U.S. Department of Labor

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

BRB Nos. 21-0191 BLA
and 21-0192 BLA

JOANN JOHNSON (o/b/o and Widow of AUSTIN JOHNSON) Claimant-Respondent v. MOUNTAINSIDE COAL COMPANY, INCORPORATED and KENTUCKY EMPLOYERS' MUTUAL INSURANCE Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 5/31/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Dana Rosen, Administrative Law Judge, Department of Labor.

Paul E. Jones and Denise Hall Scarberry (Jones & Jones Law Office, PLLC), Pikeville, Kentucky, for Employer.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Dana Rosen's Decision and Order Awarding Benefits (2019-BLA-05641 and 2019-BLA-05875) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on August 9, 2017, and a survivor's claim filed on September 25, 2018.

The ALJ found Claimant[1] established the Miner had twenty-four years of qualifying surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] The ALJ further found Employer did not rebut the presumption and awarded benefits in the miner's claim. Based on the award of benefits in the miner's claim, the ALJ found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[3]

On appeal, Employer contends the ALJ determined Claimant invoked the Section 411(c)(4) presumption based on her erroneous finding that the Miner had at least fifteen years of qualifying coal mine employment. Employer further argues the ALJ erred in finding it did not rebut the presumption. Claimant did not file a response brief, and the Director, Office of Workers' Compensation Programs, declined to file a substantive 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

[1] Claimant is the widow of the Miner, who died on July 27, 2018. Miner's Claim (MC) Director's Exhibit 15; Survivor's Claim (SC) Director's Exhibit 2; Hearing Transcript at 18. In addition to her survivor's claim, she is pursuing her husband's claim on his behalf. MC Director's Exhibits 16; SC Director's Exhibits 4, 9.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was 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 impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] Section 422(*l*) provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

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).

Miner's Claim

Invocation of the Section 411(c)(4) Presumption

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had at least fifteen years of "employment in one or more underground coal mines," or surface coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner 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); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90 (6th Cir. 2014).

In addressing whether Claimant established the Miner was regularly exposed to coal mine dust in his surface coal mine work,[5] the ALJ considered the Miner's and Claimant's testimonies. She noted the Miner testified he was a heavy equipment operator who drilled and moved coal; did not wear a mask at work; and primarily worked in an enclosed cab, but also worked reclamation jobs where he operated equipment that did not have functioning air conditioning and kept the window rolled down. Decision and Order at 4, 9 (citing MC Director's Exhibit 34 at 10, 12-16); *see* MC Director's Exhibit 34 at 12 (Miner describing that when he worked without air conditioning, he had his window down and "s[a]t in the dirt"). The ALJ also noted "Claimant testified when the Miner came home from work 'lots of days, he was dusty, his clothes were dusty, face was dusty and pretty tired.'" Decision and Order at 9 (citing Hearing Transcript at 15). Relying on the Miner's

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner 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 6.

[5] Because it is unchallenged, we affirm the ALJ's finding the Miner had twenty-four years of surface coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9.

and Claimant's testimonies and her review of "the entire record,"[6] the ALJ found the Miner's surface coal mine work regularly exposed him to coal mine dust and thus was qualifying employment for purposes of invoking the Section 411(c)(4) presumption. Decision and Order at 9.

Employer argues the Miner worked in an enclosed air-conditioned cab for most of his mining career and Claimant failed to provide "direct evidence" that his dust exposure was *continuous* or that dust conditions were "always" comparable to underground coal mine employment. Employer's Brief at 6. But this is not the standard. Rather, Claimant need only establish the Miner's working conditions "regularly" exposed him to coal mine dust.[7] 20 C.F.R. §718.305(b)(2); *Bonner v. Apex Coal Corp.*, BLR , BRB No. 20-0333 BLA, slip op. at 5-6 (Jan. 24, 2022) (credible testimony regarding a miner's appearance and the dust on his clothes when he returned home from work may be sufficient to establish the miner was regularly exposed to coal mine dust) (motion for reconsideration denied); *see Duncan*, 889 F.3d at 304 (rejecting argument that claimant must provide evidence of "the actual dust conditions" and citing with approval the Department of Labor's position that "dust exposure evidence will be inherently anecdotal"); *Kennard*, 790 F.3d at 664

[6] In addition to Claimant's and the Miner's testimonies, the ALJ considered the parties' stipulation to twenty-four years of coal mine employment and the Miner's employment history form, W-2 tax forms, description of coal mine employment form, and Social Security Administration Earnings Report. Decision and Order at 7-9.

[7] The comments accompanying the Department of Labor's regulations clarify a claimant's burden in establishing substantial similarity:

> [T]he claimant need only focus on developing evidence addressing the dust conditions prevailing at the non-underground mine or mines at which the miner worked. The objective of this evidence is to show that the miner's duties regularly exposed him to coal mine dust, and thus that the miner's work conditions approximated those at an underground mine. The term "regularly" has been added to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant's burden. The fact-finder simply evaluates the evidence presented, and determines whether it credibly establishes that the miner's non-underground mine working conditions regularly exposed him to coal mine dust. If that fact is established to the fact-finder's satisfaction, the claimant has met his burden of showing substantial similarity.

78 Fed. Reg. 59,105 (Sept. 25, 2013).

(claimant's "uncontested lay testimony" regarding the dust conditions he experienced "easily supports a finding" of regular dust exposure); *Sterling*, 762 F.3d at 490 (claimant's testimony that the conditions of his employment were "very dusty" sufficient to establish regular exposure).

We also reject Employer's contention that the ALJ made a conclusory finding on substantial similarity that does not satisfy the Administrative Procedure Act (APA).[8] Employer's Brief at 6-7. The ALJ credited the Miner's employment history form; although she did not explicitly summarize its contents, on which he indicated he was exposed to "dust, gases, or fumes" throughout his employment.[9] Decision and Order at 9; MC Director's Exhibit 3. She also credited Claimant's testimony that "lots of days" the Miner's clothes and face were dusty when he came home from work. Decision and Order at 5, 10; Hearing Transcript at 14-15. We see no error in the ALJ's permissible inference, drawn from all the uncontradicted evidence, that Claimant established the Miner was regularly exposed to coal mine dust in his surface coal mine employment. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing court can discern what the ALJ did and why he did it, the duty of explanation under the APA is satisfied); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999); *Bonner*, BLR , BRB No. 20-0333 BLA, slip op. at 5-6; Decision and Order at 5-6, 9. Thus, we affirm her determination that Claimant established the Miner had at least fifteen years of qualifying coal mine employment and thus invoked the Section 411(c)(4) presumption.[10] 30 U.S.C. §921(c)(4) (2018); *see Duncan*, 889 F.3d at 304; *Kennard*, 790

[8] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[9] Employer suggests the Miner may have been exposed to dirt and dust on occasion in his surface coal mine jobs but did not show exposure to "coal dust." Employer's Brief at 6. However, the definition of "coal-mine dust" is not limited to simply *coal dust* but instead encompasses "the various dusts around a coal mine." *Pershina v. Consolidation Coal Co.*, 14 BLR 1-55, 1-57 (1990).

[10] Employer does not challenge the ALJ's finding that Claimant established the other requirement for invoking the Section 411(c)(4) presumption – that the Miner had a totally disabling respiratory or pulmonary impairment. We thus affirm it. *See Skrack*, 6 BLR at 1-711.

F.3d at 663; *Sterling*, 762 F.3d at 489-90; *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 9.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[11] or that "no part of the miner'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)(i), (ii); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). The ALJ found Employer did not rebut the presumption by either method.[12]

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*, 25 BLR at 1-155 n.8. The United States Court of Appeals for the Sixth Circuit holds this standard requires an employer to show that the Miner's coal mine dust exposure "did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 403-06 (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, 597-99, 600 (6th Cir. 2014)).

Employer relies on the opinions of Drs. Sargent and Jarboe, both of whom diagnosed a disabling restrictive impairment due to lung cancer and not coal dust exposure.

[11] "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).

[12] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 32.

MC Director's Exhibit 26 at 3-4; MC Employer's Exhibit 3 at 7. The ALJ found their opinions insufficient to satisfy Employer's burden of proof. Decision and Order at 34-35.

Employer contends the ALJ applied a "stricter" legal standard by requiring Drs. Sargent and Jarboe to "rule out" or "exclude" coal mine dust exposure as a causative factor in the Miner's pulmonary impairment. Employer's Brief at 10-11. Contrary to Employer's contention, the ALJ correctly stated Employer must establish the Miner's impairment was not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 32; 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A). Moreover, the ALJ did not reject Employer's experts because they failed to meet a heightened legal standard; rather, she found their opinions inadequately reasoned and thus not credible. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 34-35.

The ALJ correctly observed Dr. Sargent attributed the Miner's "purely restrictive ventilatory impairment" entirely to lung cancer and excluded coal mine dust exposure as a contributing factor. Dr. Sargent explained that "the concept of legal pneumoconiosis in this case really doesn't apply, because generally legal pneumoconiosis is considered to be an obstructive impairment that spreads within the face of a dated x-ray." MC Employer's Exhibit 2 at 21. He noted the Miner's case involves "a purely restrictive impairment and in the absence of interstitial changes on chest x-ray, or [in the presence of x-rays] inconsistent with pneumoconiosis, you can't attribute those changes to pneumoconiosis." *Id.* at 21-22.

The ALJ permissibly found Dr. Sargent's opinion not well-reasoned because the regulations provide that legal pneumoconiosis may include a restrictive respiratory impairment, an obstructive respiratory impairment, or both. 20 C.F.R. §718.201(a)(2). In addition, the ALJ correctly noted Dr. Sargent failed to explain the notation on the pulmonary function study he conducted which described both a moderate restrictive impairment and "a moderate obstructive lung defect," undermining Dr. Sargent's rationale. Decision and Order at 34; MC Director's Exhibit 26 at 10-11; MC Employer's Exhibit 2 at 23; *see Kennard*, 790 F.3d at 668; *Rowe*, 710 F.2d at 255. Moreover, the ALJ rationally found Dr. Sargent's opinion contrary to the regulations to the extent he relied on an erroneous premise that "legal pneumoconiosis [takes] the form of 'an obstructive impairment in the face of a negative x-ray.'" Decision and Order at 33-34 (quoting MC Employer's Exhibit 2 at 27); *see* 20 C.F.R. §718.202(a)(4) (recognizing a physician can render a credible diagnosis of pneumoconiosis notwithstanding a negative x-ray reading); 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000); *Sterling*, 762 F.3d at 492. Employer does not challenge these findings, and we see no error in the ALJ's credibility determination. *Skrack*, 6 BLR at 1-711; *see Kennard*, 790 F.3d at 668; *Rowe*, 710 F.2d at 255.

Dr. Jarboe reviewed the medical evidence of record. He opined the Miner did not have an obstructive impairment and that coal mine dust did not cause the Miner's "severe restrictive ventilatory defect" because he did not have simple or complicated pneumoconiosis. MC Employer's Exhibit 3 at 7. He concluded the Miner's pulmonary impairment was caused "exclusively" by his lung cancer and treatment because "a restrictive disease of the degree seen in [the Miner] would be associated with visible changes on the chest radiograph." *Id.*

The ALJ found Dr. Jarboe's opinion unpersuasive. Specifically, she found that although Dr. Jarboe explained he did not diagnose an obstructive impairment because Dr. Forehand's October 5, 2017 pulmonary function test showed "no significant obstruction," Dr. Jarboe did not address Dr. Sargent's interpretation of the June 5, 2018 pulmonary function test as indicating a "moderate obstructive defect." Decision and Order at 34-35; MC Director's Exhibit 20 at 40; MC Director's Exhibit 26 at 10-11; MC Employer's Exhibit 3 at 7. She therefore permissibly found this omission undermines Dr. Jarboe's conclusion as to an absence of an obstructive impairment due to coal dust exposure. *See Kennard*, 790 F.3d at 668; *Rowe*, 710 F.2d at 255; Decision and Order at 34-35. Further, the ALJ permissibly discounted Dr. Jarboe's opinion that the Miner's restrictive impairment did not constitute legal pneumoconiosis because he failed to adequately explain how he eliminated the Miner's twenty-four years of coal dust exposure as a contributing cause of his restrictive impairment. *See Kennard*, 790 F.3d at 668; *Rowe*, 710 F.2d at 255; Decision and Order at 35.[13]

Employer's assertions are 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 only opinions supportive of Employer's burden on rebuttal, we affirm her finding that Employer did not disprove legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); *Rowe*, 710 F.2d at 255; Decision and Order at 36. 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 failed to establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R. §718.305(d)(1)(ii). She discredited the opinions of Drs. Sargent and Jarboe because they

[13] As we affirm her rejection of the only opinions supportive of Employer's burden on rebuttal, *see infra*, it is unnecessary to address Employer's argument that the ALJ erred in crediting Dr. Forehand's diagnosis of legal pneumoconiosis.

did not diagnose legal pneumoconiosis, contrary to her finding that the Miner had the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 38. Employer does not challenge that finding. *See Skrack*, 6 BLR at 1-711. We therefore affirm the ALJ's finding that Employer failed to establish no part of the Miner's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 36.

We therefore affirm the ALJ's finding Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d), and the award of benefits in the miner's claim.

The Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the award in the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge