U.S. Department of Labor

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

BRB No. 22-0383 BLA

RALEIGH FIELDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COOK & SONS MINING, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 11/17/2023
AMERICAN INTERNATIONAL SOUTH/AIG	)	
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for Claimant.

Daniel G. Murdock and Timothy J. Walker (Fogle Keller Walker, PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal[1] Administrative Law Judge (ALJ) John P. Sellers, III's[2] Decision and Order Awarding Benefits (2020-BLA-05068) rendered on a subsequent claim[3] filed on August 9, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901–944 (2018) (Act).

The ALJ found Claimant established thirty-one years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[4] and established a change in an applicable condition of entitlement. 20 C.F.R.

[1] On September 19, 2022, the Benefits Review Board issued an Order to Show Cause why Employer's appeal should not be dismissed for failing to timely file its petition for review and brief. Employer timely responded to the Order, concurrently filing its Petition for Review and Brief, and the Board accepted Employer's pleadings as part of the record. *Fields v. Cook & Sons Mining Inc.*, BRB No. 22-0383 BLA (Mar. 14, 2023) (Order); Petitioner's Response to Order to Show Cause.

[2] ALJ Larry A. Temin presided over the hearing. Hearing Transcript. After the hearing, but prior to issuing a decision, ALJ Temin retired. Decision and Order at 2. ALJ Sellers was subsequently assigned the case for decision. *Id.* at 3.

[3] Claimant's prior claim was denied for failure to establish any element of entitlement. Decision and Order at 2. 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 any element of entitlement in his prior claim, he had to submit new evidence establishing at least one element of entitlement to obtain review of the merits of his current claim. *White*, 23 BLR at 1-3.

[4] 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

§725.309(c). He further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption.[5] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.[6] 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 of total disability due to pneumoconiosis, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[7] 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.

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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.

[5] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10.

[6] 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); Hearing Transcript at 24.

[7] "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). "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).

§718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[8] Decision and Order at 10-19.

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 v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit holds Employer can "disprove the existence of legal pneumoconiosis by showing that [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 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 the opinions of Drs. Tuteur and Jarboe,[9] who opined Claimant does not have legal pneumoconiosis. Dr. Tuteur concluded Claimant has chronic obstructive pulmonary disease (COPD) due solely to his smoking history. Employer's Exhibits 1, 2, 6. Dr. Jarboe opined Claimant has COPD due to smoking and asthma, unrelated to coal dust exposure. Director's Exhibit 15; Employer's Exhibits 5, 7. The ALJ found both opinions unpersuasive because they are unreasoned and inconsistent with principles underlying the preamble to the revised 2001 regulations. Decision and Order at 16-18. Thus, he found the evidence insufficient to disprove legal pneumoconiosis. *Id.* at 18.

Employer argues the ALJ erred in finding Drs. Tuteur's and Jarboe's opinions undermined, asserting that both physicians acknowledge pneumoconiosis can cause obstruction and can be a latent disease. Employer's Brief at 11. It further submits that, contrary to the ALJ's finding, the doctors did not base their opinions on "generalities and statistical averaging," but on the specifics in this case. *Id.* We disagree.

[8] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 13.

[9] The ALJ also considered Dr. Forehand's opinion that Claimant has legal pneumoconiosis, diagnosing obstructive lung disease due to both coal mine dust and smoking. Director's Exhibits 12, 18; Claimant's Exhibit 2. As the ALJ found, Dr. Forehand's opinion does not support rebuttal. Decision and Order at 17.

The ALJ accurately noted Dr. Tuteur excluded legal pneumoconiosis based in part on his belief that smoking carries a greater risk of pulmonary impairment than coal mine dust exposure. Decision and Order at 17; Director's Exhibit at 15; Employer's Exhibits 2, 6. Thus, the ALJ permissibly discredited his opinion as based on generalities, rather than the specific facts in this case. *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255 (6th Cir. 1983); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985) (physician opinion based on generalities rather than specifics may be discredited). Moreover, the ALJ permissibly found Dr. Tuteur's explanations unpersuasive given he treated the two exposures as "mutually exclusive" and thus found his opinion inconsistent with the Department of Labor's recognition in the preamble that the risks of smoking and coal mine dust exposure are additive. *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Decision and Order at 17.

Further, contrary to Employer's arguments, the ALJ addressed Dr. Jarboe's specific reasoning for excluding coal mine dust as a contributor to Claimant's obstruction. Employer's Brief at 11-15; Decision and Order at 14-16. First, he noted Dr. Jarboe's opinion that Claimant's increased residual volume is inconsistent with coal mine dust exposure. Decision and Order at 14-15; Director's Exhibit 15; Employer's Exhibits 5, 7. The ALJ permissibly found his explanation unpersuasive, as the doctor did not identify any evidence demonstrating that coal mine dust did not also contribute to this impairment but rather relied only on the premise that smoking is the more likely cause. *See Rowe*, 710 F.2d at 255; *Knizner*, 8 BLR at 1-7; Decision and Order at 14. Similarly, the ALJ permissibly found Dr. Jarboe's reliance on the assumption that smoking is more harmful than coal mine dust, even if correct, inadequately addresses the additive risks of smoking and coal mine dust. *Sterling*, 762 F.3d at 491; *Barrett*, 478 F.3d at 356; Decision and Order at 15.

Thus, we affirm the ALJ's findings that Drs. Tuteur's and Jarboe's opinions are insufficient to rebut the presumption of legal pneumoconiosis. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015) (ALJ permissibly found medical opinion undermined as it ignored the possibility that the miner's COPD could have multiple causes); *see also Harman Min. Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); Decision and Order at 18. Employer's arguments amount to a request for the Board 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). Because the ALJ permissibly discredited Drs. Tuteur's and Jarboe's opinions,[10] we affirm

[10] Because the ALJ provided valid reasons for discrediting Drs. Tuteur's and Jarboe's opinions, we need not address Employer's remaining argument regarding the

his determination that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(2)(i). *Id*.

Disability Causation

The ALJ next considered whether Employer established that "no part of [Claimant'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). He rationally discounted Drs. Tuteur's and Jarboe's disability causation opinions because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the existence of the disease. *See Kennard*, 790 F.3d at 668-69; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 18-19.

Therefore, we affirm the ALJ's determination that Employer failed to establish no part of Claimant's total disability is due to legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 18-19.

weight accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 11-12.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge