did not have the disease. Decision and Order at 11; *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 272-76 (1994). Because Employer raises no specific challenge to the ALJ's determination that the x-ray evidence is in equipoise, we affirm it and his conclusion that Employer failed to disprove the Miner had clinical pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11; *see* 20 C.F.R. §718.305(d)(1)(i)(B).

Legal Pneumoconiosis

To disprove legal pneumoconiosis,[8] Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially

[7] All of the physicians are dually qualified as Board-certified radiologists and B-readers except for Dr. Forehand, who is only a B-reader. Director's Exhibits 12, 18, 19; Claimant's Exhibits 1, 2, 3, 4. Dr. Miller read the February 2, 2012 x-ray as positive for pneumoconiosis while Dr. Wolfe read it as negative. Director's Exhibit 18; Claimant's Exhibit 1. Drs. DePonte and Forehand interpreted the May 4, 2014 x-ray as positive for pneumoconiosis while Dr. Wolfe interpreted it as negative. Director's Exhibits 12, 18; Claimant's Exhibit 4. Dr. Alexander read the June 25, 2015 x-ray as positive for pneumoconiosis and Dr. Wolfe interpreted it as negative. Director's Exhibit 18; Claimant's Exhibit 2. Dr. DePonte interpreted the July 21, 2016 x-ray as positive for pneumoconiosis while Dr. Wolfe interpreted it as negative. Director's Exhibit 19; Claimant's Exhibit 3.

[8] The ALJ's finding that Employer did not disprove clinical pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. However, we address Employer's arguments on legal pneumoconiosis as the ALJ's findings on legal pneumoconiosis are relevant to the second method of rebuttal: whether Employer proved no part of the Miner's respiratory disability was due to clinical or legal pneumoconiosis.

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 Dr. Sargent's opinion, Director's Exhibit 19; Employer's Exhibits 1, 2, which the ALJ found not credible and thus insufficient to satisfy Employer's burden of proof. Decision and Order at 11-12.

Employer asserts the ALJ applied the wrong legal standard when discrediting Dr. Sargent's opinion because he stated the physician failed to "rule out" coal mine dust exposure as a potential cause of the Miner's respiratory impairment. Employer's Brief at 6-13. As explained below, we consider any error by the ALJ harmless, as he permissibly discredited Dr. Sargent's opinion because he found it not credible, not because it failed to meet a heightened legal standard. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984); Decision and Order at 11-12.

As the ALJ noted, Dr. Sargent opined the Miner had disabling obstructive lung disease due to smoking[9] and an alpha 1 antitrypsin deficiency. Director's Exhibit 19 at 3. Dr. Sargent testified at his deposition that, according to "the literature,"[10] the Miner's respiratory impairment "likely" was due to his alpha 1 antitrypsin deficiency and not coal mine dust because he had nearly normal lung function when he left the mines. Employer's Exhibit 1 at 14, 15-16, 18. Dr. Sargent stated he was unaware of any medical literature that showed coal dust exposure will increase or accelerate a lung impairment caused by alpha 1 antitrypsin deficiency. *Id.* at 18-19.

Contrary to Employer's contention, the ALJ permissibly found Dr. Sargent's lack of personal knowledge of medical literature addressing the impact of coal mine dust exposure on a person with alpha antitrypsin deficiency unpersuasive to show there is no such literature. Decision and Order at 11. We see no error in the ALJ's conclusion that Dr. Sargent's opinion does not constitute "affirmative evidence indicating coal mine dust is unable to contribute to respiratory impairment in persons with alpha 1 antitrypsin

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20 C.F.R. §718.305(d)(1); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015); Employer's Brief at 6-13.

[9] Dr. Sargent stated the Miner currently did not use tobacco products, but he had a "significant smoking history" starting at age fifteen and quitting in the 1970s at a rate of two packs per day. Director's Exhibit 19 at 4; Employer's Exhibit 1 at 5.

[10] Dr. Sargent did not cite to any specific literature to support his conclusion. Employer's Exhibit 1.

deficiency." *Id.* at 11-12; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). In addition, the ALJ permissibly found Dr. Sargent did not adequately explain why the Miner's smoking at an early age necessarily would have contributed to his respiratory disability from alpha 1 antitrypsin deficiency, while his more than fifteen years of underground coal mine dust exposure would have had no contribution or impact on his lungs.[11] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); Decision and Order at 12.

Employer's arguments regarding Dr. Sargent's opinion constitute 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 discrediting Dr. Sargent's opinion, we affirm his finding that Employer did not disprove the Miner had legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order at 12.

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); Decision and Order at 12. Because Employer raises no specific arguments on disability causation apart from its assertion that the ALJ erred in finding it failed to disprove the existence of clinical and legal pneumoconiosis, we affirm the ALJ's determination that Dr. Sargent's opinion is not adequately reasoned to prove no part of the Miner's total disability is due to pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 12; Employer's Brief at 13-14; *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (where

[11] Dr. Sargent explained that alpha 1 antitrypsin is an enzyme in the blood that breaks down trypsin, which breaks down elastic tissue, so it "keeps the body's enzymes from digesting itself." Employer's Exhibit 1 at 6. Too much trypsin can cause lung and liver damage. *Id.* He indicated that persons, such the Miner, who "have roughly half of that enzyme" are particularly susceptible to cigarette smoke and "at high risk of developing obstructive lung disease." *Id.* at 7. Dr. Sargent stated he did not believe the Miner had legal pneumoconiosis because "we have a genetic abnormality that predisposes him to develop emphysema, he's a former smoker, there is nothing on the x-ray that would say that he has clinical pneumoconiosis, and we have two reasons to explain the progressive obstructive disease that has occurred since he came out of the mines." *Id.* at 18.

physician failed to properly diagnose pneumoconiosis, an ALJ "may not credit" that physician's opinion on causation absent "specific and persuasive reasons," in which case the opinion is entitled to at most "little weight"). We therefore affirm the ALJ's finding that Employer failed to rebut disability causation. 20 C.F.R. §718.305(d)(1)(ii); *Skrack*, 6 BLR at 1-711; Decision and Order at 12.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge