U.S. Department of Labor

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

BRB No. 24-0112 BLA

ROGER L. EDWARDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	**NOT-PUBLISHED**
EDWARDS TRUCKING COMPANY, INCORPORATED	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 11/14/2024
	)	
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 Following Remand by the Benefits Review Board of Jodeen M. Hobbs, Administrative Law Judge, United States Department of Labor.

T. Jonathan Cook (Cipriani & Werner, PC), Charleston, West Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Awarding Benefits Following Remand by the Benefits Review Board (2020-

BLA-05080)[1] rendered on a subsequent claim filed on February 20, 2018,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

In her initial Decision and Order Denying Benefits, the ALJ found Claimant established a totally disabling respiratory impairment and credited him with 19.75 years of coal mine employment but less than six years of qualifying employment; thus, she found he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). Considering the claim under 20 C.F.R. Part 718, the ALJ found Claimant failed to establish either clinical or legal pneumoconiosis[4] and therefore denied benefits. 20 C.F.R. §718.202.

[1] The ALJ incorrectly refers to the case number as 2020-BLA-05117.

[2] Claimant filed six previous claims for benefits. Director's Exhibits 1-6, 44 at 7. He withdrew the fifth and sixth claims. Director's Exhibits 5, 6. A withdrawn claim is "considered not to have been filed." 20 C.F.R. §725.306(b). Because the records for Claimant's prior claims were destroyed in accordance with the Department of Labor's records retention policy, the ALJ treated Claimant's fourth claim, filed on May 13, 1999, as having been denied for failure to establish any element of entitlement. Decision and Order at 3.

When 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 that "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 ALJ considered the prior claim denied for failure to establish any element of entitlement, Claimant had to submit new evidence establishing at least one element of entitlement to obtain review of the merits of the current claim. *See White*, 23 BLR at 1-3; Decision and Order at 3.

[3] 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.

[4] 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

Pursuant to Claimant's appeal, the Board affirmed the ALJ's findings that Claimant established 19.75 years of coal mine employment but fewer than six years of qualifying employment and thus is unable to invoke the Section 411(c)(4) presumption. *Edwards v. Edwards Trucking Co.*, BRB No. 21-0616 BLA, slip op. at 5-7 (Jan. 12, 2023) (unpub.). The Board further affirmed the ALJ's finding that Claimant did not establish clinical pneumoconiosis. *Id.* at 8. However, it vacated the ALJ's finding that Claimant failed to establish legal pneumoconiosis.[5] *Id.* at 9. The Board instructed the ALJ on remand to reconsider whether Dr. Ajjarapu's opinion establishes legal pneumoconiosis. *Id.* Thus, the Board vacated the denial of benefits and remanded the case for the ALJ to reconsider entitlement under Part 718. *Id.* at 10.

On remand, the ALJ indicated there is "no dispute" that Claimant is totally disabled. She determined Dr. Ajjarapu's opinion is entitled to probative weight and sufficient to establish both legal pneumoconiosis and disability causation. Further, she found Dr. McSharry's contrary opinion unreasoned and therefore insufficient to outweigh Dr. Ajjarapu's opinion. Thus, she awarded benefits.

In the present appeal, Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis.[6] Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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

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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).

[5] The ALJ previously found both medical opinions on the issue of legal pneumoconiosis to be unreasoned. Decision and Order at 25-26.

[6] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant is totally disabled. *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 on Remand at 3.

with applicable law.[7] 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).

Entitlement Under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(4) presumption, 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 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).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has 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). The Sixth Circuit holds that a miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (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 again considered the medical opinions of Drs. Ajjarapu and McSharry. Decision and Order on Remand at 2-4. Dr. Ajjarapu diagnosed Claimant with legal pneumoconiosis in the form of chronic bronchitis due to both smoking and coal mine employment, while Dr. McSharry opined he has severe obstruction in the form of emphysema due to smoking, unrelated to coal mine dust. Director's Exhibit 19; Employer's Exhibit 2. The ALJ again found Dr. McSharry's opinion not well-reasoned but found Dr. Ajjarapu's opinion well-reasoned and consistent with the regulations, according her opinion probative weight. Decision and Order on Remand at 3-4. Thus, she found Claimant met his burden to establish legal pneumoconiosis. Decision and Order on Remand at 4.

[7] 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 Exhibit 12.

Employer argues the ALJ erred in crediting Dr. Ajjarapu's opinion as she underestimated Claimant's smoking history and was unaware of the level of dust exposure at his various jobs or the physical demands of his usual coal mine employment. Employer's Brief at 16-17. We disagree.

Dr. Ajjarapu

The ALJ determined Claimant has a smoking history of at least forty pack-years.[8] Decision and Order at 4; Decision and Order on Remand at 3 n.3. Dr. Ajjarapu also relied on a smoking history of forty pack-years starting when Claimant was a teenager and ending in 2016. Director's Exhibit 19. Employer, however, contends the evidence demonstrates that Claimant smoked for at least fifty pack-years, which undermines Dr. Ajjarapu's opinion. Employer's Brief at 16-17. Employer's argument is unpersuasive.

The length and extent of a miner's smoking history is a factual determination for the ALJ. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 686 (1985). The ALJ noted various smoking histories of record, acknowledged the record contains smoking histories ranging from forty to fifty pack-years as well as notations of secondhand exposure, and concluded Claimant smoked "at least" forty pack-years; thus, she accounted for the possibility that he had a greater smoking history. Therefore, the record reflects that the ALJ considered the range of Claimant's reported smoking histories to permissibly find at least forty pack-years.[9] *See Maypray*, 7 BLR at 1-686; *see also Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005). Thus, it was also within the ALJ's discretion to find Dr. Ajjarapu's reliance

[8] While the ALJ stated that the Board previously affirmed her smoking history determination, Decision and Order on Remand at 2, the Board simply noted her finding in her prior decision. *See Edwards v. Edwards Trucking Co.*, BRB No. 21-0616 BLA, slip op. at 9 n.14 (Jan. 12, 2023) (unpub.).

[9] We note Employer contends the ALJ failed to consider evidence that Claimant continued to smoke after 2016, including evidence that his carboxyhemoglobin level was elevated during Dr. McSharry's examination in 2021. Employer's Brief 16-17. While it appears the ALJ did not consider this evidence in her findings regarding Claimant's smoking history, as discussed below, Employer has not explained how this additional information would change the result, as the ALJ found a smoking history of "at least" forty years. *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").

on forty pack-years was not inconsistent with her finding. *See Huscoal v. Director, OWCP* [*Clemons*], 48 F.4th 480, 491-92 (6th Cir. 2022).

Moreover, Employer has not explained how a finding of at least fifty-pack years, rather than the ALJ's finding of at least forty pack-years, would have made a difference in this case. As the ALJ noted, Dr. Ajjarapu considered Claimant's "lengthy" smoking history to be causing the majority of his impairment but concluded coal dust also contributed in part; thus, the ALJ reasoned that even if Dr. Ajjarapu considered a greater smoking history, it would not have changed the doctor's opinion. *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); Decision and Order on Remand at 4; Director's Exhibit 19.

We further reject Employer's argument that the ALJ should have found Dr. Ajjarapu's opinion undermined because she did not state the level of dust exposure in Claimant's surface coal mine employment. Employer's Brief at 17. As the ALJ found, Dr. Ajjarapu was aware that Claimant worked approximately twenty years as a coal miner, including work at surface strip mines.[10] Decision and Order on Remand at 3 & n.2; Director's Exhibit 19. Thus, she permissibly found that although Dr. Ajjarapu did not specifically address how much of Claimant's employment was qualifying for purposes of invoking the Section 411(c)(4) presumption, the doctor's diagnosis of legal pneumoconiosis is not inconsistent with the ALJ's findings regarding Claimant's coal mine employment, particularly given that the Act recognizes all coal mine dust exposure is potentially injurious and claimants may establish legal pneumoconiosis under 20 C.F.R. Part 718. 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order on Remand at 3.

Thus, the ALJ permissibly credited Dr. Ajjarapu's opinion given her understanding of Claimant's smoking and occupational histories, symptoms, and objective testing demonstrating severe impairment.[11] *See Martin*, 400 F.3d at 305; Decision and Order on

[10] Dr. Ajjarapu's report included Claimant's Form CM-911a (Employment History) dated February 16, 2018, as an attachment. The ALJ referenced Director's Exhibits 16 and 9 when citing Claimant's Employment History and stated it indicated coal mine work from 1975 to 1981 (which would be less than twenty years). Decision and Order on Remand at 3 n.2. But Claimant's Employment History dated February 16, 2018 is found at Director's Exhibit 11 and lists coal mine employment from 1968 to 1990.

[11] Employer has not explained how Dr. Ajjarapu's understanding of the exertional requirements of Claimant's usual coal mine employment is relevant to the issue of legal pneumoconiosis, particularly given that both experts agree Claimant has a severe

Remand at 3. Further, it was within her discretion to find Dr. Ajjarapu's opinion that coal mine dust contributed in part to Claimant's impairment is well-reasoned and thus supports a finding of legal pneumoconiosis, particularly given her explanation that smoking is the most significant cause of the impairment. *See Groves*, 761 F.3d at 598-99; *see also Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002) (reviewing authority is required to defer to the ALJ's assessment of a physician's credibility); Decision and Order on Remand at 3.

Dr. McSharry

Employer next generally contends that the ALJ should have found Dr. McSharry's opinion that Claimant does not have legal pneumoconiosis to be well-reasoned and that it is not contrary to the preamble to the 2001 revised regulations. Employer's Brief at 17-19. We disagree.

The ALJ permissibly consulted the preamble to accord little weight to Dr. McSharry's opinion because he inadequately addressed the additive nature of coal mine dust exposure and cigarette smoke in rendering his opinion. *See Wilgar Land Co. v. Director, OWCP* [*Adams*], 85 F.4th 828, 840 (6th Cir. 2023); *Crockett Colleries, Inc., v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356 (6th Cir. 2007); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Moreover, the ALJ found Dr. McSharry erroneously relied on the absence of positive x-rays in coming to his conclusion regarding legal pneumoconiosis, a finding Employer does not challenge; thus, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *see also Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012) (affirming discrediting of physician who relied on negative radiographic evidence to exclude a diagnosis of legal pneumoconiosis, as legal pneumoconiosis may exist in the absence of clinical pneumoconiosis); 20 C.F.R. §718.202(a)(4), (b); Decision and Order at 25-26; Decision and Order on Remand at 4. Employer's arguments amount to a request for the Board to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988).

Because we reject Employer's contentions, we affirm the ALJ's determination that the medical opinion evidence establishes legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order on Remand at 4.

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impairment. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); 20 C.F.R. §§718.202(a)(4), 718.204(b)(1); Director's Exhibits 19, 33; Employer's Exhibit 2.

Finally, because Employer does not specifically challenge the ALJ's finding that Claimant established disability causation beyond its arguments we already addressed regarding legal pneumoconiosis, we also affirm her finding that Claimant established that legal pneumoconiosis substantially contributes to his totally disabling respiratory or pulmonary impairment. Decision and Order on Remand at 4; *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013) (where all the medical experts agreed chronic obstructive pulmonary disease caused the miner's total disability, the legal pneumoconiosis inquiry "completed the causation chain from coal mine employment to legal pneumoconiosis which caused [the miner's] pulmonary impairment that led to his disability"); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 255-56 (2019).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits Following Remand by the Benefits Review Board.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge