U.S. Department of Labor

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

BRB No. 22-0148 BLA

RANDALL F. McMILLIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL PENNSYLVANIA COAL COMPANY	)	DATE ISSUED: 9/22/2023
	)	
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 of Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

Wes Addington, (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for Claimant.[1]

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

[1] Claimant was previously represented by John Cline, Esq. After the briefing schedule in this appeal closed, but prior to a decision in the case, Mr. Cline filed a Motion for Permission to Withdraw as Counsel. Wes Addington, Esq., of the Appalachian Citizens' Law Center, subsequently entered his appearance as counsel for Claimant. The Benefits Review Board grants Mr. Cline's request to withdraw.

Steven Winkelman (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: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Patricia J. Daum's Decision and Order Awarding Benefits (2020-BLA-05268) rendered on a claim filed on May 10, 2017,[2] pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ initially found Claimant's claim was timely filed. She further accepted the parties' stipulation that Claimant had at least thirty-five years of coal mine employment, all of which she found was underground. In addition, she determined Claimant established he has a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and therefore invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). Finally, she found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the claim was not timely filed. It further contends the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation

[2] Claimant filed a prior claim but withdrew it. Director's Exhibit 1. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306(b).

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

Programs (the Director), has filed a limited response, arguing Claimant timely filed his claim. Employer has filed a reply brief[4] to both response briefs, reiterating its contentions.[5]

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, 362 (1965).

Timeliness of Claim

"Any claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). The medical determination must have been "communicated to the miner or a person responsible for the care of the miner." 20 C.F.R. §725.308(a). A miner's claim is presumed to be timely filed. 20 C.F.R. §725.308(b). To rebut the presumption, Employer must show that the claim was filed more than three years after a "medical determination of total disability due to pneumoconiosis" was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a), (c). A medical determination of total disability due to pneumoconiosis predating a denial of benefits is legally insufficient to trigger the running of the three-year time limit for filing a subsequent claim because the medical determination must be deemed a misdiagnosis in view of the superseding denial of benefits. *Helen Min. Co. v. Dir. OWCP* [*Obush*], 650 F.3d 248, 252–53 (3d Cir. 2011); *see also Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594 (6th Cir. 2013); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 618 (4th Cir. 2006).

On December 6, 2012, Claimant's treating physician, Dr. Lenkey, opined that Claimant was 100% impaired due to very severe chronic obstructive pulmonary disease (COPD) and should not go back to work. Claimant's Exhibit 1 at 2; Employer's Exhibit 3

[4] On August 23, 2022, Claimant moved to file a surreply to Employer's reply brief. Pursuant to Employer's Motion to Strike, the Board denied Claimant's motion and struck the pleading. *McMillin v. Consol Penn. Coal Co.*, BRB No. 22-0148 BLA (Sept. 30, 2022) (Order) (unpub.).

[5] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19.

[6] The Board will apply the law of the United States Court of Appeals for the Third Circuit because Claimant performed his last coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 12.

at 2. Claimant testified that Dr. Lenkey told him that his coal mine employment had resulted in a disabling impairment, that he needed to leave coal mining, and that his impairment was "most likely" due to coal workers' pneumoconiosis. Employer's Exhibit 7 at 7. Based on Dr. Lenkey's diagnosis, Claimant left his coal mine employment and filed a federal claim for benefits on February 25, 2013. Decision and Order at 8; Director's Exhibits 1, 3; Claimant's Exhibit 4; Employer's Exhibit 7 at 6-7.

On October 31, 2013, the district director issued a Proposed Decision and Order denying the claim, finding Claimant did not establish that he had pneumoconiosis or that his totally disabling respiratory impairment was due to pneumoconiosis. Claimant's Exhibit 6 at 3. On November 4, 2013, Claimant, by counsel, requested withdrawal of his claim based on his belief that "there [was] no medical merit or basis" for pursuing the claim. Claimant's Exhibit 7; *see* 20 C.F.R §725.306(a)(1) (requiring a written request "indicating the reasons for seeking withdrawal of the claim"). On November 13, 2013, the district director approved Claimant's request to withdraw the claim, after determining that "withdrawal of the claim is in the best interest of the [C]laimant." Claimant's Exhibit 8; *see* 20 C.F.R §725.306(a)(2) (allowing adjudication officer to approve a withdrawal request "on the grounds it is in the best interests of the claimant").

Claimant continued to see Dr. Lenkey, who diagnosed Claimant as totally disabled due black lung disease on September 3, 2014, and encouraged him to apply for benefits. Claimant's Exhibit 1 at 19. Claimant filed this claim on May 4, 2017, less than three years after the new diagnosis. Director's Exhibit 3.

The ALJ rejected Employer's argument that this claim was untimely filed because it was filed more than three years after Dr. Lenkey's December 6, 2012 opinion that Claimant was totally disabled due to pneumoconiosis. Decision and Order at 5-9. Rather, the ALJ found that Dr. Lenkey's December 6, 2012 opinion was rendered a misdiagnosis by the district director's October 31, 2013 denial of benefits, thus resetting the statute of limitations. *Id.* In so finding, she rejected Employer's argument that, because the prior claim was withdrawn and is considered not to have been filed, the denial does not exist and cannot render Dr. Lenkey's opinion as a misdiagnosis. *Id.* The ALJ further determined that Claimant was not again informed he was totally disabled due to pneumoconiosis until September 3, 2014. *Id.* She therefore found Employer did not rebut the presumption that this claim was timely filed. *Id.* at 9.

On appeal, Employer asserts that, because a withdrawn claim is considered not to have been filed, the denial cannot trigger a misdiagnosis as a withdrawn claim does not exist. Employer's Brief at 10 (citing 20 C.F.R. §725.306(b)); Employer's Reply Brief at 2-6. The Director disagrees, arguing no authority supports Employer's position that the misdiagnosis rule should not apply to withdrawn claims. Director's Response at 5-6.

Instead, the Director contends Claimant "reasonably believed that he had prematurely applied [for benefits] based on the district director's denial of his 2013 claim" and thus "did not sit on his rights" by withdrawing his prior claim. *Id*. We agree with the Director's position.

The courts have consistently held that the repudiation of a diagnosis of totally disabling black lung disease in a federal claim resets the statute of limitations. *Obush*, 650 F.3d at 253; *Brigance*, 718 F.3d at 594; *Williams*, 453 F.3d at 618. As the United States Court of Appeals for the Third Circuit has explained, the misdiagnosis principle extends to state adjudications, because to hold otherwise "would be to hold the miner responsible for determining not just whether his doctor made a correct diagnosis, but for determining whether the state adjudicator correctly determined that the diagnosis was incorrect," thus creating a "trap for the unwary or unsophisticated miner."[7] *Eighty Four Min. Co. v. Director, OWCP* [*Morris*], 812 F.3d 308, 313 (3d Cir. 2016).

Here, Employer cites to no authority for its proposition that a misdiagnosis does not occur if a denied claim is subsequently withdrawn, beyond 20 C.F.R. §725.306(c)'s provision that a withdrawn claim is considered not to have been filed. As the ALJ found, although Claimant's first claim was withdrawn, the communications and reports associated with it did not "disappear into thin air," and in fact Claimant submitted the relevant documentation from that denial of benefits along with the district director's determination that withdrawal of the claim was in his best interest. Decision and Order at 8-9; Claimant's Exhibits 6-8. Nor does Employer suggest that Claimant cannot submit these reports into evidence, and it did not object to their admission into evidence. Hearing Transcript at 7.

Moreover, the Third Circuit, within whose jurisdiction this case arises, has repeatedly recognized that the remedial nature of the statute requires a liberal construction to assure widespread benefits to miners. *Obush*, 650 F.3d at 252-53; *Keating v. Director, Office of Workers' Compensation Programs*, 71 F.3d 1118, 1122 (3d Cir. 1995); *Kline v. Director, OWCP*, 877 F.2d 1175 (3d Cir. 1989). Consequently, "the Act must be applied in a manner which assures compensation to every miner who suffers from any of the several lung impairments covered by the Black Lung Benefits Act." *Obush*, 650 F.3d at 257 (quoting *Pavesi v. Director, Office of Workers' Compensation Programs*, 758 F.2d 956,

[7] The Director additionally notes that the United States Court of Appeals for the Sixth Circuit has held that a district director's preliminary denial decision in a Schedule for the Submission of Evidence in a withdrawn claim rendered a medical opinion diagnosing total disability due to pneumoconiosis a misdiagnosis and reset the statute of limitations. Director's Response Brief at 6 (citing *Aberry Coal, Inc. v. Fields*, No. 19-3483 (6th Cir. Oct. 14, 2020) (unpub.)).

965 (3d Cir. 1985)). The "progressive nature of pneumoconiosis favors 'reading the statute of limitations in an expansive manner,'" to ensure that miners are "given every opportunity" to prove their entitlement to benefits, and a restrictive interpretation of the statute of limitations "would be in tension with the regulation that enables miners to file subsequent claims." *Morris*, 812 F.3d at 312 (citing *Obush*, 650 F.3d at 253).

Claimant did not sit on his rights by withdrawing his first, denied claim and filing a later claim.[8] Instead, based on the district director's October 31, 2013 decision that he was not entitled to benefits, Claimant reasonably concluded that he applied for benefits prematurely. He should not be penalized for relying on the district director's findings. *Obush*, 650 F.3d at 253; *Brigance*, 718 F.3d 594-99; Claimant's Exhibit 7 (informing the district director that Claimant saw "no medical merit or basis" for pursuing his claim). To hold otherwise would lead to differing results in identical claims based on the miner's interpretation and reliance on the opinion of the adjudicating officer. *Brigance*, 718 F.3d at 594; *Morris*, 812 F.3d at 308. Consequently, we reject Employer's arguments and affirm the ALJ's determinations that Dr. Lenkey's diagnosis of totally disabling black lung disease on December 6, 2012, was a misdiagnosis that did not trigger the statute of limitations and that Employer has not rebutted the presumption that the claim was timely filed.[9] Decision and Order at 8-9.[10]

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[11] or that "no part

[8] "It would be illogical and inequitable to hold that a diagnosis that could not sustain a . . . claim could nevertheless trigger the statute of limitations for such a claim." *See Helen Min. Co. v. Dir. OWCP* [*Obush*], 650 F.3d 248, 253 n. 7 (3d Cir. 2011) (quoting *Consol. Coal Co. Williams*, 453 F.3d 609, 617-18 (4th Cir. 2006)).

[9] We affirm, as unchallenged on appeal, the ALJ's determination that after the denial of his prior claim, Claimant was not informed he was totally disabled due to pneumoconiosis until September 3, 2014. *See Skrack*, 6 BLR at 1-711; Decision and Order at 9.

[10] Because we have affirmed the ALJ's determination that Dr. Lenkey's December 2, 2012 report was a misdiagnosis that did not trigger the statute of limitations, we need not address the Director's alternative argument that extraordinary circumstances exist for tolling the statute of limitations. Director's Response Brief at 8-9.

[11] "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

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.[12] Decision and Order at 27.

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 Co*., 25 BLR 1-149, 1-159 (2015).

Employer relies on Dr. Zaldivar's opinion to disprove legal pneumoconiosis.[13] Employer's Exhibits 1, 8. Dr. Zaldivar initially examined Claimant on May 30, 2018, opining that "[t]here is sufficient evidence considering the work history that legal pneumoconiosis may be present," but that his impairment is complicated by smoking. Employer's Exhibit 1. After reviewing additional evidence, Dr. Zaldivar opined that Claimant does not have legal pneumoconiosis but instead has emphysema and asthma due to smoking. Employer's Exhibit 8 at 18-23. The ALJ found his opinion was not well-reasoned or documented, and she therefore found Employer did not rebut the existence of legal pneumoconiosis. Decision and Order at 25.

Employer contends the ALJ erred in her weighing of Dr. Zaldivar's opinion. Employer's Brief at 14-22. We disagree.

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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).

[12] The ALJ found Employer established the absence of clinical pneumoconiosis. Decision and Order at 21.

[13] The ALJ also considered the medical opinions of Drs. Feicht and Go but accurately found they do not assist Employer in rebutting the presumption as they both diagnosed legal pneumoconiosis. Decision and Order at 24-26; Director's Exhibit 20; Claimant's Exhibit 9; Employer's Exhibit 5.

Dr. Zaldivar relied, in part, on his opinion that the leading cause of emphysema is smoking to determine that Claimant's emphysema is due to smoking. Employer's Exhibit 9 at 20-21. The ALJ permissibly found the physician did not adequately explain why Claimant's coal mine dust exposure did not contribute to his emphysema. *See Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985) (ALJ may reject medical opinions that rely on generalities); Decision and Order at 25. The physician also relied, in part, on Claimant's response to bronchodilators on pulmonary function testing to determine his obstruction was unrelated to coal mine dust exposure. Employer's Exhibit 8 at 21, 25. Noting that all the pulmonary function studies demonstrated qualifying[14] values before and after bronchodilators, the ALJ permissibly found Dr. Zaldivar failed to adequately explain why the irreversible portion of Claimant's pulmonary impairment was not due in part to coal mine dust exposure, or why Claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of his obstruction. *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 25. Moreover, we see no error in the ALJ's finding that Dr. Zaldivar failed to adequately explain why Claimant's significant history of coal mine dust exposure was not additive along with smoking in causing or aggravating his COPD. 20 C.F.R. §718.202(a)(2), (b); 65 Fed. Reg. 79,920, 79,940-43 (Dec. 20, 2000); *Obush*, 650 F.3d at 257; *Lango v. Director, OWCP*, 104 F.3d 573, 578 (3d Cir. 1997); Decision and Order at 25.

We further reject Employer's argument that the ALJ applied an incorrect "rule out" standard in determining Employer did not rebut the existence of legal pneumoconiosis. Employer's Brief at 15-16. The ALJ held Employer to the correct rebuttal standard, requiring Employer to "establish that the Claimant's impairment is not 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment.'" Decision and Order at 21-22. As discussed above, the ALJ permissibly discredited the opinion of Dr. Zaldivar, the only physician who did not diagnose legal pneumoconiosis, as he failed to explain why coal mine dust exposure did not contribute to Claimant's allegedly smoking-related impairment. *Id*. at 24.

Because it is supported by substantial evidence, we affirm the ALJ's determination that Dr. Zaldivar's opinion did not rebut the existence of legal pneumoconiosis.[15] Decision

[14] A "qualifying" pulmonary function study yields results equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[15] Because the ALJ gave permissible reasons for discrediting Dr. Zaldivar's opinion, we need not address Employer's remaining challenges to the ALJ's weighing of his opinion. *Kozele v. Rochester & Pittsburgh Coal Co*., 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 20. Similarly, we need not address Employer's arguments challenging

and Order at 25. 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). We therefore affirm the ALJ's determination that Employer did not rebut the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis.

Disability Causation

After finding Employer did not disprove pneumoconiosis, the ALJ addressed whether Employer established that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 26-27. The ALJ rationally discounted Dr. Zaldivar's opinion regarding the cause of Claimant's disability because the doctor failed to diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove legal pneumoconiosis. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 26-27. We therefore affirm the ALJ's conclusion that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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the ALJ's weighing of the other medical opinions of record as they do not support Employer's burden. *Id*.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge