U.S. Department of Labor

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

BRB No. 23-0070 BLA

ROBERT L. DYER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
M & H TRUCKING, LLC	)	
	)	
and	)	
	)	
KESA	)	DATE ISSUED: 05/09/2024
	)	
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 Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Paul E. Jones (Jones & Jones Law Office PLLC), Pikeville, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2020-BLA-05968) rendered on a claim filed on June 6, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 12.725 years of coal mine employment. He therefore found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established legal pneumoconiosis, but not clinical pneumoconiosis,[2] and determined Claimant is totally disabled due to legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b), (c). Accordingly, the ALJ awarded benefits.

On appeal, Employer argues the ALJ erred in calculating the length of Claimant's coal mine employment and smoking history, and in weighing the evidence regarding legal pneumoconiosis and disability causation.[3] 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

[1] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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.

[2] "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).

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

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).

Length of Coal Mine Employment

Claimant bears the burden of establishing the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation and supported by substantial evidence. *Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-27 (2011).

The ALJ considered Claimant's hearing testimony, Social Security Earnings Statement (SSES), his application for benefits, and truck driver questionnaires. Decision and Order a 5-6; Director's Exhibits 3, 5-8. Finding the beginning and ending dates of Claimant's coal mine employment could not be determined, the ALJ calculated its length using the method at 20 C.F.R. §725.101(a)(32)(iii).[5] Applying the United States Court of Appeals for the Sixth Circuit's holding in *Shepherd v. Incoal, Inc*., 915 F.3d 392, 406 (6th Cir. 2019), the ALJ credited Claimant with a full year of employment for each year in which his earnings met or exceeded the average yearly earnings, as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine Procedure Manual*, and he worked in or around coal mines at least 125 working days during that year. Decision and Order at 5-6. Where the earnings fell short of the average yearly earnings, he credited Claimant with a fractional year, using 125 days as a divisor. *Id*. The ALJ concluded Claimant established 12.725 years of coal mine employment based on ten full years of coal

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 8.

[5] Pursuant to 20 C.F.R. §725.101(a)(32)(iii):

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's daily average earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

The BLS data is reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*.

mine employment from 1995 to 1998, 2000 to 2002, and 2007 to 2009, and fractional years in 1989, 1990, 1994, 1999 and 2006, totaling 2.275 years. *Id.* at 6.

Employer contends the ALJ erred in crediting Claimant with 12.725 years of coal mine employment and thus in invoking the "ten-year presumption" of disease causation at 20 C.F.R. §718.203(b).[6] Employer's Brief at 10, 12. It generally argues the ALJ erred in his length of coal mine employment calculation, asserting that based on its own calculations, Claimant only had 9.466 years of coal mine employment. Employer's Brief at 10-12. We note, however, that the total years of coal mine employment that Employer provides in its table summarizing its calculations equals 10.495 years, not 9.466.[7] *Id.* Thus, even if we were to assume Employer's assumptions and calculations regarding Claimant's coal mine employment are correct, the result is still greater than ten years of coal mine employment.

Moreover, Employer has not specified what alleged errors the ALJ made in his calculation of the length of Claimant's coal mine employment to explain the difference in results between the ALJ's calculation and Employer's own calculation. 20 C.F.R. §725.101(a)(32)(iii);[8] *see Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir.

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[6] Section 718.203(b) establishes a rebuttable presumption that a miner's pneumoconiosis arose out of coal mine employment if the presence of pneumoconiosis is established and the miner has at least ten years of coal mine employment. 20 C.F.R. §718.203(b). The ALJ found Claimant invoked the presumption and Employer failed to rebut it. Decision and Order at 15.

[7] Employer calculated the following full and fractional years of Claimant's coal mine employment: 0.029 + 0.533 + 1 + 0.964 + 1 + 1 + 0.993 + 1 + 1 + 0.173 + 0.645 + 1 + 1+ 0.158, which total 10.495. Employer's Brief at 11-12.

[8] Employer contends the holding in *Shepherd* applies only when determining if the claimant has established the requisite fifteen years of coal mine employment to invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, which is not relevant in this case. Employer's Brief at 12. As the law of the Sixth Circuit applies to this case, *Shepherd* is binding precedent for calculating the length of coal mine employment. Moreover, the regulations at issue in *Shepherd* specifically provide that "if the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment *for all purposes under the Act*." 20 C.F.R. §725.101(a)(32)(i) (emphasis added). Thus, the regulatory definition of what constitutes a year of coal mine employment is the same for purposes of determining the responsible operator and determining whether the presumptions under the Act apply or can be

1986); Employer's Brief at 10-12; Decision and Order at 5-6. We therefore affirm the ALJ's determination that Claimant had 12.725 years of coal mine employment. *See Shepherd*, 915 F.3d at 406; *Muncy*, 25 BLR at 1-27; Decision and Order at 6.

Entitlement Under 20 C.F.R. Part 718

To be entitled to benefits under the Act without the Section 411(c)(3) or Section 411(c)(4) presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). The ALJ found Claimant established legal pneumoconiosis, but not clinical pneumoconiosis.[9]

Smoking History

Employer argues the ALJ violated the Administrative Procedure Act (APA) by failing to adequately explain why he found Claimant had a smoking history of thirty-nine pack-years, smoking at a rate of one pack per day, in light of conflicting evidence on the issue.[10] Employer's Brief at 13-14. It contends evidence supports a greater smoking history of sixty-eight to seventy pack-years and the ALJ's inadequately explained finding affected his weighing of the medical opinion evidence. We disagree.

The ALJ considered the smoking histories provided in the medical opinions and Claimant's testimony. Dr. Green reported Claimant smoked up to two packs of cigarettes per day for thirty-four years; Dr. Nader initially indicated Claimant smoked for forty years, then subsequently noted a history of a half-pack per day for forty-five years; Dr. Dahhan

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invoked. *See* 65 Fed. Reg. 79,920, 79,951 (Dec. 20, 2000) (20 C.F.R. §725.101(a)(32) contains a "single definition with general applicability").

[9] The ALJ accepted the parties' stipulation that Claimant does not have clinical pneumoconiosis, as supported by the record. Decision and Order at 8. We affirm this finding as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Claimant's Response.

[10] The APA provides every adjudicatory decision must include "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).

first noted a thirty pack-year history, but then indicated Claimant likely had a seventy pack-year history based on Dr. Green's notation. Director's Exhibits 13 at 3; 41 at 2; Claimant's Exhibits 1 at 2; 4 at 2; Employer's Exhibits 3 at 3; 5 at 4; 7 at 5. Claimant testified that he started smoking when he was sixteen, quit six months before the hearing, and smoked half-a-pack of cigarettes per day, but when working he smoked as much as one pack per day. Hearing Transcript at 24-25.

The ALJ recognized the number of packs per day indicated by the relevant evidence ranged between a half-pack to two packs. He found Claimant is more likely to underestimate than overestimate his smoking history, and concluded Claimant had a "significant" smoking history, resulting in "at least" a thirty-nine-pack-year history. Decision and Order at 3-4.

Contrary to Employer's contention, the ALJ considered the relevant evidence, noted the full range of smoking histories, explained why he did not accept the lesser history of a half-pack per day, and made a reasonable finding, supported by substantial evidence, that Claimant had a significant smoking history of at least thirty-nine pack years. *Bobick v. Saginaw Mining Co*., 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co*., 7 BLR 1-683, 686 (1985) (ALJ is responsible for making a factual determination as to the length and extent of a miner's smoking history); *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 3-4.

Moreover, Employer does not explain how the ALJ's alleged error in finding a thirty-nine pack-year history affected the outcome of this case, as the ALJ did not discredit Employer's expert, Dr. Dahhan, for relying on a greater smoking history than the ALJ found, and the ALJ addressed the longer smoking history that Dr. Green relied on when crediting his opinion. *See Shinseki*, 556 U.S. at 413; Decision and Order at 13, 11 n.36. Specifically, the ALJ indicated that Dr. Green's consideration of a smoking history exceeding the ALJ's finding, if anything, bolsters his opinion. Decision and Order at 11 n.36; *see Maypray*, 7 BLR at 1-686. Thus, we affirm the ALJ's finding that Claimant has a smoking history of at least thirty-nine pack-years. Decision and Order at 4.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has a "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). The Sixth Circuit has held that a miner can satisfy this burden by showing that the disease was caused "in part" by coal dust exposure. *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99, 600 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean

'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The ALJ considered the medical opinions of Drs. Green, Nader, and Dahhan. All three diagnosed Claimant with an obstructive respiratory impairment based on Claimant's pulmonary function studies and hypoxemia based on his arterial blood gas studies. Drs. Green and Nader opined Claimant has severe chronic obstructive pulmonary disease (COPD) due to his coal mine dust exposure and significant smoking history. Director's Exhibits 13 at 3-4; 41 at 3; Claimant's Exhibits 1 at 3; 4 at 3-4. Dr. Dahhan opined Claimant's obstructive impairment is due to cigarette smoking, likely with an asthmatic component, unrelated to coal mine dust exposure. Employer's Exhibits 3 at 5; 5 at 4; 7 at 4-5.

The ALJ credited Dr. Green's opinion, finding it well-documented and well-reasoned. Decision and Order at 11-12. He found Dr. Nader's opinion entitled to less weight, as he underestimated Claimant's smoking history. *Id.* at 13. Finally, he discredited Dr. Dahhan's opinion, finding it not well-reasoned. Decision and Order at 11-15. Thus, the ALJ found Claimant established legal pneumoconiosis based on Dr. Green's opinion. *Id*; 20 C.F.R. §718.204(a)(4).

Employer argues the ALJ erred in finding legal pneumoconiosis established based on Dr. Green's opinion because he did not have a proper understanding of Claimant's coal dust exposure and failed to consider his other disabling conditions.[11] Employer's Brief at 4-8. Specifically, Employer contends the ALJ did not consider that Claimant primarily drove his truck on "two (2) or four (4) lane" roads in a cab with air conditioning. *Id.* at 5-6. We disagree.

The ALJ recognized that Dr. Green initially considered an "inflated" coal mine employment history[12] but found the doctor resolved any issue in his supplemental report by relying on 10.48 years of coal mine employment and explaining it did not change his opinion that Claimant's coal mine dust exposure contributed at least in part to Claimant's obstruction. Decision and Order at 11; Director's Exhibits 13, 41.

[11] We decline to address Employer's assertions regarding Dr. Nader's opinion, as the ALJ accorded it little weight. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); Decision and Order at 13; Employer's Brief at 7-8.

[12] Dr. Green initially indicated Claimant had fifteen to sixteen years of coal mine employment. Director's Exhibit 13 at 3; 41 at 1-2.

Additionally, while Employer argues the ALJ did not address whether Dr. Green had an accurate understanding of the nature of Claimant's coal dust exposure,[13] it did not raise this issue before the ALJ.[14] *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 937 F.3d 581, 591 (6th Cir. 2021) (parties forfeit arguments before the Board not first raised to the ALJ); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); Employer's Post-Hearing Brief.

Moreover, Employer's contention that Dr. Green failed to consider Claimant's other medical conditions is not supported by the record. Employer's Brief at 7-8. Dr. Green noted Claimant's coronary heart disease, with a prior heart attack and insertion of a pacemaker, as well as exertional angina, and indicated they were not related to his chronic airflow disease. Director's Exhibit 13 at 1, 4. Further, as the ALJ found, Dr. Green considered Claimant's significant smoking history and explained it is a significant contributing factor to his COPD. Decision and Order at 11; Director's Exhibit 41. Thus, we reject Employer's contentions. *Groves*, 761 F.3d at 599; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002); Decision and Order at 11.

Employer next generally contends the ALJ erred in finding Dr. Dahhan's opinions undermined, as he "thoroughly" reviewed all of the medical evidence, considered all

[13] We note that Dr. Green understood that Claimant drove a truck on the surface and was exposed to coal and rock dust, which is consistent with the record. Director's Exhibits 13, 41; *see also* 20 C.F.R. §725.202(b)(1) (there is a presumption that coal truck drivers are exposed to coal mine dust during all periods of employment). Claimant noted in his application for benefits that he was exposed to "dust, gases, or fumes" in each of his coal mine jobs. Director's Exhibit 3. He also testified that he would be "very dusty" at the end of a typical working day. Hearing Transcript at 13. In addition, he noted that while he cleaned his truck every day, you could not tell by the end of the day, as it was covered with dust again. *Id.* at 14. Further, Dr. Dahhan noted that Claimant's truck had an enclosed cab, but the air conditioning did not always work. Employer's Exhibit 3 at 1. The doctor acknowledged that Claimant's exposure to coal mine dust as a truck driver for ten years on the surface would be sufficient to cause pulmonary impairment "in a susceptible host." *Id.* at 3.

[14] Regarding Claimant's allegedly limited coal dust exposure, Employer only contended before the ALJ that, in the event Claimant established more than fifteen years of coal mine employment, Claimant failed to establish that his coal mine employment was substantially similar to work in underground mines and thus he could not invoke the Section 411(c)(4) presumption. Post-Hearing Brief at 7-8 (unpaginated).

possible factors, and concluded that coal dust was not a contributing factor to Claimant's obstruction. Employer's Brief at 7-8. Employer's argument is unpersuasive.

Dr. Dahhan opined that Claimant does not have legal pneumoconiosis because his obstructive impairment is responsive to bronchodilators, which is inconsistent with the permanent, fixed impairment that coal dust exposure causes. Employer's Exhibits at 3 at 5; 5 at 4. The ALJ permissibly found Dr. Dahhan's opinion undermined for failing to address the etiology of the fixed portion of Claimant's impairment which was still disabling after the administration of bronchodilators. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356 (6th Cir. 2007) (ALJ acted within his discretion when he found the expert did not adequately explain why the miner's response to bronchodilators necessarily eliminated coal dust exposure as a cause of his obstructive lung disease); Decision and Order at 14.

Employer's arguments are a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson*, 12 BLR at 1-113. Because the ALJ permissibly credited Dr. Green's opinion finding legal pneumoconiosis and discredited the contrary opinion of Dr. Dahhan, we affirm his finding that Claimant established legal pneumoconiosis as supported by substantial evidence. *See Barrett*, 478 F.3d at 352-53; *Martin*, 400 F.3d at 305; 20 C.F.R. §718.201(b); Decision and Order at 15.

Disability Causation

To establish disability causation, Claimant must prove his legal pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

Employer argues the ALJ erred in concluding Claimant's legal pneumoconiosis is a substantial cause of his disabling pulmonary impairment. Employer's Brief at 8-10. Specifically, it contends the opinions supporting causation are speculative and unsupported. We disagree.

Much of Employer's argument relies on its contention that the opinions supporting legal pneumoconiosis rely on incorrect smoking and coal mine dust exposure histories, which we have already rejected.[15] Further, the ALJ permissibly determined that Claimant's

[15] Employer also contends Dr. Green could not distinguish the relative contributions of coal mine dust and cigarette smoke, rendering his opinion speculative. Employer's Brief

disabling COPD constitutes legal pneumoconiosis, which necessarily encompasses a finding that Claimant is totally disabled due to legal pneumoconiosis. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Hawkinberry v. Monongalia Cnty. Coal Co*., 25 BLR 1-249, 255-56 (2019); Decision and Order at 16-17. The ALJ further permissibly rejected Dr. Dahhan's opinion on disability causation because he did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that Claimant has the disease, which we have affirmed. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Ramage*, 737 F.3d at 1062; Decision and Order at 16; Employer's Exhibits 3 at 5; 5 at 4; 7 at 5.

Thus, we reject Employer's arguments and affirm the ALJ's finding that Claimant is totally disabled due to legal pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 16-17.

at 9. But the premise of Employer's contention is incorrect. *See Cornett v. Benham Coal, Inc*., 227 F.3d 569, 569 (6th Cir. 1998) (medical experts are not required to apportion the relative contribution of each contributing cause of disability); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17 (2003). A physician need only credibly diagnose a chronic 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).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge