U.S. Department of Labor

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

BRB No. 23-0471 BLA

THOMAS R. CULBERTSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EXTRA ENERGY, INCORPORATED	)	DATE ISSUED: 06/13/2024
	)	
Employer-Petitioner	)	
	)	
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 Carrie Bland, Associate Chief Administrative Law Judge, United States Department of Labor.

Mark J. Grigoraci (Robinson & McElwee PLLC), Charleston, West Virginia, for Employer.

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

PER CURIAM:

Employer appeals Associate Chief Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Awarding Benefits (2018-BLA-05481) rendered on a claim filed on April 11, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with twenty-three years of underground coal mine employment and surface coal mine employment in conditions substantially similar to those in an underground mine 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,[1] 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established at least fifteen years of qualifying coal mine employment for purposes of invoking the Section 411(c)(4) presumption. It also asserts she erred in finding it did not rebut the presumption.[2] Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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.[3] 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).

Invocation of the Section 411(c)(4) Presumption – Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mine employment or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes 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.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2); Decision and Order at 3-4, 14.

[3] 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 and West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 8; Employer's Exhibit 9 at 13-14; Hearing Tr. at 59.

underground mine if [Claimant] demonstrates that [he] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001).

The ALJ noted Claimant testified he engaged in underground coal mine employment with Mullins Coal Company for less than one year and with M&C Coal Company from 1976 to 1981. Decision and Order at 4. Based on Claimant's testimony, the ALJ found he established five years of underground coal mine employment. *Id.* As this finding is unchallenged, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). In addition, Employer concedes Claimant "has [five] years of qualifying coal mine employment." Employer's Brief at 18.

The ALJ further noted Claimant stated he worked at surface coal mines for Summit Services, Incorporated (Summit Services) from 1994 to 2004 and for Employer from 2004 to 2012. Decision and Order at 3-4. Employer does not challenge the ALJ's finding that Claimant worked from 1994 to 2004 for Summit Services; thus, we affirm it. *See Skrack* 6 BLR at 1-711; Decision and Order at 4.

The ALJ next considered whether Claimant's work for Summit Services and Employer constituted qualifying coal mine employment for purposes of invoking the Section 411(c)(4) presumption. Decision and Order at 4.

At his deposition, Claimant testified he was exposed to coal and rock dust "all day, every day" while working "at least [fifty] hours a week" during all of his surface coal mine employment with both Summit Services and Employer as an excavator and dozer operator. Employer's Exhibit 9 at 6-8. He explained the machines he operated had enclosed cabs, but the doors opened and the seals around the doors and windows were not tight. *Id*. at 10-12, 53-54. As a result, he stated the dust went through the openings and "settl[ed] in the cab." *Id*. Additionally, he stated the cabs needed to be cleaned out at least once a day to remove the coal and rock dust "piled up" on the floor. *Id*. at 10-12. He further stated he "could see [dust] in the air" inside the cabs and, "sometimes," the dust "would be so thick maybe like water running down the inside of the windshield" of the cab. *Id.* at 12. In addition, he described his clothes as having "dust all over them" at the end of a shift. *Id*. Moreover, he testified he worked for Summit Services "[i]mmediately prior" to Employer and had "about the same" daily aboveground dust exposure for it as an excavator and dozer operator working ten to eleven hours a day for "five to six days a week." *Id*. at 15-17.

Further, Claimant testified at the hearing that while he operated excavators and dozers with enclosed cabs for Employer and Summit Services, "[a] lot of . . . dust" came

inside the cabs and on the floor "an inch deep" because they had "no seals around the doors and a lot of the windows." Hearing Tr. at 53-54.

The ALJ found Claimant's testimony credible and sufficient to establish regular dust exposure with Summit Services and Employer. Decision and Order at 4.

Employer argues the ALJ erred in failing to consider Dr. Go's medical opinion that, on average, surface coal mines have less dust than underground mines. Employer's Brief at 16 (citing Employer's Exhibit 11 at 65-66). It asserts "the general dust conditions in surface mining are less than underground coal mining." *Id*. (citing *The Respiratory Health Effects of Opencast Coalmining: A Cross Sectional Study of Current Workers Study* by Love and Miller); Employer's Exhibits 10 at 65-66; 12 at 7. We disagree.

Contrary to Employer's argument, Claimant is not required to prove the dust conditions aboveground were identical to those underground. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664-65 (6th Cir. 2015); *Director, OWCP v. Midland Coal Co.*, 855 F.2d 509, 512 (7th Cir. 1988) ("a surface miner must only establish that he was exposed to sufficient coal dust in his surface coal mine employment" in order to qualify for the Section 411(c)(4) presumption); 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013). Rather, Claimant need only establish he was "regularly exposed to coal-mine dust" while working at surface mines. 20 C.F.R. §718.305(b)(2).

We also reject Employer's argument that Claimant's testimony is not sufficient to establish he was regularly exposed to coal mine dust while working for Summit Services. Employer's Brief at 13-17. Contrary to Employer's argument, the ALJ permissibly found Claimant's testimony establishes he was regularly exposed to coal mine dust based on his "description of the dusty conditions he worked in," "the quantities of dust that entered the cabs of the machines he operated," and "his description of the need to clean the dust out of the cabs of the vehicles he operated." Decision and Order at 4; *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ evaluates the credibility of the evidence of record, including witness testimony); *Kennard*, 790 F.3d at 664 (claimant's "uncontested lay testimony" regarding the dust conditions he experienced "easily supports a finding" of regular dust exposure); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490 (6th Cir. 2014) (a claimant's testimony that the conditions throughout his employment were "very dusty" met the claimant's burden to establish he was regularly exposed to coal mine dust); *Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-344-345 (1984) (the ALJ may rely on a miner's testimony, especially if the testimony is not contradicted by any documentation of record). Thus, we affirm the ALJ's finding that

Claimant established qualifying coal mine employment from 1994 to 2004 with Summit Services.[4] Decision and Order at 4.

Because substantial evidence supports it, we affirm the ALJ's findings that Claimant established a total of at least fifteen years of qualifying coal mine employment and invoked the Section 411(c)(4) presumption.[5] *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); 20 C.F.R. §718.305; Decision and Order at 14.

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 that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in

[4] Claimant indicated in a Dust Exposure History Form that he worked for Summit Services, Incorporated (Summit Services) from January 20, 1994, to July 2, 2004, for a total of ten years and five months. Director's Exhibit 3 at 2.

[5] Employer argues the ALJ erred in crediting Claimant with any qualifying coal mine employment with it from 2007 to 2012 because she failed to consider dust sampling records from the Mine Safety and Health Administration's Mine Data Retrieval System. Employer's Brief at 11-13, 15-17; *see* Employer's Exhibit 11. As Claimant has established at least fifteen years of qualifying coal mine employment based on his underground coal mine work with Mullins Coal Company and M&C Coal Company and his surface coal mine work with Summit Services, Employer has not explained how the error it alleges regarding Claimant's employment with it would make a difference. *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).

[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 that is 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).

[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.[7]

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 ALJ considered the medical opinions of Drs. Rosenberg and Zaldivar.[8] Decision and Order at 8-12, 14-15. Dr. Rosenberg opined Claimant does not have legal pneumoconiosis but has chronic obstructive pulmonary disease (COPD) in the form of emphysema and chronic bronchitis due to cigarette smoking, and unrelated to coal mine dust exposure. Employer's Exhibits 1 at 11; 3 at 7; 4 at 2; 8 at 26-27. Dr. Zaldivar opined Claimant does not have legal pneumoconiosis but has asthma and emphysema with airway remodeling due to cigarette smoking and lack of asthma treatment, unrelated to coal mine dust exposure. Employer's Exhibit 6 at 10. The ALJ found Drs. Rosenberg's and Zaldivar's opinions not adequately reasoned, unpersuasive, and entitled to no probative weight. Decision and Order at 14-15. She thus found Employer failed to disprove legal pneumoconiosis. *Id.*

Employer argues the ALJ erred in discrediting the opinions of Drs. Rosenberg and Zaldivar. Employer's Brief at 18-27. We disagree.

The ALJ permissibly found their opinions unpersuasive because they failed to address why coal mine dust exposure did not contribute, along with smoking, to Claimant's impairment. *See Stallard*, 876 F.3d at 673-74 n.4 (ALJ permissibly discredited medical

[7] The ALJ declined to address whether Employer disproved the existence of clinical pneumoconiosis because she found Employer failed to disprove legal pneumoconiosis. Decision and Order at 15 n.11.

[8] The ALJ also considered Drs. Ajjarapu's and Go's medical opinions that Claimant has legal pneumoconiosis in the form of chronic obstructive pulmonary disease, emphysema and chronic bronchitis related to coal mine dust exposure. Decision and Order at 9, 12-14; Director's Exhibit 18 at 7; Claimant's Exhibits 4 at 10; 5 at 3; Employer's Exhibit 10 at 66. As their opinions do not support Employer's burden to disprove legal pneumoconiosis, we need not address Employer's contentions regarding the ALJ's weighing of them. *See Larioni,* 6 BLR at 1-1278; Employer's Brief at 27-28.

opinions that "solely focused on smoking" as a cause of obstruction and "nowhere addressed why coal dust could not have been an additional cause"); *Island Creek Coal Co. v. Young*, 947 F.3d 399, 408-09 (6th Cir. 2020); 20 C.F.R. §718.201(b); Decision and Order at 15.

Additionally, Dr. Rosenberg excluded coal mine dust exposure as a contributing factor of Claimant's COPD based, in part, on the partial reversibility of his impairment in response to bronchodilators seen on his pulmonary function testing. Employer's Exhibits 4 at 2; 8 at 25. The ALJ permissibly found Dr. Rosenberg's reasoning unpersuasive because he failed to adequately explain why the irreversible portion of Claimant's obstructive impairment is not significantly related to, or substantially aggravated by, his coal mine dust exposure. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 18.

Finally, Dr. Rosenberg attributed Claimant's COPD, emphysema, and chronic bronchitis solely to cigarette smoking based in part on the marked reduction in his FEV_1 in relation to his FVC on pulmonary function testing. Employer's Exhibits 1 at 5-6; 3 at 5; 4 at 2; 8 at 25-26. The ALJ permissibly discredited Dr. Rosenberg's opinion as inconsistent with the DOL's recognition in the preamble that coal mine dust exposure can cause clinically significant obstructive disease that can be shown by a reduction in the FEV_1/FVC ratio. *Stallard*, 876 F.3d at 671-72; *Sterling*, 762 F.3d at 491-92; *Adams*, 694 F.3d at 801-02; *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); 65 Fed. Reg. at 79,943; Decision and Order at 24.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Looney*, 678 F.3d at 316-17. Employer's arguments amount to a request for the Board 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 the ALJ acted within her discretion in discrediting the opinions of Drs. Rosenberg and Zaldivar, the only medical opinions supportive of Employer's burden on rebuttal, we affirm her finding that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(2)(i). Decision and Order at 15.

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 16. She permissibly discredited the opinions of Drs. Rosenberg and Zaldivar on disability causation because they did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015), *quoting Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order at 16. She also permissibly found their opinions not reasoned because neither physician "adequately explained" why pneumoconiosis has "no part in causing Claimant's respiratory or pulmonary impairment." Decision and Order at 16; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). We therefore affirm the ALJ's finding that Employer failed to establish no part of Claimant's total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge