U.S. Department of Labor

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

BRB No. 21-0361 BLA

CURTIS L. TRESSLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
G.M. & W. COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 10/18/2022
STATE WORKERS' INSURANCE FUND	)	
	)	
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 Natalie A. Appetta, Administrative Law Judge, United Stated Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for Claimant.

Donna M. Hojo Lowman (Rulis & Bochicchio, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2019-BLA-06187) rendered on a claim filed on May 11, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ found Claimant established fewer than fifteen years of coal mine employment[2] and thus could not invoke 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).[3] Considering Claimant's entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established the existence of clinical pneumoconiosis arising out of his coal mine employment, legal pneumoconiosis, and total disability due to legal pneumoconiosis. Accordingly, the ALJ awarded benefits. 20 C.F.R. §§718.202(a)(4), 718.203, 718.204(b)(2), (c).

On appeal, Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis and disability causation. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, declined to file a substantive 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

[1] Claimant filed a prior claim for benefits, which he withdrew. Director's Exhibit 1. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] The ALJ found 10.4 years of coal mine employment based on the parties' stipulation. Decision and Order at 4; Hearing Transcript at 7. Employer asserts in its brief that the stipulation was to 10.14 years. Employer's Brief at 11. Claimant asserts he stipulated to 10.4 years. Claimant's Brief at 1.

[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 impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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).

When the Section 411(c)(3) and (c)(4) presumptions do not apply, a 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.[5] *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). Employer challenges the ALJ's findings that Claimant established legal pneumoconiosis and disability causation.

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(b).

The ALJ considered four medical opinions. Drs. Celko, Go, and Sood diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to both coal mine dust exposure and smoking. Director's Exhibit 12 at 8; Claimant's Exhibits 3 at 6-7, 9; 5 at 9. Dr. Fino opined Claimant's COPD was caused solely by smoking. Employer's Exhibit 1 at 13. The ALJ credited the opinions of Drs. Celko, Go, and Sood that Claimant has legal pneumoconiosis over Dr. Fino's contrary opinion. Decision and Order at 25.

Employer first challenges the ALJ's finding that Claimant smoked for thirty-four pack-years, asserting she should have found Claimant smoked fifty-six pack-years based on his treatment records because they are more reliable. Employer's Brief at 12-13.

[4] The Board will apply the law of the United States Court of Appeals for the Third Circuit, as Claimant performed his last coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3 n.4; Director's Exhibit 4; Hearing Transcript at 41-42.

[5] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established clinical pneumoconiosis arising out of coal mine employment and 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, 26, 31.

Contrary to Employer's argument, the ALJ was not required to rely on the treatment records just because they were not prepared in anticipation of litigation. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35-36 (1991) (en banc). The ALJ accurately noted the treatment records contain "wildly divergent smoking histories" ranging from thirty-four to more than one hundred pack-years and permissibly rejected them for this reason. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ determines credibility of conflicting evidence); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989). Decision and Order at 4; Director's Exhibits 14, 15; Employer's Exhibits 3, 4. In addition, the ALJ had the discretion to rely on Claimant's hearing testimony, which is consistent with the smoking histories he gave to the physicians. *See Stallard*, 876 F.3d at 670 (affirming the ALJ's smoking history based on the claimant's testimony); Decision and Order at 4; Hearing Transcript at 28-30, 37-38. Drs. Celko and Fino describe Claimant as having smoked a pack a day for thirty-four years, consistent with the ALJ's determination.[6] *See Stallard*, 876 F.3d at 670; Decision and Order at 4; Director's Exhibit 12 at 7, 15; Employer's Exhibit 1 at 2. Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant smoked for thirty-four pack-years.

Turning to the medical opinions, Employer argues the ALJ erred in crediting the opinions of Drs. Go and Sood because they did not personally examine Claimant. Employer's Brief at 13, 15. However, there is no requirement that a non-examining physician's opinion be given less weight than that of an examining physician. *See Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1028 (3d Cir. 1986) (non-examining physician's opinion may "have probative worth supporting substantial evidence"); *Collins v. J & L Steel (LTV Steel)*, 21 BLR 1-181, 1-189 (1999) (ALJ erred in rejecting medical report solely because the physician did not examine the miner).

Employer also argues Drs. Celko's, Go's, and Sood's opinions do not support Claimant's burden of proof because they do not "rule out" smoking as the cause of Claimant's respiratory impairment or adequately apportion the percentages of Claimant's impairment to smoking as opposed to coal mine dust exposure. Employer's Brief at 14. But Employer misstates the legal standard. Claimant is not required to "rule out" smoking as a cause of his respiratory impairment. He need only establish that his impairment is significantly related to, or substantially aggravated by, coal mine dust exposure in order to prove the existence of legal pneumoconiosis. 20 C.F.R. §718.201(b). Moreover, the physicians were not required to apportion the percentages of Claimant's pulmonary

[6] Dr. Fino, who is Employer's expert, specifically observed the record contained "many different reported smoking histories, from 56 pack years up to 162 pack years," yet concluded, "a 34 pack year history is the most accurate." Employer's Exhibit 1 at 13.

impairment caused by coal mine dust exposure and smoking. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18 (2003) (physician need not specifically apportion extent to which various causal factors contribute to a respiratory or pulmonary impairment). It was sufficient that each concluded Claimant's coal mine dust exposure significantly contributed to his COPD. *Id.*

Employer further asserts Drs. Go and Sood relied on generalities and therefore the ALJ erred in finding their opinions adequately reasoned. Employer's Brief at 14. We disagree. The ALJ permissibly found both doctors specifically linked their diagnoses of legal pneumoconiosis to Claimant's smoking and coal mine employment histories, his respiratory symptoms, and their review of the objective evidence. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Claimant's Exhibits 3 at 6-8; 3a at 3; 5 at 11-12; 5a at 2, 4-5.

Further, we reject Employer's assertion that the ALJ failed to consider that Dr. Go did not explain what he considered to be a sufficient coal mine dust exposure history to significantly contribute to Claimant's impairment. Employer's Brief at 14-15. The ALJ permissibly credited Dr. Go's opinion that "to a reasonable degree of medical certainty," Claimant's "10.14 years of exposure to coal mine dust led to the development of legal pneumoconiosis." *See Kertesz*, 788 F.2d at 163; Decision and Order at 23-25; Claimant's Exhibit 3 at 9.

Regarding Dr. Fino's opinion that Claimant does not have legal pneumoconiosis, Employer points out that he conducted the most recent examination of Claimant. Employer's Brief at 13. However, an ALJ is not required to give determinative weight to a more recent medical opinion when she finds other medical opinions to be otherwise adequately reasoned and documented. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); Director's Exhibit 12; Claimant's Exhibits 3, 3a, 5, 5a; Employer's Exhibits 1, 5, 6. Moreover, we note that Drs. Go and Sood considered the same medical examination information considered by Dr. Fino, and their supplemental opinions were issued within two months of his, hence their opinions were as up to date regarding Claimant's condition. Claimant's Exhibits 3 at 6, 8; 3a at 3; 5 at 1, 3, 4-5, 6, 7; 5a at 1, 2, 3, 5.

Moreover, the ALJ accurately noted Dr. Fino excluded a diagnosis of legal pneumoconiosis, in part, because Claimant's COPD developed after he left the mines in 1985. Decision and Order at 23; Employer's Exhibits 1 at 13; 5 at 24-25, 30. The ALJ permissibly found Dr. Fino's opinion unpersuasive in view of the Department of Labor's recognition in the regulations that pneumoconiosis can be a latent and progressive disease that first appears after cessation of coal mine employment. 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Island Creek Coal*

Co. v. Young, 947 F.3d 399, 408 (6th Cir. 2020); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 209-10 (3d Cir. 2002); Decision and Order at 23; Employer's Exhibits 1 at 13; 5 at 24-25.

We also affirm the ALJ's overall finding that Dr. Fino's opinion fails to adequately account for the possibility that Claimant's coal mine dust exposure and smoking were additive in causing his COPD. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (ALJ permissibly rejected medical opinion where physician failed to adequately explain why coal mine dust exposure did not exacerbate a claimant's smoking-related impairment); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 24. Thus, we affirm the ALJ's decision to give less weight to Dr. Fino's opinion when compared to the opinions of Drs. Celko, Go, and Sood.[7]

Employer's arguments on legal pneumoconiosis 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 the opinions of Dr. Celko, Go, and Sood, and discredited Dr. Fino's opinion, we affirm her finding that Claimant established the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a); Decision and Order at 25.

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).

[7] Employer misstates that the ALJ rejected Dr. Fino's opinion for relying on a longer employment history than the ALJ found. Decision and Order at 23-26; Employer's Brief at 15. To the extent the ALJ gave valid reasons for finding Dr. Fino's opinion unpersuasive, we need not address Employer's additional contention that the ALJ failed to fully address Dr. Fino's and Dr. Go's disagreement over the significance of whether Claimant's impairment was reversible after the use of a bronchodilator. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 23-26; Claimant's Exhibits 3 at 8; 3a at 3; Employer's Exhibits 1 at 13; 5 at 26-27; Employer's Brief at 15.

The ALJ credited the opinions of Drs. Celko, Go, and Sood that Claimant is totally disabled due to legal pneumoconiosis. Decision and Order at 31-32. Employer raises no specific error with regard to the ALJ's finding other than its already-rejected arguments on legal pneumoconiosis. *See* Employer's Brief at 11-15. Moreover, because all the physicians agree Claimant has totally disabling COPD, the ALJ's finding that Claimant's COPD constitutes legal pneumoconiosis subsumed a disability causation conclusion. *See 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, 1-255-57 (2019); Decision and Order at 31-32; Director's Exhibit 12 at 1, 8; Claimant's Exhibits 3 at 9; 3a at 4; 5 at 9, 12-13, 16; 5a at 5; Employer's Exhibits 1 at 13; 5 at 32; 6 at 6. We therefore affirm the ALJ's finding that Claimant established he is totally disabled due to legal pneumoconiosis, and we therefore affirm the award of benefits. *See* 20 C.F.R. §718.204(c).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge