U.S. Department of Labor

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

BRB Nos. 22-0213 BLA
and 22-0214 BLA

SINA E. HUFF (o/b/o and Widow of CLAUDE HUFF, JR.) Claimant-Respondent v. SHAMROCK COAL COMPANY, INCORPORATED, Self-insured by SUNCOKE ENERGY, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 9/29/2023 DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits in Living Miner's and Survivor's Claims of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass (Johnnie L. Turner, P.S.C), Harlan, Kentucky, for Claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for Employer.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Richard M. Clark's Decision and Order on Remand Awarding Benefits in Living Miner's and Survivor's Claims (2015-BLA-05923 and 2015-BLA-05924) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on October 23, 2013, and a survivor's claim filed on July 31, 2014.[1] This case is before the Benefits Review Board for the second time.

Initially, the ALJ found the Miner had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. Thus, he determined Claimant[2] invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits. Based on the award of benefits in the miner's claim, he found Claimant derivatively entitled to survivor's benefits pursuant to Section 422(*l*) of the Act.[4]

[1] The appeal in the miner's claim was assigned BRB No. 22-0213 BLA and the appeal in the survivor's claim was assigned BRB No. 22-0214 BLA. The Benefits Review Board consolidated these appeals for purposes of decision. *Huff v. Shamrock Coal Co.*, BRB Nos. 22-0213 BLA and 22-0214 BLA (Mar. 16, 2022) (unpub. Order).

[2] Claimant is the widow of the Miner, who died on February 28, 2014. Director's Exhibit 34. She is pursuing the miner's claim on his behalf, along with her own survivor's claim.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption the Miner was totally disabled due to pneumoconiosis if he had 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); 20 C.F.R. §718.305.

[4] Section 422(*l*) of the Act provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

Upon review of Employer's appeal, the Board affirmed, as unchallenged, the ALJ's finding that the Miner was totally disabled and, rejecting Employer's arguments, affirmed the ALJ's finding that he had at least fifteen years of coal mine employment. *Huff v. Shamrock Coal Co.*, BRB Nos. 19-0160 BLA & 19-0167 BLA, slip op. at 6 n.9, 7-9 (Apr. 8, 2020) (unpub.). However, the Board vacated the ALJ's finding that all the Miner's coal mine employment was qualifying for purposes of invoking the Section 411(c)(4) presumption because the ALJ did not explain the basis for that finding. *Id.* at 9-10. The Board therefore vacated the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption and remanded the case for the ALJ to reconsider whether the Miner had at least fifteen years of underground or substantially similar coal mine employment. *Id.* at 10-11. Thus, the Board also vacated the award of derivative survivor's benefits. *Id.* at 11.

On remand, the ALJ found Claimant did not establish the Miner had fifteen years of qualifying coal mine employment and thus did not invoke the Section 411(c)(4) presumption. Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established legal pneumoconiosis[5] that substantially contributed to the Miner's respiratory disability, and awarded benefits. 20 C.F.R §§718.202(a), 718.204(b)(2), (c). Based on the award in the miner's claim, he again awarded Claimant derivative survivor's benefits pursuant to Section 422(*l*).

On appeal, Employer argues the ALJ erred in finding the Miner had legal pneumoconiosis. Claimant responds urging affirmance 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).

[5] "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).

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5; Hearing Transcript at 16.

Without the benefit of the Section 411(c)(3)[7] and (c)(4) presumptions, 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, 718.204. 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, Claimant must prove the Miner had 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(b). The United States Court of Appeals for the Sixth Circuit has held a claimant can satisfy this burden by showing that the disease was caused in part by coal mine employment.[8] *Arch on the Green 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. Habre, Fino, and Vuskovich. Decision and Order on Remand at 6-8. Dr. Habre diagnosed the Miner with legal pneumoconiosis in the form of chronic bronchitis due to smoking and coal mine dust exposure. Director's Exhibit 8 at 3. Dr. Fino opined the Miner did not have legal pneumoconiosis but instead had severe obstructive lung disease due to smoking, along with restriction and hypoxemia due to metastatic lung cancer. Director's Exhibit 9 at 5-12. Dr. Vuskovich diagnosed the Miner with metastatic lung cancer and liver failure unrelated to coal mine dust exposure. Employer's Exhibit 1 at 7. Further, Dr. Vuskovich opined that

[7] The ALJ found Claimant did not establish the Miner had complicated pneumoconiosis and therefore did not invoke the Section 411(c)(3) irrebuttable presumption he was totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304; Decision and Order on Remand at 5 n.2; 2018 Decision and Order at 19 n.8.

[8] The ALJ applied the *Groves* standard and maintained the burden of proof on Claimant to establish legal pneumoconiosis. Decision and Order on Remand at 5-6, 8. We therefore reject Employer's contention he applied an improper legal standard. Employer's Brief at 10.

by the time of Dr. Habre's December 2013 examination, the Miner was so ill from cancer and liver failure that it was not possible to determine whether he had a pulmonary impairment related to coal mine dust exposure. *Id.*

The ALJ found Dr. Habre's opinion well-reasoned and supported by the objective medical evidence. Conversely, he found Drs. Fino's and Vuskovich's opinions were not well-reasoned and accorded them less weight. Based on Dr. Habre's opinion, the ALJ found the Miner had legal pneumoconiosis.

Employer argues the ALJ erred in crediting Dr. Habre's opinion when the doctor relied on a twenty-two-year coal mine employment history. Employer's Brief at 5-6. We disagree.

The ALJ determines the effect of an inaccurate coal mine dust exposure history on the credibility of a medical opinion. *Huscoal, Inc., v. Director, OWCP* [*Clemons*], 48 F.4th 480, 491 (6th Cir. 2022); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1994). The ALJ considered the discrepancy between his finding of "just over" fifteen years of coal mine employment and Dr. Habre's statement on the length of the Miner's coal mine employment. Decision and Order on Remand at 6. He concluded that Dr. Habre's opinion was nevertheless well-reasoned because it was supported by the objective evidence and consistent with the premises underlying the Act that coal mine dust exposure can cause an obstructive impairment and its effects may be additive with those of smoking. *Id.* Contrary to Employer's contention, the ALJ acted within his discretion in finding Dr. Habre still rendered a well-reasoned opinion that the Miner's obstructive impairment was due, in part, to coal mine dust exposure. *See Clemons*, 48 F.4th at 491-92; *Young*, 947 F.3d at 407; *Groves*, 761 F.3d at 598-99; *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012).[9]

[9] Our dissenting colleague asserts that the ALJ did not provide the "required" explanation for his decision to credit Dr. Habre's opinion regarding legal pneumoconiosis and disability causation, given the discrepancy between his findings and Dr. Habre's assumptions as to the length and conditions of the Miner's coal mine dust exposure. *Infra* p.11. But such credibility decisions are within the purview of the fact-finder. "[T]he ALJ is not required to totally discount a doctor's opinion just because it relied on imprecise information so long as the ALJ acknowledges the discrepancy and adequately explains why the opinion is nevertheless entitled to greater weight than others in the record." *Huscoal, Inc., v. Director, OWCP* [*Clemons*], 48 F.4th 480, 491-92 (6th Cir. 2022).

The ALJ did not ignore the discrepancy between his finding on the length of the Miner's coal mine employment and Dr. Habre's statement on the length of his coal mine

Employer also contends the ALJ erred in crediting Dr. Habre's opinion when the doctor relied on an "inaccurate" smoking history of ten pack years, even though the Miner's treatment records suggest he may have smoked up to two packs per day for fifty years. Employer's Brief at 6. Again, we disagree.

In the ALJ's initial decision, he considered conflicting documentary evidence regarding the Miner's smoking history and noted no hearing testimony was elicited from Claimant on the issue. 2018 Decision and Order at 7 & n.5. Considering the "varied and inconsistent" accounts in the record,[10] the ALJ found it was not possible to determine a precise smoking history but concluded the Miner smoked "from . . . one pack of cigarettes a day for ten years, up to two packs of cigarettes a day for [fifty] years." *Id.* at 8. Employer

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employment. Rather, he expressly considered the discrepancy and specifically found this fact did not undermine Dr. Habre's opinion that the Miner's obstructive impairment was due, in part, to coal mine dust exposure because he found the doctor's opinion supported by the objective evidence and consistent with the premises that coal mine dust causes an obstructive impairment, as well as that the effects of coal mine dust and smoking may be additive. Decision and Order on Remand at 6. These reasons are sufficient to discern what the ALJ did and why he did it. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 802 (6th Cir. 2012); *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999) (An ALJ's "duty of explanation" is satisfied if "a reviewing court can discern what the ALJ did and why he did it."). Thus, our dissenting colleague does not explain why Dr. Habre's reliance on a lesser coal mine employment history undermines his diagnosis of a coal dust-related impairment, given the alleged length of the discrepancy and the ALJ's discretion. *See, e.g., Little T Coal Co. v. Director, OWCP* [*Bailey*], No. 22-3135, 2023 WL 1463434 (6th Cir. Feb. 2, 2023) (affirming slightly under three years of coal mine employment sufficient to support diagnosis of legal pneumoconiosis); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311 n.2 (4th Cir. 2012) (characterizing a difference between seventeen and twenty-one years in the length of coal mine employment as "relatively insignificant," that did not compel rejection of the physician's opinion diagnosing legal pneumoconiosis); *Rickey v. Director, OWCP*, 7 BLR 1-106, 108 (1984) (discrepancy between seven years of coal mine employment found by adjudicator and eleven years assumed by doctor did not affect the weight given opinion diagnosing legal pneumoconiosis).

[10] The ALJ considered that the Miner told Dr. Habre he smoked one pack of cigarettes a day from 1970 to 1980, that Dr. Fino cited a December 11, 2012 report noting a history of smoking two packs per day for fifty years, and that Dr. Fino pointed to treatment record notations that the Miner had a history of tobacco abuse and was a current smoker. 2018 Decision and Order at 7 (citing Director's Exhibits 8, 9, 36).

does not acknowledge or discuss this finding by the ALJ, which he based, in part, on Dr. Habre's history of ten pack years of smoking. In arguing only that the ALJ failed to consider that Dr. Habre's opinion is based on an inaccurate smoking history, Employer essentially asks us to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. We therefore reject its allegation of error.

Employer next argues the ALJ erroneously rejected the opinions of Drs. Fino and Vuskovich. Employer's Brief at 8-11. Employer's arguments are unpersuasive.

Dr. Fino acknowledged that coal mine dust caused some loss in the Miner's FEV_1 value on pulmonary function testing, but relied on medical studies indicating that the average loss from coal mine dust would be two to three cc of FEV_1 a year. Decision and Order on Remand at 6; Director's Exhibit 9 at 6. According to Dr. Fino, if the Miner were given back the average amount of loss from coal mine dust, he would still have been disabled. Director's Exhibit 9 at 6, 10. Dr. Fino also relied on medical studies to conclude that the impact of cigarette smoking is far greater than that of coal mine dust exposure. *Id.* at 10-13. The ALJ permissibly found this reasoning unpersuasive because Dr. Fino relied on general statistics rather than the specifics of the Miner's case. *See Young*, 947 F.3d at 408-09; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 312-13 (4th Cir. 2012); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). He further found, within his discretion, that Dr. Fino did not adequately address whether the Miner's coal mine dust exposure was additive along with smoking, even if smoking was the primary cause of his obstructive disease. *See Clemons*, 48 F.4th 489-90; *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000).

The ALJ permissibly found Dr. Vuskovich did not adequately explain the basis for his opinion that, because of the Miner's metastatic lung cancer and liver failure, it could not be determined whether he had an impairment related to coal mine dust exposure. *See Banks*, 690 F.3d at 489. Noting that Drs. Habre and Fino diagnosed the Miner with a disabling obstructive impairment in addition to his cancer and addressed whether that impairment was related to coal mine dust exposure, the ALJ permissibly found Dr. Vuskovich provided insufficient reasoning and support for his view that such an assessment was not possible. *See Banks*, 690 F.3d at 489; Decision and Order on Remand at 6. Employer's argument that Dr. Vuskovich adequately explained his opinion and did not need to cite medical literature in support of it amounts to a request to reweigh the opinion, which we may not do. *Anderson*, 12 BLR at 1-113. We therefore reject Employer's allegation of error.

As it is supported by substantial evidence, we affirm the ALJ's determination that Claimant established legal pneumoconiosis based on Dr. Habre's opinion. 20 C.F.R. §718.202(a); Decision and Order on Remand at 8.

Disability Causation

To establish the Miner was totally disabled due to pneumoconiosis, Claimant must prove pneumoconiosis was "a substantially contributing cause of [the Miner's] totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c); *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 "[m]aterially worsens" a totally disabling respiratory or pulmonary impairment 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 that since Drs. Habre and Fino agreed the Miner was totally disabled by obstructive lung disease and Dr. Habre's opinion established the obstructive disease constituted legal pneumoconiosis, it also established legal pneumoconiosis was a substantially contributing cause of the Miner's total disability. Decision and Order on Remand at 9; 20 C.F.R §718.204(c). As Employer does not separately challenge this finding, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Survivor's Claim

Based on the award of benefits in the Miner's claim, the ALJ found Claimant satisfied her burden to establish each fact necessary to demonstrate entitlement under Section 422(*l*) of the Act: she filed her claim after January 1, 2005; she is an eligible survivor of the Miner; her claim was pending on or after March 23, 2010; and the Miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*); Decision and Order on Remand at 9. Because we have affirmed the award of benefits in the Miner's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co*., 25 BLR 1-121, 1-126 (2013).

Accordingly, we affirm the ALJ's Decision and Order on Remand Awarding Benefits in Living Miner's and Survivor's Claims.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

While I otherwise concur in the majority opinion, I respectfully dissent from my colleagues' determination that the ALJ properly credited Dr. Habre's opinion and found Claimant established that the Miner had legal pneumoconiosis.

In formulating his opinion, Dr. Habre relied on the Miner's representation that he had twenty-two years of underground and two years of surface mining coal dust exposure (twenty-four years of exposure in total). Director's Exhibit 8 at 35. This was contrary to the ALJ's finding that the Miner had fifteen years of coal mine dust exposure, with less than fifteen of those years underground or in substantially similar conditions. Decision and Order on Remand at 3-4. The ALJ nonetheless gave Dr. Habre's opinion determinative weight on the grounds that it was supported by objective evidence and consistent with the premises underlying the Act that coal mine dust exposure can cause an obstructive impairment and its effects may be additive with those of smoking. *Id.* at 6.

However, we cannot tell from that explanation what the objective evidence being cited is, nor how, based on that evidence, Dr. Habre's finding of legal pneumoconiosis was not affected by his assumption that the miner was exposed to very dusty coal mine conditions for a much lengthier period than that found by the ALJ.[11] Consequently, the

[11] The ALJ also purported to cite premises underlying the Act as a basis for finding Dr. Habre's opinion sound. Decision and Order on Remand at 6. However, the ALJ's recital of "premises" is not fully accurate as to the Act, and it is not apparent how any such

Administrative Procedure Act's requirement[12] for an explanation of the ALJ's determination, giving full weight to Dr. Habre's opinion as well-reasoned and well-documented, has not been met. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 802 (6th Cir. 2012) (APA "imposes on the ALJ a duty accurately and specifically to reference the evidence supporting his decision."); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253 (4th Cir. 2016) ("[A] reviewing court must be able to discern what the ALJ did and why he did it.").

Accordingly, I would vacate the ALJ's findings crediting Dr. Habre's opinion on legal pneumoconiosis, as well as the ALJ's determination that the Miner had legal pneumoconiosis. Because the ALJ's findings and determinations as to legal pneumoconiosis also affected the ALJ's findings and determinations as to causation of the Miner's total disability, as well as Claimant's ultimate entitlement, I also would vacate those findings and determinations and the award of benefits.

"premises" render Dr. Habre's mistaken assumptions as to the conditions and length of the Miner's coal mine employment harmless. The Department's regulations, and the scientific studies undergirding the Department's findings (not the Act), specifically take note that obstructive impairment can be caused by coal mine dust and that the *risk* of obstructive impairment from coal dust exposure may be additive to the risk from smoking. *See* 20 C.F.R §718.201(a)(2) (including "obstructive pulmonary disease arising out of coal mine employment" in the definition of legal pneumoconiosis); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000) (noting additive risk of developing obstruction for miners who smoke). However, this establishes only a possibility of causation, and then only as a general matter. It is not obvious how it supports Dr. Habre's finding of legal pneumoconiosis in the Miner's specific case, so that the length and conditions of coal mine employment he assumed do not affect the credibility of his opinion.

[12] The Administrative Procedure Act requires that every adjudicatory decision include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

I would therefore remand the case for the ALJ to provide the required explanation for his decision to either credit or discredit Dr. Habre's opinion regarding legal pneumoconiosis and disability causation, given the discrepancies between his findings and Dr. Habre's assumptions as to the length and conditions of the Miner's coal mine dust exposure. *See Adams*, 694 F.3d at 802; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

JUDITH S. BOGGS
Administrative Appeals Judge