U.S. Department of Labor

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

BRB No. 22-0012 BLA

DAVID M. TILLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PINNACLE MINING COMPANY	)	
	)	DATE ISSUED: 02/07/2023
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 Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Granting Benefits (2019-BLA-06266) rendered on a claim filed

pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on June 8, 2017.[1]

The ALJ found Claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309. She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[4] Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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[1] This is Claimant's third claim for benefits. Director's Exhibits 1, 2. On April 27, 2016, the district director denied Claimant's most recent prior claim, filed on July 18, 2014, because he failed to establish total disability. 20 C.F.R. §718.204(b)(2); Director's Exhibit 2.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes 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.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she 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); *see White v. New White Coal Co.*, 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(c)(3). Because Claimant did not establish total disability in his prior claim, he had to submit new evidence establishing this element of entitlement to obtain review of the merits of his current claim. *Id*.; Decision and Order at 5-6.

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established at least fifteen years of underground coal mine employment, total disability, a change in an applicable condition of entitlement, and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.204(b)(2), 718.305(b), 725.309(c); Decision and Order at 4, 5, 10.

The Benefits 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, 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 (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 Claimant has neither legal nor clinical pneumoconiosis,[6] or that "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). The ALJ found Employer failed to establish rebuttal by either method.[7]

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 Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the medical opinions of Drs. Nader, Green, Zaldivar and Basheda, as well as Claimant's treatment records from Bluefield Pulmonary Consultants.

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[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because 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 Exhibits 6, 9, 10; Hearing Tr. at 26.

[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 that is 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).

[7] The ALJ found Employer disproved the existence of clinical pneumoconiosis. Decision and Order at 11-12.

Decision and Order at 12. Drs. Nader and Green opined Claimant has legal pneumoconiosis[8] whereas Drs. Zaldivar and Basheda opined he does not.[9] Director's Exhibit 13; Claimant's Exhibit 1; Employer's Exhibits 4, 9, 12, 13. Claimant's treatment records include diagnoses of asthma and chronic obstructive pulmonary disease (COPD). Claimant's Exhibit 2; Employer's Exhibit 3. The ALJ found all the medical opinions entitled to "some weight." Decision and Order at 13. She further found the medical opinions and Claimant's treatment records support a finding that Claimant has legal pneumoconiosis. *Id*. She thus concluded Employer failed to disprove the existence of legal pneumoconiosis. *Id*.

Employer argues the ALJ erred by failing to explain her findings. Employer's Brief at 4-22. We agree.

After briefly summarizing the medical opinions, the ALJ concluded:

> All four doctors diagnosed the Claimant with a chronic restrictive or obstructive pulmonary impairment. Additionally, Drs. Nader and Green opined that the Claimant has "legal diagnosis of coal workers' pneumoconiosis [and] coal workers (sic) pneumoconiosis, respectively. Affording some weight to all the opinions as to legal pneumoconiosis/coal workers (sic) pneumoconiosis, I find the medical opinion evidence in equipoise as to a physician determination of legal pneumoconiosis. However, I find the medical opinion evidence supports a finding of a chronic restrictive or obstructive pulmonary impairment in the form of COPD and/or asthma, which under the regulations is sufficient for a finding of legal pneumoconiosis. In particular, I note that asthma can constitute legal pneumoconiosis. Additionally, the treatment records support a finding of a chronic respiratory impairment. Furthermore, I find that the evidence shows

[8] Dr. Nader opined Claimant has chronic obstructive pulmonary disease (COPD) related to coal mine dust exposure. Director's Exhibit 13 at 3. Dr. Green opined Claimant suffers from chronic obstruction and identified his "37 year occupational history of respirable coal and rock dust [as] an additional significant contributing and aggravating factor for the legal diagnosis of coal workers' pneumoconiosis." Claimant's Exhibit 1 at 3.

[9] Dr. Zaldivar opined Claimant has asthma "both genetically acquired, as well as acquired through his smoking habit, and not related to" coal mine dust exposure. Employer's Exhibits 9 at 8, 13 at 29-31. Dr. Basheda opined Claimant has asthma unrelated to coal mine dust exposure. Employer's Exhibits 4 at 21, 12 at 9, 17, 19-22.

> that the Claimant's chronic pulmonary impairment arose out of coal mine employment.

Decision and Order at 13.

The ALJ made no determination as to whether the medical opinions are reasoned and documented; although she assigned their opinions "some weight," she did not explain the basis for this finding. Decision and Order at 13. Thus she erred by failing to critically analyze the physicians' opinions, render any findings as to whether their opinions are reasoned and documented, or otherwise explain why she found their opinions credible as the Administrative Procedure Act (APA)[10] requires. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016) (ALJ must still conduct an appropriate analysis of the evidence to support his or her conclusion and render necessary credibility findings); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998) (ALJ erred by failing to adequately explain why he credited certain evidence and discredited other evidence); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

While the burden remains on Employer to disprove pneumoconiosis, the ALJ did not explain why she found Drs. Nader's and Green's opinions outweigh Drs. Zaldivar's and Basheda's contrary opinions. *Wojtowicz*, 12 BLR at 1-165; Decision and Order at 13. As discussed above, although the ALJ found all the medical opinions entitled to "some weight," that finding is unexplained and the mere presence of conflicting medical opinions is not a valid basis to conclude Employer failed to meet its burden to disprove the existence of the disease. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994). The ALJ has a duty to resolve any conflicts in the evidence and explain her basis for doing so. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803 (4th Cir. 1998); *Gunderson v. United States Department of Labor*, 601 F.3d 1013, 1024 (10th Cir. 2010); *Wojtowicz*, 12 BLR at 1-165.

Finally, as noted above, the ALJ stated Claimant's chronic restrictive or obstructive pulmonary impairment is a "form of COPD and/or asthma, which under the regulations is sufficient for a finding of legal pneumoconiosis" and "asthma can constitute legal

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

pneumoconiosis." Decision and Order at 13. However, the presence of COPD and/or asthma[11] – and the fact that either disease *can* constitute legal pneumoconiosis – is not, without further explanation, a sufficient basis to conclude Employer did not disprove legal pneumoconiosis. Employer's burden on rebuttal is to disprove that Claimant does not have a 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). Thus, the ALJ must determine whether Employer met that burden.

In view of the foregoing errors, we vacate the ALJ's finding that Employer did not disprove the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 13. Thus, we vacate her finding that Employer failed to establish rebuttal at 20 C.F.R. §718.305(d)(1)(i) and remand the case for further consideration of the medical opinion evidence. *Id*. The ALJ must set forth her findings in detail, including the underlying rationale for her decision as the APA requires. *See Wojtowicz*, 12 BLR at 1-165. She should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441. Further, she must consider all the relevant evidence in reaching her determinations.[12] *See* 30 U.S.C. §923(b) (fact-finder must address all relevant evidence); *Addison*, 831 F.3d at 252-53; *McCune v. Cent. Appalachian Coal Co*., 6 BLR 1-996, 1-998 (1984) (failure to discuss relevant evidence requires remand).

Disability Causation

The ALJ next considered whether Employer established "no part of [Claimant'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), Decision and Order at 13. She found the medical opinion evidence in "equipoise" on the issue of whether Claimant's total disability is due to pneumoconiosis. Decision and Order at 13. She further determined Employer

[11] Dr. Nader diagnosed COPD due in part to coal mine dust exposure; Dr. Green similarly diagnosed chronic obstruction due in part to coal mine dust exposure; Drs. Basheda and Zaldivar diagnosed chronic obstruction consistent with asthma and unrelated to coal mine dust exposure. Director's Exhibit 13; Claimant's Exhibit 1; Employer's Exhibits 4, 13.

[12] Employer correctly states the "[d]epositions from Drs. Basheda and Zaldivar were noted, but no portion are discussed in the ALJ's decision discussing the medical opinion evidence" on the issue of legal pneumoconiosis. Employer's Brief at 5; *see* Decision and Order at 9, 10, 12-13; Employer's Exhibits 12, 13.

did not rebut the presumed fact that Claimant's total disability is due to pneumoconiosis because she found "Claimant has legal pneumoconiosis" and "Employer bears the burden" of rebutting disability causation. *Id*. Because the ALJ's errors in assessing legal pneumoconiosis affected her credibility findings on disability causation, we vacate her finding that Employer failed to prove no part of Claimant's respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Employer's Brief at 23. Thus, we vacate the award of benefits.

Remand Instructions

On remand, the ALJ must reconsider the medical opinions and Claimant's treatment records to determine whether Employer disproved the existence of legal pneumoconiosis by affirmatively establishing Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment" by a preponderance of the evidence. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) (rebuttal inquiry is "whether the employer has come forward with affirmative proof that [the miner] does not have legal pneumoconiosis, because his impairment is not in fact significantly related to his years of coal mine employment"); *Minich*, 25 BLR at 1-155 n.8.

Because the ALJ found Employer disproved the existence of clinical pneumoconiosis, if she finds it has disproved the existence of legal pneumoconiosis, Employer has rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i) and she need not reach the issue of disability causation. If, however, the ALJ finds Employer has failed to rebut the presumption of legal pneumoconiosis and thus has failed to establish rebuttal at 20 C.F.R. §718.305(d)(1)(i), she must then address whether Employer established "no part of [Claimant'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).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge