U.S. Department of Labor

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

BRB No. 23-0279 BLA

JESSE WATSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MURRIELL-DON COAL, INCORPORATED	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE/AIG	)	DATE ISSUED: 06/07/2024
	)	
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 Willow Eden Fort, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for Claimant.

Timothy J. Walker and Daniel G. Murdock (Fogle Keller Walker, PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Willow Eden Fort's Decision and Order Awarding Benefits (2021-BLA-05545) rendered on a subsequent claim filed on September 9, 2019,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant had twenty-seven years of underground coal mine employment and determined he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act[2] and therefore established a change in an applicable condition of entitlement.[3] 30 U.S.C. §921(c)(4); 20 C.F.R. §§718.305, 725.309(c). The ALJ further found Employer did not rebut the presumption and thus awarded benefits.

[1] Claimant filed claims on April 14, 2014, and July 9, 2018, both of which he withdrew. Director's Exhibit 57. Withdrawn claims are considered not to have been filed. 20 C.F.R. §725.306(b). The district director denied Claimant's prior claim, filed on April 9, 2015, because the evidence did not establish total disability. Director's Exhibit 57; Living Miner's Claim 2.

[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] Where 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 "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 the district director denied Claimant's prior claim for failure to establish total disability, he had to submit new evidence establishing this element to obtain review of his current claim on the merits. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c); Director's Exhibit 57; Living Miner's Claim 2.

On appeal, Employer contends the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed 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.[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 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

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established twenty-seven 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); Decision and Order at 3, 6-7; Employer's Brief at 7-8 (unpaginated).

[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); Hearing Transcript at 15; Director's Exhibits 7 at 5; 26 at 3.

[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).

C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to rebut the presumption by either method.[7] Decision and Order at 11-16.

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), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, holds an 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, 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. Dahhan and Jarboe that Claimant does not have legal pneumoconiosis.[8] Decision and Order at 12-15. The ALJ found their opinions unpersuasive and thus insufficient to satisfy Employer's burden of proof. *Id.* at 12-14. Employer contends the ALJ failed to adequately explain her discrediting of Drs. Dahhan's and Jarboe's opinions. Employer's Brief at 8-12 (unpaginated). We disagree.

Dr. Dahhan diagnosed a totally disabling obstructive ventilatory impairment due entirely to cigarette smoking. Employer's Exhibits 1 at 2-3; 3 at 9-11. He excluded coal mine dust exposure as a cause of Claimant's impairment, in part, because Claimant's pulmonary function study results showed "variable responses to the administration of

[7] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 11.

[8] The ALJ also considered Dr. Forehand's opinion and Claimant's treatment records. Decision and Order at 14-15. Because Dr. Forehand diagnosed legal pneumoconiosis, the ALJ correctly found his opinion does not assist Employer in rebutting the presumption. Decision and Order at 15; Director's Exhibits 16, 24. The ALJ also determined Claimant's treatment records do not sufficiently address the cause of Claimant's impairment and therefore do not aid Employer in rebutting legal pneumoconiosis. Decision and Order at 15; Director's Exhibits 20 at 5-6; 21 at 6; Claimant's Exhibits 2 at 8, 11, 15; 3 at 4. We affirm these findings as they are not challenged on appeal. *See Skrack*, 6 BLR at 1-711.

bronchodilators[,] . . . . [which he opined is] inconsistent with [the] fixed permanent adverse effect of coal dust [exposure]." Employer's Exhibit 1 at 3-4. However, as the ALJ accurately noted, Dr. Dahhan's pulmonary function study results showed only partial reversibility post-bronchodilator. Decision and Order at 13; Employer's Exhibit 1 at 8. Thus, contrary to Employer's argument, the ALJ permissibly discredited his opinion because he failed to address why the "irreversible component" of Claimant's respiratory impairment was not caused by coal mine dust exposure. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (ALJ may accord less weight to a physician who fails to adequately explain why a miner's response to bronchodilators necessarily eliminated coal dust exposure as a cause of his obstructive lung disease); Decision and Order at 13; Employer's Exhibit 1 at 8.

Dr. Jarboe diagnosed Claimant with a "[v]ery severe airflow obstruction" caused by a "long history of heavy cigarette smoking." Employer's Exhibits 2 at 8, 13; 4 at 17. He opined coal mine dust did not contribute "more than a de minimis amount" to Claimant's impairment because he did not develop pulmonary symptoms until 2005 at the earliest, a year after he stopped working as a coal miner. Employer's Exhibits 2 at 10, 12; 4 at 20-21.

The ALJ found Dr. Jarboe's opinion that Claimant did not develop pulmonary symptoms until after he left his coal mine work is contradicted by Claimant's deposition testimony that he could not continue working in coal mining because he "had so much back trouble and breathing trouble[.]" Decision and Order at 14; Director's Exhibit 26 at 11. She ultimately credited Claimant's testimony describing his respiratory symptoms while working in the coal mines and that he could not continue his coal mine work, in part, because of these symptoms. Decision and Order at 14; Director's Exhibit 26 at 11.

Employer generally contends that Dr. Jarboe's opinion should not be "discounted" because it was based on Claimant's own account of when his symptoms began. Employer's Brief at 11 (unpaginated). However, Employer has neither established nor argued that it was unreasonable for the ALJ to credit Claimant's deposition testimony over Dr. Jarboe's opinion in determining when Claimant's respiratory symptoms began. *Id.* Because the ALJ acted within her discretion in weighing the conflicting evidence, we affirm her discrediting of Dr. Jarboe's opinion based on his understanding of when Claimant's symptoms initially arose as contrary to Claimant's testimony. Decision and Order at 14; *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012) (ALJ's function is to weigh the evidence, draw appropriate inferences, and determine credibility); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc) (Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable).

Alternatively, the ALJ noted Dr. Jarboe explained that if Claimant "had been sensitive to the ill effects of breathing coal mine dust, . . . he would have been symptomatic at some point while he was working." Decision and Order at 14 (quoting Employer's Exhibit 2 at 12). She permissibly determined that even assuming Claimant did not experience respiratory symptoms while working, Dr. Jarboe's opinion is contrary to the regulations which recognize pneumoconiosis is "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); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738 (6th Cir. 2014); *Banks*, 690 F.3d at 488; Decision and Order at 14.

In addition, we affirm as unchallenged on appeal, the ALJ's finding that Dr. Jarboe failed to adequately explain why Claimant's twenty-seven years of coal mine dust exposure did not also contribute to his chronic bronchitis and emphysema even if they were caused primarily by smoking. *See Skrack*, 6 BLR at 1-711; *see also Barrett*, 478 F.3d at 356 (ALJ permissibly rejected physician's opinion where physician failed to adequately explain why coal dust exposure did not exacerbate a miner's smoking-related impairments); Decision and Order at 14.

Employer's arguments amount to 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 permissibly discredited the opinions of Drs. Dahhan and Jarboe, the only opinions supportive of Employer's burden on rebuttal, we affirm her finding that Employer did not disprove legal pneumoconiosis.[9] 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 15. 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 next considered whether Employer established "no part of the [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 16. She permissibly discredited Drs. Dahhan's and Jarboe's opinions on the cause of Claimant's disability because they did not diagnose legal pneumoconiosis, contrary to her

[9] As the ALJ provided valid reasons for giving Drs. Dahhan's and Jarboe's opinions little weight, we need not address Employer's remaining arguments regarding the ALJ's weighing of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 12-15; Employer's Brief at 8-12 (unpaginated).

determination.[10] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 16. Apart from its general contention that it disproved legal pneumoconiosis, which we have rejected, Employer raises no specific arguments regarding the ALJ's finding that it failed to rebut disability causation at 20 C.F.R. §718.305(d)(1)(ii). Thus, we affirm the ALJ's finding. *See Skrack*, 6 BLR at 1-711. We therefore also affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption.

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

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