U.S. Department of Labor

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

BRB No. 21-0307 BLA

DONALD BENTLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 02/16/2023
	)	
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.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

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

Sarah M. Hurley (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 ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits in a Subsequent Claim (2019-BLA-06338) rendered on a subsequent claim filed on October 23, 2018,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 7.56 years of coal mine employment, and therefore found he could not invoke 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).[2] Considering entitlement under 20 C.F.R. Part 718, the ALJ found the evidence established Claimant is totally disabled due to legal pneumoconiosis,[3] and therefore established a change in a condition of entitlement.[4] 20 C.F.R. §725.309(c). Accordingly, he awarded benefits.

On appeal, Employer argues the Department of Labor's (DOL's) destruction of Claimant's prior claim file violates its due process rights. On the merits, Employer contends the ALJ erred in finding Claimant has legal pneumoconiosis and is totally

[1] Claimant's initial claim, filed on January 1, 1970, was closed on May 23, 1980. Director's Exhibit 54 at 7. The record of his prior claim for benefits was destroyed, so there is no record of why his claim was denied. Decision and Order at 2; Director's Exhibit 54.

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

[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).

[4] Pursuant to 20 C.F.R. §725.309(d), if a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the ALJ 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); *White v. New White Coal Co., Inc.*, 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(d)(2). Because no record exists of Claimant's prior claim, the ALJ found he had to submit new evidence establishing at least one element of entitlement to proceed with this claim. Decision and Order at 3.

disabled due to his legal pneumoconiosis.[5] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response urging the Benefits Review Board to reject Employer's due process arguments.

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).

Due Process

Employer argues its due process rights were violated because it did not have access to Claimant's initial claim file after the Federal Records Center destroyed it. Employer's Brief at 5-9. It argues that the ALJ's inability to make a substantive consideration of the evidence from the prior claim circumvented his role in determining whether a change in a condition of entitlement has been established. *Id*. Further, it contends that the loss of evidence deprived it of potential defenses to its designation as the responsible operator and to possible evidence of Claimant's smoking history. *Id*. at 8. Thus, Employer asserts any liability for benefits must transfer to the Black Lung Disability Trust Fund (Trust Fund). *Id*.

The Director responds that Employer's due process rights were not violated as the ALJ logically found Claimant must have established a change in a condition when he affirmatively established every element of entitlement. Director's Response Brief at 2-4. Similarly, the Director urges the Board to reject Employer's argument that the lack of evidence from the prior claim hampered its defenses. *Id*. at 3. We agree with the Director.

In the absence of deliberate misconduct, "the mere failure to preserve evidence [from a prior black lung claim] – evidence that may be helpful to one or the other party in some hypothetical future proceeding – does not violate [a party's right to due process]." *Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009)

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2); Decision and Order at 39.

[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); Decision and Order at 3; Hearing Transcript at 44.

(rejecting coal mine operator's argument that due process is violated whenever the Trust Fund loses or destroys evidence from a miner's prior claim). Employer must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim. *See Consol. Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000). As the United States Court of Appeals for the Tenth Circuit explained in *Oliver*, Employer must "demonstrate that the contents of [the] lost claim file were so vital to its case that it would be fundamentally unfair to make the company live with the outcome of this proceeding without access to those records." *Oliver*, 555 F.3d at 1219. Employer has not met this burden.

Employer suggests the DOL's failure to include this evidence in the record of the current claim prevented the ALJ from adequately evaluating whether Claimant established a change in an applicable condition of entitlement. Employer's Brief at 8-9. We disagree. A claimant must show that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final" by submitting new evidence that establishes an element of entitlement upon which the prior denial was based. 20 C.F.R. §725.309(c); *Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 758-59 (6th Cir. 2013); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The ALJ reasonably found that, because Claimant established every element of entitlement, he is entitled to benefits and thus established a change in an applicable condition of entitlement since the denial of his prior claim. Decision and Order at 8 n.22. He further indicated that, as Claimant's prior claim file was "over 50 years old" and the Act recognizes that pneumoconiosis is a latent and progressive disease, he would have found the more recent evidence more probative of Claimant's current physical condition. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993); Decision and Order at 8 n.22. Employer has not explained how the record from Claimant's prior claim, filed in 1970, is relevant to this current inquiry. *Oliver*, 555 F.3d at 1222-23.

As discussed below, the ALJ permissibly credited the physicians offering medical opinions that Claimant is totally disabled due to legal pneumoconiosis and the ALJ permissibly found Claimant established each element of his claim, thereby proving both a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and his entitlement to benefits overall. *White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c).

Further, while Employer speculates that evidence from the prior 1970 claim might have been helpful in obtaining evidence on the responsible operator issue, it conceded it was the responsible operator at the hearing. *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 937 F.3d 581, 591 (6th Cir. 2021) (parties forfeit arguments before the Board not first raised to the ALJ); *Nippes v. Florence Mining Co.*, 12 BLR 1-108, 1-109

(1985) (party is bound by its stipulations and concessions); Decision and Order at 3; Hearing Transcript at 45; Employer's Brief at 8.

Employer also speculates that evidence from the prior 1970 claim might have been helpful in determining Claimant's smoking history. Employer's Brief at 8. However, Employer was provided with the opportunity to develop evidence relevant to Claimant's smoking history, and both deposed Claimant and cross-examined him at the hearing. Director's Exhibit 29; Hearing Transcript at 39-43. Moreover, the ALJ did not accept or reject any expert based on their reliance on an inaccurate smoking history and Employer does not argue that any physician relied on an inaccurate smoking history. *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). Consequently, Employer has not demonstrated how it was deprived of a fair opportunity to mount a meaningful defense or how the records from the prior claim are vital to the current claim. *Oliver*, 555 F.3d at 1219; *Borda*, 171 F.3d at 184; *Holdman*, 202 F.3d at 883-84.

Accordingly, we reject Employer's assertion that its due process rights were violated and that liability for benefits should transfer to the Trust Fund.

Part 718 Entitlement

In order to obtain benefits without the aid of a statutory presumption, 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, 1-2 (1986) (en banc).

To establish legal pneumoconiosis, Claimant must prove he has a chronic lung disease or an 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 that a miner can establish a lung impairment is significantly related to coal mine dust exposure "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 opinions of Drs. Raj, Green, Nader, Dahhan, and Fino.[7] Decision and Order at 12-23. Drs. Raj, Green, and Nader diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to coal mine dust exposure and smoking. Director's Exhibits 13, 20, 28; Claimant's Exhibits 3, 4; Employer's Exhibit 10. Conversely, Dr. Dahhan opined Claimant's COPD is due to smoking, with possible contributions from prior pneumonia and old bronchiectasis. Director's Exhibit 8; Employer's Exhibit 8. Similarly, Dr. Fino opined Claimant does not have legal pneumoconiosis, but instead has emphysema due to smoking. Director's Exhibit 25; Employer's Exhibit 9.

The ALJ found the opinions of Drs. Raj, Green, and Nader well-documented and reasoned, and accorded them full probative weight. Decision and Order at 12-14, 20-22. Conversely, he found the opinions of Drs. Dahhan and Fino not well-reasoned and accorded them less weight. *Id*. at 14-20. Consequently, he found the medical opinion evidence establishes legal pneumoconiosis. *Id*. at 22-23.

Employer contends the ALJ erred in finding Claimant established legal pneumoconiosis, arguing that the opinions of Drs. Raj, Green, and Nader are insufficiently reasoned to support Claimant's burden of proof.[8] Employer's Brief at 9-15. Specifically, Employer argues the ALJ "erred in crediting the opinions of physicians that do not know the cause of the obstruction or cannot distinguish the role of mining as opposed to smoking" in causing his impairment. *Id*. at 11. We disagree.

Contrary to Employer's arguments, a physician is not required to specifically apportion the contributions of coal mine dust exposure and smoking to the Miner's lung disease. *See* 20 C.F.R. §718.201(b); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-107-1-108 (1998) (en banc); *see also Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576-77 (6th Cir. 2000) (legal pneumoconiosis can be proven by a physician's opinion that coal dust and smoking were both causal factors and it was impossible to allocate between them). Rather, the physician need only credibly diagnose a chronic respiratory or pulmonary impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[7] The ALJ determined Claimant did not establish clinical pneumoconiosis. Decision and Order at 11.

[8] We affirm, as unchallenged on appeal, the ALJ's determination that the opinions of Drs. Dahhan and Fino are not well-reasoned or documented. *See Skrack*, 6 BLR at 1-711; Decision and Order at 14-20.

Dr. Raj diagnosed Claimant with legal pneumoconiosis based on his smoking and employment history; symptoms of shortness of breath, cough, and wheezing; a physical examination; pulmonary function testing revealing a moderate obstructive impairment that did not respond to bronchodilators; and a chest x-ray showing emphysema. Decision and Order at 12-14; Director's Exhibits 13, 20, 28. He opined that, while he could not apportion the damage caused by cigarette smoking and coal mine dust exposure, he attributed it primarily to Claimant's extensive cigarette smoking with a substantial contribution from coal mine dust exposure. Decision and Order at 12-14; Director's Exhibits 13, 20, 28. The ALJ permissibly found Dr. Raj's diagnosis of legal pneumoconiosis well-documented and reasoned, as it was supported by the objective evidence and adequately took into account Claimant's significant smoking history as well as his coal mine dust exposure. *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Groves,* 761 F.3d at 597-98; *Cornett,* 227 F.3d at 576-77; Decision and Order at 14.

Similarly, Dr. Green diagnosed legal pneumoconiosis based on Claimant's smoking and employment histories; symptoms of chronic cough, wheezing, and shortness of breath; a physical examination; a pulmonary function study showing a moderate obstructive impairment with only a partial response to bronchodilators; a moderately reduced diffusion capacity; and a resting blood gas study showing hypoxemia. Decision and Order at 20-21; Claimant's Exhibit 3; Employer's Exhibit 10. He explained that, although Claimant has a significant smoking history that is significant factor in his COPD, his coal mine dust exposure was a significant aggravating cause of his obstruction. Decision and Order at 20-21; Claimant's Exhibit 3; Employer's Exhibit 10. The ALJ permissibly found his diagnosis of legal pneumoconiosis well-reasoned and documented as his opinion was supported by the objective testing and he considered both risk factors for Claimant's COPD. *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; *Groves,* 761 F.3d at 597-98; *Cornett,* 227 F.3d at 576-77; Decision and Order at 21.

Dr. Nader diagnosed legal pneumoconiosis based on Claimant's smoking and employment histories; symptoms of chronic cough, wheezing, shortness of breath, and mucus expectoration; a physical examination; a moderate obstructive impairment; an increase in reserve volume and decrease in diffusion capacity reflecting underlying hyperinflation and emphysema; and x-ray evidence of emphysema. Decision and Order at 22; Claimant's Exhibit 4. He opined that he could not distinguish the relative contribution of Claimant's smoking and coal and rock dust exposures to his COPD, but opined that Claimant's coal mine dust exposure was a significant substantial contributing cause of his underlying pulmonary impairment. Decision and Order at 22; Claimant's Exhibit 4. The ALJ permissibly found Dr. Nader's diagnosis of legal pneumoconiosis well-reasoned and documented as his opinion was supported by the objective testing and Claimant's symptoms, and he adequately addressed both of Claimant's exposure histories. *Crisp*, 866

F.2d at 185; *Rowe*, 710 F.2d at 255; *Groves*, 761 F.3d at 597-98; *Cornett*, 227 F.3d at 576-77; Decision and Order at 21.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012). Employer's arguments amount to a request that the Board reweigh the evidence which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). Thus, we affirm the ALJ's finding that Claimant established legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 23.

As Employer raises no specific allegations of error regarding disability causation, other than to assert Claimant does not have legal pneumoconiosis,[9] we affirm the ALJ's finding that Claimant established his total respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.204(c); *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 32-34.

[9] We reject Employer's contention that the ALJ erred in failing to make a specific finding of disease causation at 20 C.F.R. §718.203, as a determination of legal pneumoconiosis subsumes the inquiry as to whether a miner's disease arose from coal mine employment. *See* 20 C.F.R. §718.203; *Kiser v. L & J Equipment Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co., Inc.*, 21 BLR 1-147, 1-151 (1999); Employer's Brief at 9 n.1.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge