U.S. Department of Labor

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

BRB No. 24-0009 BLA

ROY C. BAILEY Claimant-Respondent v. NEW SOUTH RESOURCES INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND c/o SMART CASUALTY CLAIMS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 11/15/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Cameron Blair (Wolfe Williams & Austin), Norton, Virginia, for Claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, 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) Scott R. Morris's Decision and Order Awarding Benefits (2020-BLA-05457) on a claim[1] filed on February 26, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulations that Claimant has twenty-one years of qualifying coal mine employment and that he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). The ALJ further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption based on Dr. Zaldivar's medical opinion.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a response unless requested to do so by the Benefits Review Board.

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

[1] Claimant filed and withdrew two prior claims. Director's Exhibits 1, 2. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] Section 411(c)(4) of the Act 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] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established twenty-one years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, and therefore invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2, 5; Hearing Transcript at 5; Employer's Post-hearing Brief at 2 n.2, 6.

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, 362 (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,[5] or that "no part of [his] 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). The ALJ found Employer disproved clinical pneumoconiosis but did not rebut the existence of legal pneumoconiosis or establish that no part of Claimant's total disability is caused by legal pneumoconiosis. Decision and Order at 14, 16-17.

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).

Employer relies on Dr. Zaldivar's opinion that Claimant does not have legal pneumoconiosis. Employer's Exhibit 2. The ALJ found his opinion unpersuasive and entitled to little weight, and therefore insufficient to satisfy Employer's burden to establish that Claimant does not have legal pneumoconiosis. Decision and Order at 15-16.

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[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3 & n.5; Director's Exhibit 5; Hearing Transcript at 23-24.

[5] "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).

Employer asserts the ALJ did not sufficiently explain his credibility findings and misconstrued Dr. Zaldivar's opinion in finding it insufficient to disprove legal pneumoconiosis.[6] Employer's Brief at 3-14. We disagree.

Dr. Zaldivar examined Claimant and reviewed his medical records, including those from Dr. Boustani, a pulmonologist who treated Claimant for pneumoconiosis, chronic obstructive pulmonary disease, and Alpha-1 antitrypsin deficiency (Alpha-1 deficiency). *See* Employer's Exhibit 2. Dr. Zaldivar opined Claimant does not have clinical pneumoconiosis and further stated:

> There is no evidence of legal pneumoconiosis because the pulmonary impairment which [Claimant] has is the result of untreated asthma, unrelated to his occupation. The asthma in his case is triggered by the low [A]lpha-1 antitrypsin level, which is a genetic condition, not related to coal mine work.

Id. at 8.

Contrary to Employer's contention, the ALJ accurately observed that Dr. Zaldivar "focused primarily" on Claimant's Alpha-1 deficiency, and we see no error in his conclusion that Dr. Zaldivar failed to adequately address why Claimant's twenty-one years of coal mine dust exposure and his Alpha-1 deficiency "are not concurrently responsible" for his pulmonary impairment. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013) (ALJ may discount a physician's opinion for failure to adequately address whether coal dust played a role in Claimant's pulmonary impairment); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (ALJ has discretion to assess the credibility of the medical opinions based on the experts' explanations for their diagnoses and assign those opinions appropriate weight); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc) (ALJ may reject medical opinion when the doctor failed to adequately explain his or her diagnosis); Decision and Order at 15-16; Employer's Exhibit 2 at 8.

Further, the ALJ accurately noted that Dr. Zaldivar excluded legal pneumoconiosis, based, in part, on the doctor's belief that Claimant either was exposed to only minimal coal mine dust or did not retain it in his lungs. Dr. Zaldivar explained:

> [A]lthough [Claimant] had worked a sufficient number of years in the coal mines to potentially have developed coal workers' pneumoconiosis, had he

[6] The ALJ found the opinions of Drs. Nader and Raj do not assist Employer in rebutting the presumption because they diagnosed Claimant with legal pneumoconiosis. Decision and Order at 15; Director's Exhibit 14; Claimant's Exhibits 5, 6, 11, 12.

> been exposed to high enough concentration of respirable coal mine dust, he either was not exposed to a high concentration of respirable coal mine dust because the dust levels were kept low, or he was able to dispose of whatever dust he did inhale . . . .

Employer's Exhibit 2 at 7.

The ALJ permissibly found this aspect of Dr. Zaldivar's opinion was speculative[7] and also contradicted by Claimant's "unrebutted" testimony that he was exposed to heavy dust in his usual coal mine job.[8] *See U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 389 (4th Cir. 1999) (ALJ may not credit a purely speculative opinion); Decision and Order at 15; Employer's Exhibit 2 at 7; Hearing Transcript at 13-14, 16-17.

Because Employer bears the burden to disprove legal pneumoconiosis and the ALJ permissibly gave Dr. Zaldivar's opinion little weight, we need not address Employer's arguments that Drs. Raj and Nader, who diagnosed legal pneumoconiosis, relied on an incomplete picture of Claimant's condition or relied on "outdated" medical literature when disputing Dr. Zaldivar's claim that Alpha-1 deficiency causes asthma. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Director's Exhibit

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[7] We disagree with Employer that the ALJ mischaracterized Dr. Zaldivar's opinion. Dr. Zaldivar pointed out that Claimant has a certain type of Alpha-1 deficiency, allele SZ, which has "less of a risk of developing emphysema," and not "[t]he one associated with severe emphysema." Employer's Exhibit 2 at 7. Because Claimant has bronchospasm, Dr. Zaldivar reasoned that Claimant had inhaled or retained a sufficient amount of coal mine dust to cause severe emphysema with his Alpha-1 deficiency. *Id*. But Dr. Zaldivar found Claimant has asthma and not emphysema, and further concluded that Claimant does not have legal pneumoconiosis because he either was not exposed to enough coal mine dust or disposed of whatever coal mine dust he did inhale. *Id*.

[8] Claimant testified:

> The hardest part [of operating the continuous miner was] being able to see what you were doing because you can't see. . . . [T]hey put a washdown hose so you could spray the front of the miner and keep the dust knocked down to where you can see to keep places on center, but that's the hardest part that I felt like was seeing what I was doing.

Hearing Transcript at 13-14. Additionally, Claimant testified that he worked in "a lot" of coal mine dust and he tried to wear a respirator but it "smother[ed]" him. *Id*. at 16-17.

14; Employer's Exhibit 2; Claimant's Exhibits 5, 6, 11, 12; Employer's Brief at 3, 7-12, 13-14.

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 gave little weight to Dr. Zaldivar's opinion, the only opinion supportive of Employer's burden on rebuttal, we affirm his determination that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 16. 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 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)(ii); Decision and Order at 16-17. He rationally determined that Dr. Zaldivar's opinion "merits little weight" because he did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the presence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (causation opinion that erroneously fails to diagnose pneumoconiosis may not be credited at all absent "specific and persuasive reasons" that the doctor's judgment does not rest upon the misdiagnosis, in which case the opinion is entitled to at most "little weight");[9] *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 17. Moreover, Employer raises no specific challenge to this determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory or pulmonary total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

[9] The ALJ found that "specific and persuasive reasons" do not exist for concluding Dr. Zaldivar's opinion on disability causation did not rest upon the misdiagnosis because his rationale underlying his disability causation opinion "seems inextricably linked to his misdiagnosis." Decision and Order at 17 n.15.

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