



BRB No. 23-0262 BLA

SANDRA SCHILPP (o/b/o JOANN H. LYLE, deceased widow, o/b/o Estate of JAMES E. LYLE))

Claimant-Respondent)

v.)

ENERGY WEST MINING COMPANY)

Employer-Petitioner)

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 06/20/2024

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Reynolds), Norton, Virginia, 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) Drew A. Swank's Decision and Order Awarding Benefits on Remand (2013-BLA-05233) rendered on a claim filed on June 27, 2011, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for the second time.

In a Decision and Order Awarding Benefits dated March 9, 2017, ALJ Lee J. Romero, Jr. found the Miner had twenty-eight years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found the Miner invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.¹ 30 U.S.C. §921(c)(4) (2018). Further, he found Employer failed to rebut the presumption and awarded benefits.

In consideration of Employer's appeal, the Board affirmed ALJ Romero's finding that the Miner had twenty-eight years of underground coal mine employment, a totally disabling respiratory or pulmonary impairment, and invoked the Section 411(c)(4) presumption. *Lyle v. Energy West Mining Co.*, BRB No. 17-0354 BLA, slip op. at 2-7 (Apr. 24, 2018) (unpub.). The Board also affirmed ALJ Romero's finding Employer failed to rebut the presumption of legal pneumoconiosis with Dr. Tomashefski's opinion. *Id.* at 7-10. Specifically, the Board held ALJ Romero permissibly assigned little weight to Dr. Tomashefski's opinion that the Miner did not have legal pneumoconiosis. *Id.* at 9. Further, the Board affirmed ALJ Romero's finding Employer failed to disprove disability causation as it raised no allegations of error. *Id.* at 10. Therefore, the Board affirmed the award of benefits. *Id.*

Employer appealed the Board's decision to the United States Court of Appeals for the Tenth Circuit,² which vacated ALJ Romero's finding Employer failed to disprove legal pneumoconiosis and the award of benefits. *Energy W. Mining Co. v. Lyle ex rel. Lyle*, 929 F.3d 1202, 1213-14 (10th Cir. 2019). The court held ALJ Romero erred in discrediting Dr. Tomashefski's opinion on legal pneumoconiosis because, in finding the physician did not explain his opinion, ALJ Romero "overlooked" the physician's deposition testimony setting forth why he believed coal mine dust exposure did not contribute to the Miner's

¹ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was 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.

² The Board will apply the law of the United States Court of Appeals for the Tenth Circuit because the Miner performed his last coal mine employment in Utah. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

constrictive bronchiolitis and interstitial fibrosis. *Id.* at 1213. It thus ordered that the case be remanded for reconsideration of Dr. Tomaszewski's opinion on legal pneumoconiosis. *Id.*

On remand, the case was reassigned to ALJ Swank (the ALJ). In his March 21, 2023 Decision and Order Awarding Benefits on Remand that is the subject of this appeal, the ALJ found Employer failed to rebut legal pneumoconiosis and therefore awarded benefits.

On appeal, Employer challenges the ALJ's finding it did not rebut the presumption of legal pneumoconiosis. Claimant³ responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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." 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 Dr. Tomaszewski's medical opinion that the Miner did not have legal pneumoconiosis but had constrictive bronchiolitis and interstitial fibrosis with a usual interstitial pneumonia (UIP) pattern, unrelated to coal mine dust exposure. Decision and Order at 8; Employer's Exhibit 4. The ALJ found his opinion not well-reasoned and unpersuasive, and thus insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 9.

³ The Miner died on January 9, 2018, while the case was pending before the United States Court of Appeals for the Tenth Circuit. *Energy W. Mining Co. v. Lyle ex rel. Lyle*, 929 F.3d 1202, 1205 n.1 (10th Cir. 2019). His widow, Joann H. Lyle, is also deceased. Claimant, Sandra Schilpp, is pursuing the deceased Miner's claim on behalf of his deceased widow and the Miner's estate.

Employer argues the ALJ erred in weighing Dr. Tomashefski's opinion. Employer's Brief at 6-9. We are not persuaded.

Initially, we reject Employer's contention that the ALJ erred in reconsidering Dr. Tomashefski's opinion on remand, asserting the Tenth Circuit's holding in *Energy W. Mining Co. v. Lyle ex rel. Lyle* required the ALJ to find Dr. Tomashefski's opinion supports rebuttal at 20 C.F.R. §718.305(d)(1)(i). Employer's Brief at 6. To the contrary, the court held ALJ Romero did not consider all relevant evidence in weighing Dr. Tomashefski's opinion because he overlooked the physician's deposition testimony. See *Lyle*, 929 F.3d at 1213-14. The court instructed the ALJ, on remand, to reconsider Dr. Tomashefski's opinion. On remand, ALJ Swank correctly articulated and followed the court's instructions. *Id.* at 1214; Decision and Order at 3.

Based on his review of the Miner's medical records, medical reports, objective studies, x-rays and computed tomography (CT) scans, Dr. Tomashefski opined the Miner had constrictive bronchiolitis with chronic small airways remodeling, lumen distortion, and "lumen narrow." Employer's Exhibit 9 at 1, 4. In addition, he opined the Miner developed "patchy areas of advanced interstitial fibrosis with fibroblastic foci and metaplastic bone formation, consistent with a UIP pattern." *Id.* Because he did not identify coal macules or micronodules, he concluded the Miner did not have pneumoconiosis. *Id.* at 4-5. Further, Dr. Tomashefski opined the Miner's negative chest x-rays and CT scans support his opinion that the Miner did not have legal pneumoconiosis. *Id.* at 5. While he found the cause of the Miner's constrictive bronchiolitis and interstitial fibrosis is "not determined," he concluded neither of the diseases are the result of "coal workers' pneumoconiosis, mineral dust-related small airways disease, or diffuse interstitial fibrosis due to coal dust exposure." *Id.*

In his deposition, Dr. Tomashefski stated the Miner's constrictive bronchiolitis and interstitial fibrosis "could very well be" idiopathic, as there is "no clear cut explanation" for them. Employer's Exhibit 10 at 14. He opined, however, that coal mine dust exposure did not cause the Miner's constrictive bronchiolitis because coal dust produces "a coal macule, not constrictive bronchiolitis" and there is no evidence of dust deposition in the constricted airways. Employer's Exhibit 10 at 15. Dr. Tomashefski then stated "it's the same thing" with respect to the Miner's interstitial fibrosis, explaining that the Miner's "pattern" of interstitial fibrosis does not "qualify as pneumoconiosis," and to diagnose interstitial fibrosis as being caused by coal dust, "you need to see" deposition of pigment and mineral particles in the areas of the fibrosis. *Id.*

Consistent with the Tenth Circuit's remand instructions, the ALJ reconsidered Dr. Tomashefski's opinion that the Miner did not have legal pneumoconiosis, including the explanation he provided in his deposition testimony. Decision and Order at 7-9. Given

Dr. Tomashefski's reliance in part on the Miner's lack of coal macules or evidence of clinical pneumoconiosis to exclude the presence of legal pneumoconiosis, the ALJ permissibly found his opinion inconsistent with the regulations indicating legal pneumoconiosis and clinical pneumoconiosis are separate diseases, and a miner may have the legal form even without evidence of the clinical form. *See* 20 C.F.R. §718.202(a)(4), (b); 65 Fed. Reg. at 79,945; *Energy W. Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 831 (10th Cir. 2017); *Blue Mountain Energy v. Director, OWCP [Gunderson]*, 805 F.3d 1254, 1260-62 (10th Cir. 2015); *N. Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 873 (10th Cir. 1996); Decision and Order at 8-9; Employer's Brief at 8-9.

As the trier-of-fact, the ALJ has discretion to assess the credibility of the medical opinions based on the experts' explanations for their diagnoses and to assign those opinions appropriate weight. *See Pickup*, 100 F.3d at 873; *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993). Employer's argument is a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ acted within his discretion in discrediting Dr. Tomashefski's opinion, the only medical opinion supportive of Employer's burden on rebuttal, we affirm his finding Employer did not disprove the existence of legal pneumoconiosis.⁴ 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order at 9. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.

Disability Causation

To disprove disability causation, Employer must establish "no part of [Claimant's] respiratory or pulmonary disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii). The Board previously affirmed ALJ Romero's unchallenged finding that Employer failed to rebut disability causation. *Lyle*, BRB No. 17-0354 BLA, slip op. at 10. Because Employer's current appeal addresses only rebuttal of legal pneumoconiosis, it has not attempted to show the Board's decision on disability causation was clearly erroneous or set forth any other valid exception to the law of the case doctrine. We thus decline to disturb the Board's prior disposition. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989-90 (1984). Consequently, we affirm the ALJ's finding Employer did not

⁴ To the extent Employer argues the ALJ erred in finding Dr. Tomashefski's opinion undermined for failing to cite medical literature supporting his conclusion, we need not address it because the ALJ provided a valid reason for discrediting Dr. Tomashefski's opinion on legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 6-7.

rebut the Section 411(c)(4) presumption and the award of benefits. Decision and Order at 9.

Accordingly, the ALJ's Decision and Order Awarding Benefits on Remand is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge