U.S. Department of Labor

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

BRB No. 23-0458 BLA

LUKE MAIDEN, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL MINING COMPANY, LLC	)	
	)	
and	)	
	)	
CONSOL ENERGY INCORPORATED, c/o SMART CASUALTY CLAIMS	)	DATE ISSUED: 07/29/2024
	)	
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 of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Frank K. Newman (Cole, Cole, Anderson & Newman P.S.C.), Barbourville, Kentucky, for Claimant.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Awarding Benefits (2020-BLA-05234) rendered on a claim filed on February 12, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

Based on Employer's stipulation, the ALJ credited Claimant with nineteen years of coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he determined 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).[3] He further found Employer did not rebut the presumption and awarded benefits.

[1] This case was initially assigned to ALJ Peter B. Silvain, who issued a November 20, 2020 Order of Remand for Complete Pulmonary Evaluation and Cancelling the Scheduled Hearing to allow Dr. Ajjarapu to provide a supplemental medical report in compliance with 20 C.F.R. §725.406(a). Decision and Order at 2; Director's Exhibit 62 at 5-7. The case was subsequently reassigned to ALJ Steven D. Bell (the ALJ). July 21, 2021 Notice of Assignment; Director's Exhibit 63 at 4.

[2] Section 411(c)(4) 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.

[3] Neither the ALJ nor Employer specifically stated whether Claimant's nineteen years of coal mine employment are qualifying. *See* Decision and Order at 3, 15; Employer's Brief at 1-2. However, Claimant testified to having at least nineteen years of underground coal mine employment, and Employer conceded the claim is to be considered under the 15-year presumption, which "switches the burden of proof to the operator to show the impairment or disease was not caused by coal mine dust." Employer's Post-Hearing Letter at 1-2; *see also* Hearing Transcript at 11-15. We therefore affirm, as unchallenged on appeal, the ALJ's finding that Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-4, 22; Employer's Brief at 1.

On appeal, Employer argues the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a 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.[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 (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,[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 Claimant does 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),

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Hearing Tr. at 7; Director's Exhibit 3.

[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 pursuant to 20 C.F.R. §718.305(d)(1)(i)(B). Decision and Order at 18.

718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on Drs. Dahhan's and McSharry's opinions to establish that Claimant does not have legal pneumoconiosis. Decision and Order at 18-20; Director's Exhibit 18; Employer's Exhibits 2, 4, 5; Employer's Brief at 6-13. Both observed a significant partially reversible obstructive impairment, based on the pulmonary function studies, which they attributed to asthma or hyperactive airway disease unrelated to coal dust exposure. Director's Exhibit 18 at 4; Employer's Exhibits 2 at 5-6; 4 at 8-19; 5 at 8-15. Dr. Dahhan also indicated Claimant does not have a restrictive impairment. Employer's Exhibit 5 at 14-15. The ALJ found their opinions not well-reasoned and, therefore, insufficient to satisfy Employer's burden of proof. Decision and Order at 19-20.

Employer contends the ALJ applied the wrong legal standard and failed to adequately consider Drs. Dahhan's and McSharry's specific explanations for concluding Claimant does not have legal pneumoconiosis. Employer's Brief at 6. We disagree.

Contrary to Employer's contention, the ALJ did not require it to "effectively rule-out any contribution to [Claimant's pulmonary] impairment by coal mine dust exposure." Employer's Brief at 6. When addressing legal pneumoconiosis, the ALJ accurately stated Employer's burden is to "establish that the miner did not have pneumoconiosis as defined in the regulations." He also set forth the appropriate regulatory definition as being a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 15-16; *see* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Employer's Brief at 6. Rather, the language Employer identifies as objectionable is the ALJ's reference to the standard for the rebuttal of total disability causation at 20 C.F.R. §718.305(d)(1)(ii). Employer's Brief at 6, *citing* Decision and Order at 15, *quoting Rose v. Clinchfield Coal Co.*, 614 F.2d. 936, 939 (4th Cir. 1980).

As the ALJ did not apply the wrong standard for rebuttal, we reject Employer's arguments. Moreover, as explained below, the ALJ discredited Drs. Dahhan's and McSharry's opinions because he found their rationales were not well-reasoned, not because they failed to meet an allegedly heightened legal standard. Decision and Order at 18-20.

Next, Employer concedes an ALJ may consult the preamble to the 2001 revised regulations but alleges the ALJ "switche[d]" the burden of proof to Employer in evaluating

the medical opinions[7] by creating a "binding presumption" that "any [chronic obstructive pulmonary disease] had to arise from mining." It also alleges he applied "an iron clad rule" that "any expert that says *asthma may not be caused by coal dust exposure – must* be discarded." Employer's Brief at 11-12. We disagree.

The ALJ did not use the preamble as a binding legal rule or as a presumption that all obstructive lung disease constitutes legal pneumoconiosis. As discussed further below, he permissibly consulted the preamble as a statement of credible medical research findings accepted by the Department of Labor (DOL) when it revised the definition of legal pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012).

As the ALJ noted, Dr. Dahhan attributed Claimant's obstructive impairment to hyperactive airway disease or bronchial asthma "[m]ost of the time" and stated "[t]here is no literature" indicating coal mine dust exposure can cause these diseases. Employer's Exhibit 5 at 11-12, 15. Dr. McSharry similarly diagnosed a "partially reversible airflow obstruction" with the "most likely cause" in a non-smoker, like Claimant, being asthma. Employer's Exhibit 2 at 5. He indicated that "[a]sthma is not [coal workers' pneumoconiosis] and is not caused by or significantly aggravated by coal dust exposure." *Id*. Thus, substantial evidence supports the ALJ's finding that Drs. Dahhan and McSharry opined that coal mine dust exposure cannot cause asthma, contrary to the premises underlying the regulations that chronic obstructive pulmonary disease (COPD) includes three disease processes, including asthma, and that COPD may be caused by coal mine dust exposure. Decision and Order at 19-20, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000); *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Looney*, 678 F.3d at 314-16; *see also American Energy, LLC v. Director, OWCP* [*Goode*], 106 F.4th 319, 332 (4th Cir. 2024) (ALJ may discredit a physician's opinion if it "is, in fact, inconsistent with the preamble"). Accordingly, we reject Employer's assertion that the ALJ erred in using the preamble as guidance in evaluating the medical opinion evidence.

In addition, Dr. Dahhan excluded legal pneumoconiosis based, in part, on the partial reversibility of Claimant's impairment in response to bronchodilators seen on his pulmonary function testing. Director's Exhibit 18 at 4; Employer's Exhibit 5 at 10-13. The ALJ permissibly found this reasoning unpersuasive because Dr. Dahhan failed to

[7] Because Claimant invoked the Section 411(c)(4) presumption, the ALJ properly put the burden on Employer to establish Claimant does not have legal or clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

adequately explain why the irreversible portion of Claimant's pulmonary impairment and his asthma were not significantly related to, or substantially aggravated by, coal mine dust exposure. *See W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74 n.4 (4th Cir. 2017); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 20.

The ALJ also considered Dr. McSharry's opinion that Claimant's coal dust exposure in the remote past makes a diagnosis of legal pneumoconiosis "unreasonable." Employer's Exhibit 2 at 5. Dr. McSharry explained that changes in lung function due to coal mine dust after removal of the exposure occur when the miner has "very high profusion pneumoconiosis and most often in progressive massive fibrosis." Employer's Exhibit 4 at 15. He stated it would be "extremely uncommon" for miners "with low profusion or no evidence of abnormality on x-ray who have fairly normal lung function at the time they leave the mines," to then develop a coal-dust related disease decades later. *Id.* at 15-16; *see also* Exhibits 2 at 5; 4 at 15-18.

The ALJ permissibly found Dr. McSharry's opinion unpersuasive because the regulations provide that legal pneumoconiosis may be present even in the absence of a positive x-ray for clinical pneumoconiosis. *Looney*, 678 F.3d at 313 (the regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that '[n]o claim for benefits shall be denied solely on the basis of a negative chest x-ray'"); *see* 20 C.F.R. §§718.201, 718.202(a)(4), (b); 65 Fed. Reg. at 79,945; Decision and Order at 20. In addition, the ALJ permissibly found Dr. McSharry's reasoning unpersuasive as the regulations specifically state that pneumoconiosis "is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *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) (medical opinion not in accord with the accepted view that pneumoconiosis can be latent and progressive may be discredited); Decision and Order at 20.

Because the ALJ permissibly discredited the opinions of Drs. Dahhan and McSharry, the only opinions supportive of Employer's burden on rebuttal,[8] we affirm his

[8] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Dahhan and McSharry on the issue of legal pneumoconiosis, we need not address Employer's remaining arguments regarding the weight accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 6-7, 11.

finding that Employer did not disprove legal pneumoconiosis.[9] 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 20. 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)(i).

Disability Causation

The ALJ also found Employer did not rebut the presumption by establishing "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); *see* Decision and Order at 21. Because Employer raises no specific arguments on disability causation, we affirm the ALJ's determination that Employer failed to prove that no part of Claimant's total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Skrack*, 6 BLR at 1-711; Decision and Order at 22.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[9] Because Employer has the burden of proof and the ALJ permissibly rejected the opinions of its medical experts, we need not address Employer's argument that the ALJ erred in crediting Dr. Ajjarapu's opinion that Claimant has legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 20; Employer's Brief at 13-15.