U.S. Department of Labor

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

BRB No. 23-0192 BLA

ROBERT L. CORLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL MINING COMPANY, LLC	)	
	)	
and	)	DATE ISSUED: 07/18/2024
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

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

William M. Bush (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: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2022-BLA-05219) rendered on a subsequent claim filed on October 12, 2020,[1] pursuant to the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2012) (Act).

The ALJ credited Claimant with twenty-eight years of underground coal mine employment and found he established 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). She further found Employer did not rebut the presumption and 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, it contends the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[3] 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.

[1] Claimant's initial claim, filed on March 7, 1996, was closed on July 17, 1996. Director's Exhibit 48 at 7. The record of that prior claim for benefits was destroyed, so there is no record of why it was denied. Decision and Order at 6-7; Director's Exhibits 1, 2, 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] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. *See Skrack* v. *Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 21.

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.[4] 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).

Due Process

Employer argues its due process rights were violated because it did not have access to Claimant's initial claim file because the Federal Records Center destroyed it. Employer's Brief at 5-12. It argues the initial claim file should not have been destroyed because "[a]ll actions" relating to the initial claim "were not completed." *Id.* at 8-9. It also argues the ALJ's inability to substantively consider the prior claim's evidence circumvented her role in determining whether Claimant established a change in a condition of entitlement. *Id.* at 10-11. It further argues the destruction of the file deprived it of possible evidence that could aid it on rebuttal. *Id.* Thus, Employer asserts any liability for benefits must transfer to the Black Lung Disability Trust Fund (Trust Fund). *Id.* at 12.

The Director responds that Employer's due process rights were not violated as the ALJ logically found Claimant necessarily established a change in a condition when he established every element of entitlement. Director's Response Brief at 8. He further argues Employer misconstrues 20 C.F.R. §725.309 to assert all actions related to the initial claim had not been completed. *Id.* at 8-9.

We are not persuaded that Employer's due process rights have been violated. 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) (rejecting coal mine operator's argument that due process is violated whenever the DOL 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 Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *Consol. Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999). 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

[4] 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, 7; Hearing Transcript at 16-17.

with the outcome of this proceeding without access to those records." 555 F.3d at 1219. Employer has not met this burden.

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 entitlement to benefits, he necessarily established a change in at least one condition of entitlement since the denial of his initial claim. *See Eastern Associated Coal Corp.* v. *Director, OWCP* [*Toler*], 805 F.3d 502, 511-14 (4th Cir. 2015); Decision and Order at 7-8.

She further rationally found that because the medical evidence from Claimant's prior claim file predates the present claim "by at least [twenty-five] years," and the Act recognizes that pneumoconiosis is a latent and progressive disease, she 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); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Kincaid v. Island Creek Coal Co.*, 26 BLR 1-43, 1-49-52 (2023); Decision and Order at 8 n.22. Employer has not explained how the absence of the record from Claimant's prior claim, filed in 1996, prejudiced the outcome of this current inquiry. *Oliver*, 555 F.3d at 1222-23.

Employer has not challenged the ALJ's determination that Claimant established total disability and invoked the Section 411(c)(4) presumption and, as discussed below, she permissibly discredited the physicians' opinions on which Employer relies to establish rebuttal. The ALJ thus correctly concluded Claimant proved 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, Employer asserts the record from the 1996 claim was improperly destroyed because all actions related to that claim had not yet been completed, and liability thus must be transferred to the Trust Fund. Employer's Brief at 8-9. However, Employer does not identify any specific action yet to be completed—beyond waiting on the possibility of a subsequent claim, *id.* (citing 20 C.F.R. §725.309)—nor does it identify authority that would require transfer of liability under these circumstances. Further, we agree with the Director's assertion that Employer's argument misconstrues Section 725.309. Director's Response Brief at 8-9. Initial claims and subsequent claims are not one combined claim but, rather, are distinct and separate claims. *See Toler*, 805 F.3d at 515; *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1362 (4th Cir. 1996); Director's Response Brief

at 8-9. Thus, all actions related to the 1996 claim were complete prior to destruction of that file.

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. Therefore, we affirm the ALJ's finding that the destruction of the prior claim file did not violate Employer's due process rights; consequently, as the ALJ concluded, liability for benefits should not transfer to the Trust Fund.

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,[5] 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.[6]

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." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the medical opinions of Drs. Basheda and Goodman. Director's Exhibit 21; Employer's Exhibits 1, 3, 4. Dr. Basheda diagnosed chronic obstructive

[5] "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).

[6] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 25, 28.

pulmonary disease (COPD) and asthma and opined he cannot exclude legal pneumoconiosis because he could not exclude tobacco use or coal mine dust as contributors to Claimant's impairments. Employer's Exhibits 1 at 20; 4 at 15. Dr. Goodman diagnosed COPD due to obesity, deconditioning, and tobacco smoke exposure and unrelated to coal mine dust exposure. Director's Exhibit 21 at 6-7; Employer's Exhibit 4 at 19, 27. The ALJ concluded "Dr. Basheda diagnosed Claimant with legal pneumoconiosis" and thus found his opinion does not support Employer's burden to rebut the disease. Decision and Order at 25-26. She further found Dr. Goodman's opinion entitled to little weight and thus found Employer failed to disprove legal pneumoconiosis. *Id.* at 26-27.

Employer contends the ALJ erred in discrediting Dr. Goodman's opinion.[7] Employer's Brief at 13. We disagree.

The ALJ noted Dr. Goodman attributed Claimant's impairments to a combination of obesity, deconditioning, and tobacco smoke exposure. Decision and Order at 26; Director's Exhibit 21 at 6; Employer's Exhibit 3 at 27-28. The ALJ permissibly discredited Dr. Goodman's opinion because he did not explain why Claimant's coal mine dust exposure did not contribute to or aggravated his obstructive impairment. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); Decision and Order at 26. She reasonably found his explanation that smoking and the effects of lung surgery were the cause of Claimant's impairment unpersuasive in light of DOL's recognition in the preamble to the revised 2001 regulations that credible scientific studies show coal dust exposure may cause clinically significant airways obstruction in the absence of smoking and that the risks of smoking and coal dust exposure are additive. *See Am. Energy LLC v. Director, OWCP* [*Goode*], No. 22-1740, slip op. at 19 (4th Cir. July 1, 2024); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); 65 Fed. Reg. 70, 920, 79,939-42 (Dec. 20, 2000); Decision and Order at 26.

[7] Employer further contends the ALJ erred in finding Dr. Basheda diagnosed legal pneumoconiosis. Employer's Brief at 12-13. As Employer concedes, however, Dr. Basheda opined he cannot exclude coal mine dust exposure as a contributing factor to Claimant's impairment and further opined he cannot exclude legal pneumoconiosis. Employer's Exhibits 1 at 20; 4 at 15. As such, his opinion does not support Employer's burden to affirmatively disprove legal pneumoconiosis, and we need not address Employer's assertion that the ALJ mischaracterized his opinion. *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).

We consider Employer's arguments on legal pneumoconiosis to be a request to reweigh the evidence, which we are not empowered to do.[8] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ's credibility findings are supported by substantial evidence, we affirm her determination that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 28.

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 28-29. She correctly found Dr. Basheda's opinion does not support Employer's burden to disprove disability causation. Decision and Order at 29. She further permissibly discounted Dr. Goodman's opinion on the cause of Claimant's total disability because he did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove the existence of the disease. *See Epling*, 783 F.3d at 504-05; Decision and Order at 29. We therefore affirm the ALJ's finding that Employer failed to rebut the Section 411(c)(4) presumption and the award of benefits. *See* 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 29-30.

[8] Because the ALJ provided valid reasons for discrediting Dr. Goodman's opinion on legal pneumoconiosis, we need not address Employer's remaining arguments regarding the weight assigned to his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 13.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge