U.S. Department of Labor

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

BRB No. 21-0422 BLA

DAVID L. WILLIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
and	)	
	)	DATE ISSUED: 02/16/2023
PEABODY ENERGY CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Drew A. Swank, Administrative Law Judge, Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Paul E. Frampton (Bowles Rice, LLP), Charleston, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2020-BLA-05387) of Administrative Law Judge (ALJ) Drew A. Swank, rendered on a miner's claim filed on January 24, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

Claimant alleged and the ALJ found Claimant worked five years in coal mine employment. Because Claimant established fewer than fifteen years of coal mine employment, he did not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] Considering Claimant's entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.202(a)(4), 718.204(b)(2). However, the ALJ found Claimant failed to establish his total disability is due to legal pneumoconiosis and denied benefits. 20 C.F.R. §718.204(c)(1).

On appeal, Claimant asserts the ALJ erred in finding Dr. Jaworski's opinion insufficient to establish that he is totally disabled due to legal pneumoconiosis. Employer responds in support of the denial, asserting that while the ALJ erred in finding legal pneumoconiosis established, he properly found Claimant did not establish disability causation.[2] The Director, Office of Workers' Compensation Programs has not filed a response brief in this appeal.

The Benefit's Review 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,

[1] 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.

[2] Employer additionally asserted that if the denial of benefits is vacated, the Benefits Review Board must instruct the ALJ to properly address its arguments regarding the responsible carrier. However, pursuant to the Director, Office of Workers' Compensation Programs (the Director's), timely motion, the Board struck this argument because it was not raised in a cross-appeal. March 15, 2022 Order.

and in accordance with applicable law.[3] 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).

Entitlement under 20 C.F.R. Part 718

Without the benefit of the Sections 411(c)(3)[4] or 411(c)(4) presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); total disability (a totally disabling respiratory or pulmonary impairment);[5] and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 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).

Employer conceded before the ALJ that Claimant has a totally disabling obstructive impairment. Employer's Closing Brief at 4. The ALJ found Claimant established legal but not clinical pneumoconiosis. In considering disability causation, the ALJ found none of the physicians' opinions sufficiently establish that Claimant's respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.204(c).

For the reasons that follow, we first vacate the ALJ's finding that Claimant's chronic obstructive pulmonary disease (COPD) in the form of asthma constitutes legal pneumoconiosis and remand the case for further consideration of that issue. In the event Claimant on remand reestablishes his disabling COPD constitutes legal pneumoconiosis, however, we further vacate the ALJ's finding Claimant failed to establish legal pneumoconiosis substantially contributed to his disability. Because Claimant's COPD is itself totally disabling, Claimant is entitled to benefits if it constitutes legal pneumoconiosis. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013) (claimant entitled to benefits as a matter of law where his totally disabling COPD is

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[4] The irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 is not applicable because there is no evidence in the record that Claimant has complicated pneumoconiosis. 30 U.S.C. §921(c)(3).

[5] The ALJ found that Claimant established total disability based on the pulmonary function studies and medical opinions, and in consideration of the evidence as a whole. 20 C.F.R §718.204(b)(2).

determined to constitute legal pneumoconiosis); *Cumberland River Coal Co., v. Banks*, 690 F.3d 477, 489-90 (6th Cir. 2012) (same); *see also Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 1-256 (2019) (same).

Legal Pneumoconiosis

"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). In order to establish legal pneumoconiosis, Claimant must prove that he has 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). Claimant may satisfy this standard by establishing his lung disease or impairment is caused "in part" by coal mine employment. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 309 (4th Cir. 2012).

The ALJ considered three medical opinions. He found Dr. Jaworski's diagnosis of legal pneumoconiosis "conclusory." Similarly, he found Dr. Rosenberg's opinion excluding legal pneumoconiosis not well-reasoned.[6] However, finding that Dr. Basheda provided a reasoned diagnosis of asthma, and further noting the preamble to the revised 2001 regulations recognizes asthma as a form of COPD, the ALJ concluded Claimant established legal pneumoconiosis. 20 C.F.R. §718.202(a)(4).

Dr. Basheda examined Claimant on October 30, 2020, and diagnosed severe obstruction secondary to persistent asthma. Claimant's Exhibit 1. He stated, "I cannot exclude coal dust as contributing to this airway obstruction, that is, legal pneumoconiosis." *Id.* at 8-10. Further, he stated, "I cannot exclude legal pneumoconiosis as contributing to this impairment" because Claimant's obstruction on pulmonary function testing did not respond to bronchodilators, nor to aggressive treatment for his asthma and allergies. *Id.* at 10. Dr. Basheda also cited Claimant's history of recurrent COPD exacerbations, his limited

[6] Dr. Rosenberg diagnosed Claimant with a disabling respiratory impairment but opined it did not constitute legal pneumoconiosis based on epidemiological studies indicating five years of coal dust exposure does not result in clinically significant impairment. Employer's Exhibit 3 at 2-4. The ALJ found Dr. Rosenberg's opinion not well-reasoned because Dr. Rosenberg's rationale "tell[s] us nothing about *what happened in* [*Claimant's*] *particular case*." Decision and Order at 14 (emphasis in original).

pipe-smoking history,[7] and the fact that Claimant's limited coal mining work is sufficient to cause impairment in a susceptible coal miner as supporting his opinion.[8] *Id.* at 7-10.

Contrary to the ALJ's analysis, the mere fact that Dr. Basheda diagnosed asthma does not equate to a finding that Claimant has legal pneumoconiosis. The preamble to the Department's rulemaking promulgating the current regulations recognizes COPD, including asthma, may constitute legal pneumoconiosis only if coal mine dust exposure is a significant contributing cause of Claimant's asthma or a substantially aggravating factor for his asthma. *See* 30 U.S.C. §902(b); 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. 79,920 79,938 (Dec. 20, 2000); *Looney*, 678 F.3d at 314-16. We further agree with Employer that the length of Claimant's smoking history is relevant to the credibility of the physicians' opinions at 20 C.F.R. §§718.202(a), 718.204(c). *See Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-137-38 (2006) (en banc); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); Employer's Brief at 3-8. Under 20 C.F.R. Part 718, Claimant bears the burden of proof to establish legal pneumoconiosis by a preponderance of evidence; he must establish it is more likely than not that his respiratory impairment is significantly related to or substantially aggravated by his exposure to coal dust. 20 C.F.R. §718.201(a)(2), (b); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994). Because the ALJ misconstrued the law and failed to resolve the conflict in evidence as to Claimant's smoking history, we vacate the ALJ's reliance on Dr. Basheda's opinion to establish legal pneumoconiosis. Thus, we vacate the ALJ's finding that Claimant established pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Disability Causation

To prove Claimant is totally disabled due to pneumoconiosis, he must establish pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or it "[m]aterially worsens a totally disabling

[7] Dr. Basheda stated, "Mr. Willis was a limited pipe smoker in his late teens and early twenties. I would consider this an insignificant smoking history." Claimant's Exhibit 1 at 7. Employer correctly asserts, however, Claimant reported a forty-one year smoking history to Dr. Jaworski. Employer's Brief at 5.

[8] Dr. Basheda additionally stated "I would need more clinical and objective data to help differentiate the causes of his airway obstruction." Claimant's Exhibit 1 at 9.

respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

The ALJ apparently discredited Dr. Jaworski's opinion on disability causation and found the opinions of Drs. Rosenberg and Basheda do not support Claimant's burden of proof.[9] We agree with Claimant, however, that the ALJ erred in several respects in weighing Dr. Jaworski's opinion.

The ALJ reasoned:

> Doctor Jaworksi attributed Claimant's severe obstruction (due both to his coal mine dust exposure and smoking) as causing *inter alia* his total pulmonary disability. DX-12. As the undersigned has found that Claimant has legal coal workers' pneumoconiosis resulting in obstruction (based upon Dr. Basheda's opinion and the *Preamble), supra*, Dr. Jaworski's opinion is consistent with the record and found to be well-reasoned. What is unclear, however, is what portion of Claimant's severe obstruction is due to his coal mine dust exposure or what portion of Claimant's total pulmonary disability is due to his legal coal workers' pneumoconiosis. Doctor Jaworski did not apportion the relative contributions; it is unknown from his opinion if Claimant's coal workers' pneumoconiosis *materially* impacted his total pulmonary disability. Emphasis added. The undersigned cannot *sua sponte* assume that Claimant's legal coal workers' pneumoconiosis materially affects his total pulmonary disability nor assume how Dr. Jaworski would apportion it as opposed to the damage caused by his history of smoking. Doctor Jaworski's opinion therefore does not prove that Claimant's coal workers' pneumoconiosis is a *"substantially contributing cause"* to the miner's total disability. . . .

Decision and Order at 22.

By revisiting the role coal dust exposure and smoking played in causing Claimant's obstructive impairment -- rather than the role that his pneumoconiosis played in his total respiratory disability -- the ALJ conflated the elements of disease and disability causation

[9] The ALJ observed that Dr. Basheda's inability to exclude coal mine dust exposure as a contributing factor for Claimant's disabling respiratory impairment "does not mean that it *materially* contributed" and thus did not support Claimant's burden of proof. Decision and Order at 23 (emphasis in original). The ALJ discredited Dr. Rosenberg's opinion because he did not diagnose legal pneumoconiosis. *Id.*

in weighing Dr. Jaworski's opinion. 20 C.F.R. §718.204(b), (c). Moreover, the ALJ further erred to the extent that his findings can be interpreted as requiring Dr. Jaworski to apportion the relative contribution between Claimant's coal mine dust exposure and smoking in determining whether his disabling obstructive impairment (which the ALJ found took the form of asthma) constitutes legal pneumoconiosis.[10] As Claimant asserts, the Department of Labor in the preamble recognized that the risks of smoking and coal mine dust exposure are additive. *See* 65 Fed. Reg. at 79,940-941, 79,943; Claimant's Brief at 5. Further, a physician need not attribute a specific portion of a claimant's impairment to coal dust for it to constitute legal pneumoconiosis. *See Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003); Claimant's Brief at 5.

Because the ALJ's credibility findings with respect to Drs. Basheda and Jaworski are contrary to law, we vacate them. Thus, we vacate the ALJ's finding that Claimant did not establish that pneumoconiosis is a substantially contributing cause of his total disability. 20 C.F.R. §718.204(c).

Remand Instructions

On remand, the ALJ must reconsider whether the evidence establishes Claimant's totally disabling obstructive impairment is "significantly related to, or substantially aggravated by dust exposure in coal mine employment" and thus constitutes legal pneumoconiosis. *See Looney*, 678 F.3d at 309. If he determines Claimant's totally disabling obstructive impairment constitutes legal pneumoconiosis, Claimant is entitled to benefits. *See Ramage*, 737 at 1062; *Banks*, 690 F.3d at 489-90; *see also Hawkinberry*, 25

[10] Although the ALJ found Dr. Jaworski's opinion "conclusory," Decision and Order at 13-14, his subsequent analysis regarding causation makes it unclear to what extent that judgment was based on his mistaken belief that the physician was required to apportion between smoking and coal mine dust exposure. Thus, the ALJ must re-examine Dr. Jaworski's opinion on remand and determine whether it is adequately reasoned and documented to establish legal pneumoconiosis. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 802-03 (4th Cir. 1998). In order to constitute legal pneumoconiosis, as noted above, the impairment must be significantly related to or substantially aggravated by coal mine dust. 20 C.F.R. §718.201(a)(2), (b). Thus, although apportionment is not required, coal mine dust must be at least a partial cause of the impairment, beyond a merely de minimus role, in order for it to constitute legal pneumoconiosis. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 309 (4th Cir. 2012). The ALJ must find the physician's opinion reasoned in order for it to support a determination that legal pneumoconiosis is established. 20 C.F.R. §718.202(a)(4).

BLR at 1-256. If he finds Claimant has not established it constitutes legal pneumoconiosis, the ALJ may reinstate his denial.

In rendering his credibility determinations on remand, the ALJ must address "the qualifications of the respective physicians, the explanation of their medical findings, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses."[11] *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 442 (4th Cir. 1997). The ALJ also must set forth the bases for all of his credibility findings as the Administrative Procedure Act[12] requires. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[11] The ALJ should address Employer's contentions regarding Claimant's smoking history and render a finding as to its length. He should then consider whether the physicians had an accurate understanding of Claimant's smoking history in determining the weight to accord their opinions.

[12] The Administrative Procedure Act requires 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).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this decision.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge