U.S. Department of Labor

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

BRB No. 2022-0198 BLA

HOMER DEAN FIELDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PREMIER ELKHORN COAL, LLC	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS' MUTUAL INS.,	)	DATE ISSUED: 02/27/2023
	)	
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 an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for Claimant.

Joseph D. Halbert (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for Employer and its Carrier.[1]

[1] Employer and its carrier filed a Notice of Entry of Appearance and Motion to Substitute Counsel on December 9, 2022 notifying the Board that Mr. Halbert would now

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits in an Initial Claim (2020-BLA-05116) rendered 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 June 14, 2018.

The ALJ found that Claimant established twenty-six years of qualifying surface coal mine employment and a totally disabling respiratory or pulmonary impairment.[2] 20 C.F.R. §718.204(b)(2). Therefore, he concluded Claimant 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). The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption.[4] Claimant responds urging affirmance of the award of benefits.

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be representing Employer and its Carrier. The brief in this matter was submitted by Employer's previous counsel, Denise Hall Scarberry, on April 18, 2022.

[2] The ALJ noted that there was no evidence of complicated pneumoconiosis and thus Claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304; Decision and Order at 7.

[3] 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); 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the ALJ's finding of twenty-six years of qualifying coal mine employment, Claimant is totally disabled, Claimant invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis, and Employer successfully rebutted the presumption of clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-5, 18, 22.

The Director, Office of Workers' Compensation Programs, declined to file a substantive response.

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, 362 (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 he has 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). The ALJ found Employer did not establish rebuttal by either method.

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 Sixth Circuit holds Employer can "disprove the existence of legal pneumoconiosis by showing that [the miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399,

[5] 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 4; Hearing Tr. at 21-22.

[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).

405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal-dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id*. at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relies on the opinions of Drs. Rosenberg and Jarboe. Employer's Brief at 7-10. Both physicians opined Claimant has chronic obstructive pulmonary disease (COPD) caused by smoking and unrelated to coal dust exposure. Decision and Order at 12-14; Director's Exhibit 36; Employer's Exhibits 3-4, 8-9. The ALJ found their opinions not well-reasoned and inconsistent with the preamble to the 2001 revised regulations and, therefore, insufficient to satisfy Employer's burden of proof. Decision and Order at 18.

Initially, we reject Employer's arguments that the ALJ used a heightened legal standard and effectively required its medical experts to "rule out" coal mine dust exposure as a causative factor for Claimant's COPD.[7] Employer's Brief at 10. The ALJ accurately noted the regulatory definition of legal pneumoconiosis as set out in 20 C.F.R. §718.201 and made findings consistent with that definition. Decision and Order at 19. Moreover, as explained below, the ALJ rejected the opinions of Employer's experts because he found them inadequately reasoned and not because they failed to meet a heightened legal standard.

The ALJ accurately noted Drs. Jarboe and Rosenberg excluded a diagnosis of legal pneumoconiosis based, in part, on Claimant's markedly reduced FEV1/FVC ratio on pulmonary function testing, which they maintain is consistent with impairment related to smoking and not coal mine dust exposure. Decision and Order at 23-25; Employer's Exhibits 3-4, 8-9. The ALJ permissibly discredited their rationale as inconsistent with the scientific studies the Department of Labor (DOL) credited in the preamble to the 2001 revised regulations indicating that coal dust exposure may cause COPD with associated decrements in the FEV1 and FEV1/FVC ratio. *See* 65 Fed. Reg. 79,920 79,943 (Dec. 20,

[7] Employer argues that "[t]he regulations do not require that a physician find that both coal dust and cigarette smoking both contribute to a miner's lung impairment, when both risk factors are present[]" and that it would be impossible to rebut the presumption of legal pneumoconiosis if this were the case. Employer's Brief at 7-8. Employer is correct that a physician is not required to conclude that coal dust contributed to a miner's impairment. But, by operation of the Section 411(c)(4) presumption, Employer retains the burden to disprove coal dust as a significant contributor or substantial aggravator to Claimant's impairment. The ALJ, in turn, has the duty to determine whether Employer's physicians credibly explained their opinions that Claimant's impairment is unrelated to his coal dust exposure.

2000); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014); *see also Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-73 (4th Cir. 2017); Decision and Order at 12-14.

The ALJ also permissibly found that, given DOL's recognition of scientific studies that the risksof smoking and coal mine dust exposure may be additive, neither Dr. Jarboe nor Dr. Rosenberg adequately explained why Claimant's "significant" coal mine dust exposure did not also substantially aggravate his respiratory condition along with smoking. *See* 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. at 79,940; *Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 24-25.

Employer's arguments regarding legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). Because it is supported by substantial evidence, we affirm the ALJ's finding that Employer did not disprove legal pneumoconiosis.[8] *See* 20 C.F.R. §718.305(d)(1)(i); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Employer's failure to disprove legal pneumoconiosis, precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1).

Disability Causation

The ALJ next considered whether Employer established that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R. §718.305(d)(1)(ii). He permissibly discredited the opinions of Drs. Rosenberg and Jarboe because they did not diagnose legal pneumoconiosis, contrary to his finding Employer failed to disprove the disease, and for the same reasons he discredited them regarding legal pneumoconiosis.[9] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013);

[8] Because Employer has the burden of proof on rebuttal and the ALJ gave permissible reasons for discrediting the opinions of its medical experts, we need not reach Employer's challenges to the ALJ's additional reasons for finding the opinions of Drs. Jarboe and Rosenberg not well-reasoned, nor Employer's challenges to the weight accorded the opinion of Dr. Forehand who diagnosed legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 21-26; Employer's Brief at 4-10.

[9] Drs. Rosenberg and Jarboe did not address whether legal pneumoconiosis caused Claimant's total respiratory disability independent of their conclusions that he did not have the disease.

Decision and Order at 27. Employer raises no specific allegations of error as to the ALJ's findings other than its assertions that Claimant does not have legal pneumoconiosis, which we have rejected. Employer's Brief at 10. We therefore affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 27-28. Consequently, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge