U.S. Department of Labor

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

BRB No. 22-0320 BLA

ROY JOHNSON, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BIG ELK CREEK COAL COMPANY, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 11/07/2023
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

James D. Holliday (Holliday Law Offices), Hazard, Kentucky, for Claimant.

Michael A. Pusateri and Brian D. Straw (Greenberg Traurig, LLP), Washington, D.C., for Employer and its Carrier.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits in a Subsequent Claim (2020-BLA-05194) filed on January 16, 2019,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ determined Claimant established twelve to thirteen years of underground coal mine employment and therefore found he could not invoke 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). Considering entitlement under 20 C.F.R. Part 718, he found Claimant established legal pneumoconiosis,[3] as well as a totally disabling respiratory or pulmonary impairment due to legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b)(2). The ALJ therefore

[1] Claimant filed three prior claims, all of which were denied or withdrawn. Director's Exhibits 1-3. The district director denied his most recent prior claim as abandoned. Director's Exhibit 3 at 10-12. A denial by reason of abandonment is "deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

[2] 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.

[3] "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).

concluded Claimant established a change in an applicable condition of entitlement,[4] 20 C.F.R. §725.309(c), and awarded benefits.

On appeal, Employer asserts the ALJ lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[5] It further contends the removal provisions applicable to Department of Labor (DOL) ALJs render his appointment unconstitutional. On the merits, Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis and thus a change in an applicable condition of entitlement.[6] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a response urging rejection of Employer's Appointments

[4] When a claimant 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 the district director denied Claimant's prior claim for failing to establish any element of entitlement, Claimant had to establish at least one element of entitlement to obtain review of the merits of his claim. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

[5] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[6] We affirm, as unchallenged on appeal, the ALJ's determinations that Claimant had twelve to thirteen years of coal mine employment, a four to six pack-year smoking history, 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, 12, 20.

Clause challenges and its argument that the ALJ erred in his subsequent claim analysis. Employer filed two reply briefs reiterating its arguments.

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.[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, 362 (1965).

Appointments Clause and Removal Protections

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[8] Employer's Brief at 40-41; Employer's Reply Brief to the Director at 1-3. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor ALJs on December 21, 2017,[9] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's

[7] 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).

[8] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia*, 138 S. Ct. at 2055 (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[9] The Secretary issued a letter to ALJ Merck on December 21, 2017, stating:

> In my capacity as head of the [DOL], and after due consideration, I hereby ratify the Department's prior appointment of you as an [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] of the U.S. [DOL] violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Merck.

prior appointment.[10] Employer's Brief at 40-42. In addition, it generally challenges the constitutionality of the removal protections afforded to ALJs. Employer's Brief at 40-42; Employer's Reply to the Director at 2-4. For the reasons set forth in *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 3-6 (May 26, 2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023), and *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

Subsequent Claim Analysis

Employer contends the ALJ erred in finding Claimant established a change in an applicable condition of entitlement. Employer's Brief at 17-21, 26-29. Specifically, Employer asserts the ALJ erroneously compared the present claim to Claimant's abandoned third claim rather than the "fully adjudicate[d]" second claim,[11] and that the ALJ failed "to provide a robust analysis" of what conditions of entitlement changed. *Id.* at 17-21. We disagree.

Contrary to Employer's contention, the ALJ properly compared the new evidence with the denial of Claimant's abandoned third claim, which, "[f]or purposes of §725.309," must be "deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c). Moreover, Employer has not explained why the alleged error would require remand.[12] *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). The district

[10] Employer further contends the ratification of the ALJ's appointment violated the rulemaking requirements of the Administrative Procedure Act (APA), 5 U.S.C. §553(b). Employer's Brief at 41-42. Contrary to Employer's assertion, the APA provides an exception from the rulemaking requirement for matters "relating to agency management or personnel[.]" 5 U.S.C. §553(a)(2).

[11] ALJ Donald W. Mosser denied Claimant's second claim on July 29, 2008, for failure to establish pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 2 at 147-61. The district director denied Claimant's request for modification on March 17, 2009, and Claimant took no further action on that claim. *Id.* at 12-18.

[12] We reject Employer's assertion that the ALJ erred by failing to explain "whether there was any proof of deterioration" in the most recent claim. Employer's Brief at 29. An ALJ "need not compare the old and new evidence to determine a change in condition; rather, he will consider only the new evidence to determine whether the element of entitlement previously found lacking is now present." *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 486 (6th Cir. 2012).

director denied Claimant's second claim for failure to establish pneumoconiosis and total disability due to pneumoconiosis. Director's Exhibit 2 at 12-18, 147-61. Considering the evidence submitted in connection with the present claim, the ALJ found Claimant established each element of entitlement, including pneumoconiosis and total disability due to pneumoconiosis, and thus established a change in an applicable condition of entitlement. Decision and Order 18-21. That conclusion would be the same even if, as Employer incorrectly argues, the result of the second claim were taken as the relevant prior claim denial under 20 C.F.R §725.309.

Entitlement to Benefits

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,[13] Claimant must establish he has a "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(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 opinions of Drs. Alam and Green that Claimant has legal pneumoconiosis and the opinions of Drs. Jarboe and Dahhan that he does not. Decision and Order at 10-18; Director's Exhibits 12 at 6; 21; Claimant's Exhibit 2 at 6; Employer's Exhibit 1 at 13, 24-25, 29-30, 136-37, 153-54 (unpaginated); Employer's Exhibit 2 at 3. The ALJ found Drs. Jarboe's and Dahhan's opinions unpersuasive. Giving

[13] The ALJ found Claimant did not establish clinical pneumoconiosis. Decision and Order at 10.

the greatest probative weight to the opinions of Drs. Alam and Green, he found Claimant established legal pneumoconiosis. Decision and Order at 17-18.

Employer contends the ALJ erred in crediting Dr. Alam's opinion, asserting it is equivocal.[14] Employer's Brief at 30-33. We disagree.

Dr. Alam initially opined Claimant does not have legal pneumoconiosis, even though he attributed Claimant's obstructive impairment to bronchiectasis caused by tobacco use and coal mine dust exposure. Director's Exhibit 12 at 6. In a supplemental opinion, however, Dr. Alam clarified that Claimant's history of coal mine dust exposure substantially aggravated his underlying impairment and that his disability is due, at least in part, to legal pneumoconiosis. Director's Exhibit 21. Thus, contrary to Employer's assertion, Dr. Alam's supplemental opinion did not contain a new diagnosis of legal pneumoconiosis but rather, as the ALJ noted, was a clarification of his original report. Decision and Order at 12 (citing Director's Exhibits 12 at 6; 21). Dr. Alam's original report expressly attributed Claimant's impairment, in part, to coal mine dust exposure, which, by definition, is a diagnosis of legal pneumoconiosis. *See Young*, 947 F.3d 399 at 407; 20 C.F.R. §718.201(a)(2), (b); Director's Exhibit 12 at 6. Thus, we see no error in the ALJ treating Dr. Alam's supplemental opinion as a clarification of his original report and diagnosis of legal pneumoconiosis.[15] Decision and Order at 12.

Employer further contends the ALJ erred in discrediting Drs. Jarboe's and Dahhan's opinions and impermissibly shifted the burden of proof by requiring it to "rule out" legal pneumoconiosis.[16] Employer's Brief at 21-26, 29-38. We disagree.

---

[14] Employer briefly asserts that Dr. Green's opinion is insufficient to prove pneumoconiosis because it is just a conclusion that coal mine dust can cause chronic obstructive pulmonary disease (COPD), and Claimant was exposed to coal mine dust and has COPD. Employer's Brief at 37-38. This argument is a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

[15] We thus reject Employer's assertion that Dr. Alam "reversed" his opinion based "solely" on learning that Claimant may have had thirteen rather than twelve years of coal mine employment. Employer's Brief at 32. The ALJ permissibly found Dr. Alam did not reverse his opinion; nor did the physician base his clarifying opinion on a year's difference in Claimant's coal mine employment history.

[16] Contrary to Employer's contention, the ALJ considered Dr. Jarboe's opinions from the prior claims and the evidence on which he relied and permissibly gave them little probative weight due to their age. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624

Dr. Jarboe diagnosed asthma, recurrent infections, and bronchiectasis unrelated to coal mine dust exposure. Employer's Exhibit 1 at 13, 24-25, 29-30, 136-37, 153-54 (unpaginated). The ALJ permissibly discredited Dr. Jarboe's diagnosis of asthma as unsupported by the record because the treatment records do not contain any such diagnosis and Claimant specifically informed Dr. Jarboe that he had never been diagnosed with asthma.[17] *See 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); Decision and Order at 15. He further permissibly discredited Dr. Jarboe's opinion because the physician relied on generalities: the ALJ found that Dr. Jarboe relied on his belief that smoking was the more likely cause Claimant's pulmonary condition, and his conclusion that it would be improbable for a miner with only twelve to thirteen years of coal mine employment to develop pneumoconiosis.[18] *See Crisp*, 866 F.2d at 185; *Director, OWCP v. Rowe*, 710 F.2d

---

(6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004); *Workman v. E. Assoc. Coal Corp*., 23 BLR 1-22, 1-27 (2004); Employer's Brief at 23, 26; Decision and Order at 10, 18. We likewise reject Employer's contention that the principles of finality required the ALJ to credit Dr. Jarboe's 2006 opinion because it was found dispositive by ALJ Mosser when he denied Claimant's second claim. Employer's Brief at 22-26. The doctrine of res judicata generally has no application in the context of subsequent claims, "as the purpose of Section 725.309 is to provide relief from the principles of res judicata to a miner whose physical condition worsens over time." *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-79 (1993). Section 725.309 specifically provides that if a claimant establishes a change in one of the applicable conditions of entitlement, "no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (*see* §725.463), will be binding on any party in the adjudication of the subsequent claim." 20 C.F.R. §725.309(c)(5).

[17] The ALJ stated, "I find it hard to believe that all the physicians the Claimant has seen in his lifetime would fail to diagnose a condition that, in Dr. Jarboe's words, 'clearly' existed." Decision and Order at 15. Dr. Green likewise indicated Claimant had never been diagnosed with asthma. Claimant's Exhibit 2 at 3.

[18] Contrary to Employer's contention, the ALJ did not reject Dr. Jarboe's opinion as inconsistent with a premise that pneumoconiosis is *always* a latent and progressive disease but rather permissibly discredited his opinion because he failed to explain his conclusions in light of the regulation defining 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)(1) (emphasis added); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); 65 Fed. Reg. 79,920, 79,939-42 (Dec. 20, 2000); Decision and Order at 15-16; Employer's Brief at 31-37.

251, 255 (6th Cir. 1983); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985) (ALJ may discount a physician's reasoning because it is based on generalities and not the specifics of a claimant's case); Decision and Order at 17.

Dr. Dahhan opined Claimant's respiratory impairment is caused by obesity, cardiac disease, "pleural thickening and/or effusion," and infiltrate in the lower left lobe of the lung and is unrelated to coal mine dust exposure. Employer's Exhibit 2 at 3. The ALJ permissibly discredited Dr. Dahhan's opinion because the physician failed to provide evidence to support his conclusion that Claimant's impairment is related to obesity and noted it was contradicted by Dr. Green's statement that, although obesity can result in a restrictive impairment, it does not cause an obstructive impairment from which Claimant suffers. *See Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356 (6th Cir. 2007); *Rowe*, 710 F.2d at 255; Decision and Order at 17; Claimant's Exhibit 2 at 4.

We further reject Employer's assertion that the ALJ impermissibly shifted the burden of proof by requiring its physicians to "rule out" coal mine dust exposure as a contributing factor to Claimant's impairment. Employer's Brief at 38-39. Contrary to Employer's argument, the ALJ did not shift the burden to Employer but rather permissibly discredited Drs. Jarboe's and Dahhan's opinions because neither physician adequately explained why they concluded Claimant's coal mine dust exposure did not contribute to or aggravate his obstructive lung disease.[19] *See Young*, 947 F.3d at 405; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 17-18.

Disability Causation

To establish disability causation, Claimant must prove his legal pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1); *Groves*, 761 F.3d at 599-600. Pneumoconiosis is a substantially contributing cause if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); *Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003). The ALJ found the opinions of Drs. Alam and Green establish Claimant is totally disabled due to pneumoconiosis. Decision and Order at 20-21. In contrast, he discredited Drs. Jarboe's and Dahhan's opinions because neither physician

[19] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Jarboe and Dahhan, we need not address Employer's additional arguments as to why the ALJ erred in weighing their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 34-40.

diagnosed legal pneumoconiosis, contrary to the ALJ's finding that Claimant established the existence of the disease. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989); Decision and Order at 21.

Employer raises no specific allegations of error with regard to the ALJ's disability causation findings, and we thus affirm them. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983). Therefore, we affirm the ALJ's finding that Claimant established disability causation. 20 C.F.R. §718.204(c); Decision and Order at 21.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits in a Subsequent Claim.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge