U.S. Department of Labor

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

BRB No. 23-0379 BLA

PATRICIA L. ANTHONY[1] (o/b/o MELVIN ANTHONY)	)	
Claimant-Respondent	)	
v.	)	
KEYSTONE COAL MINING CORPORATION c/o MURRAY ENERGY	)	
and	)	DATE ISSUED: 08/28/2024
ROCHESTER & PITTSBURGH COAL COMPANY c/o SMART CASUALTY CLAIMS	)	
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 of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

[1] On March 11, 2024, Claimant's counsel filed a Motion to Substitute Party informing the Benefits Review Board that the Miner died on August 25, 2022, and requesting that his widow be added as a party in this claim. The Board grants the request and amends the caption accordingly. *See* 20 C.F.R. §725.360(b).

Cameron Blair (Wolfe Williams & Austin),[2] Norton, Virginia, for Claimant.

Toni J. Williams (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy 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, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2022-BLA-05852) rendered on a claim filed on May 6, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation of twenty-one years of underground coal mine employment and found the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, the ALJ found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] The ALJ further found Employer failed to rebut the presumption and awarded benefits.

[2] Linda D. Glagola, a lay representative from Lungs at Work in McMurray, Pennsylvania, previously represented Claimant and filed her response brief. After briefing, but prior to a decision in this case, Cameron Blair, of Wolfe Williams & Austin, filed a Notice of Change of Counsel and Notice of Appearance on behalf of Claimant.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a 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.

On appeal, Employer challenges the ALJ's finding that it failed to rebut the Section 411(c)(4) presumption and specifically argues the ALJ erred in relying on the preamble to the 2001 revised regulations to weigh the medical opinion evidence.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a response urging the Board to reject Employer's arguments regarding the ALJ's reliance on the preamble.

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.[5] 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, 361-62 (1965).

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

Because Claimant invoked the Section 411(c)(4) presumption, 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); *Minich v. Keystone Coal*

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established twenty-one years of underground coal mine employment, a totally disabling respiratory or pulmonary impairment, and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 9, 33.

[5] The Board will apply the law of the United States Court of Appeals for the Third Circuit because the Miner 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 4.

[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 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).

Mining Corp., 25 BLR 1-149, 1-155 n.8 (2015). The ALJ found Employer failed to establish rebuttal by either method.[7] Decision and Order at 11-24.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did 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*, 25 BLR at 1-155 n.8.

The ALJ considered the medical opinions of Drs. Basheda and Rosenberg that the Miner did not have legal pneumoconiosis. Employer's Exhibits 5, 6, 13, 14. Dr. Basheda diagnosed him with chronic obstructive pulmonary disease (COPD) with an asthmatic component and air trapping due to cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibits 5 at 22-23; 13 at 20-22. Dr. Rosenberg diagnosed COPD, emphysema, and bronchitis due to cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibits 6 at 11-16; 14 at 11-12. The ALJ discredited both opinions as not well-reasoned and entitled to no weight. Decision and Order at 24.

Employer contends the ALJ erred in discrediting Drs. Basheda's and Rosenberg's opinions based on the preamble to the 2001 revised regulations and in failing to consider their specific explanations for why the Miner's COPD, emphysema, asthma, and bronchitis did not constitute legal pneumoconiosis. Employer's Brief at 27-37. We disagree.

Initially, we reject Employer's assertion that the ALJ impermissibly used the preamble as a "binding rule" in evaluating Drs. Basheda's and Rosenberg's opinions. Employer's Brief at 28-29. Rather, as the Director argues, Director's Response Brief at 2-3, the ALJ permissibly consulted the preamble as a statement of credible medical research findings the Department of Labor accepted when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011);[8] 65 Fed. Reg. 79,920, 79,939-42 (Dec. 20, 2000); Decision and Order at 23-24. Nor did the

[7] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 11-15.

[8] *See also Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 830-31 (10th Cir. 2017); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008).

ALJ presume that the preamble links all diagnoses of COPD, emphysema, asthma, and bronchitis to coal mine dust exposure. Employer's Brief at 28-29. He simply, and accurately, stated that while the preamble concludes coal mine dust exposure may cause or aggravate these conditions, a diagnosis of COPD or asthma does not necessarily constitute a finding of legal pneumoconiosis. Decision and Order at 23-24 (quoting 65 Fed. Reg. at 79,939).

The ALJ thus appropriately considered whether Drs. Basheda and Rosenberg credibly explained their diagnoses and, therefore, whether they met Employer's burden to disprove legal pneumoconiosis. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 209-10 (3rd Cir. 2002); Decision and Order at 23-24. In finding they did not, the ALJ noted both physicians excluded coal mine dust exposure as a cause of the Miner's COPD and asthma because, if those conditions were related to coal mine dust exposure, the Miner would have begun to show symptoms while still working in coal mine employment. Decision and Order at 23-24; Employer's Exhibits 5 at 22; 13 at 20-21; 14 at 24-25. The ALJ permissibly discounted this rationale as inconsistent with the regulations' recognition that pneumoconiosis is "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); *see Mullins Coal Co. of Va. V. Director, OWCP*, 484 U.S. 135, 151 (1987); *Kramer*, 305 F.3d at 209-10; Decision and Order at 23-24. Further, the ALJ permissibly discredited both physicians' opinions because they failed to adequately explain why coal mine dust exposure did not significantly contribute, along with cigarette smoking, to his obstructive impairment. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 23-24.

Employer's arguments on appeal are a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ acted within his discretion in rejecting Drs. Basheda's and Rosenberg's opinions, the only opinions supportive of Employer's burden to affirmatively prove the Miner did not have legal pneumoconiosis,[9] we affirm his determination that Employer did not disprove legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 22-24.

[9] We need not address Employer's arguments concerning Drs. Sood's, Celko's, and Krefft's opinions because their diagnoses of legal pneumoconiosis do not assist Employer in proving the Miner did not have the disease. *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"); Decision and Order at 22-24; Employer's Brief at 22-27.

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). Contrary to Employer's contentions, Employer's Brief at 37-44, the ALJ permissibly discounted Drs. Basheda's and Rosenberg's disability causation opinions because neither doctor diagnosed legal pneumoconiosis, contrary to his finding that Employer failed to disprove the Miner had the disease.[10] *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *see also 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 33-38. We therefore affirm the ALJ's finding that Employer failed to establish no part of the Miner's total disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[10] Neither physician offered an opinion on this subject independent of his reasoning relating to the absence of pneumoconiosis.