U.S. Department of Labor

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

BRB No. 22-0085 BLA

JUDITH A. HOLLIDAY (o/b/o of KENNETH J. HOLLIDAY) Claimant-Respondent v. HELVETIA COAL COMPANY and SMARTCASUALTYCLAIMS, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/18/2022 DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long) Ebensburg, Pennsylvania, for Claimant.

Deanna Lyn Istik (SutterWilliams, LLC) Pittsburgh, Pennsylvania, for Employer and its Carrier.

Before: ROLFE, 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 (2020-BLA-05868) rendered on a claim filed on June 11, 2019,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with at least fifteen years of underground coal mine employment and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant[2] invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018). Furthermore, she found Employer did not rebut the presumption and thus awarded benefits.

On appeal, Employer asserts the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless requested to do so.

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] The Miner filed a prior claim but withdrew it. Director's Exhibit 1. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306.

[2] The Miner died on July 15, 2019. Director's Exhibit 12. Claimant is the Miner's widow and is pursuing this claim on his behalf. *Id.*

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had 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); *see* 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established at least fifteen years of underground coal mine employment, total disability at 20 C.F.R. §718.204(b)(2), and therefore invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 30.

accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assoc., Inc.*, 380 U.S. 359 (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 the Miner had neither legal nor clinical pneumoconiosis,[6] 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 failed to establish rebuttal by either method.[7]

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 v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The ALJ considered Dr. Rosenberg's opinion that the Miner had emphysema due to cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibits 2-5. The ALJ found Dr. Rosenberg's rationale for excluding legal pneumoconiosis "has been rejected as hostile to the Act by the Department of Labor [(DOL)] as well as the [United States] Court[s] of Appeals for the Sixth and Fourth Circuits." Decision and Order at 35.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because the Miner performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4, 7-9; Hearing Transcript at 6.

[6] "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).

[7] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 33.

Employer argues the ALJ did not adequately explain why she rejected Dr. Rosenberg's opinion.[8] Employer's Brief at 10. We disagree. Dr. Rosenberg relied, in part, on the intervening time between when the Miner left the mines and the onset of his emphysema in concluding the disease was unrelated to coal mine dust exposure. The physician noted the Miner "left his coal mine employment in 2002" and, at that time, there was "no documentation [] that he sought medical attention for respiratory complaints." Employer's Exhibit 6 at 11-12. Although the Miner developed respiratory complaints in 2017, Dr. Rosenberg explained medical studies establish "obstruction occurring in miners due to coal [mine] dust, if it is going to occur, will be displayed in the first few years after beginning work in the coal mines" rather than decades later to constitute legal pneumoconiosis. *Id*. at 10-11. Thus the ALJ correctly found Dr. Rosenberg excluded legal pneumoconiosis because he "considered the Miner's [late] onset of symptoms to be not representative of legal pneumoconiosis." Decision and Order at 35.

The regulations recognize pneumoconiosis as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c). Moreover, in the preamble to the 2001 revised regulations, the DOL indicated "it is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period." 65 Fed. Reg. 79,920, 79,971 (Dec 20, 2000). The ALJ permissibly found, and sufficiently explained, that Dr. Rosenberg's use of "the intervening length of time after [the Miner left] coal mine employment" as a basis to exclude legal pneumoconiosis is improper, as doing so is contrary to the regulations and the medical science set forth in the preamble.[9] Decision and Order at 35; *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 253 (3d Cir.

[8] The ALJ considered Dr. Rasmussen's November 13, 2014 medical opinion excluding legal pneumoconiosis. Decision and Order at 24. She found the opinion "is of no probative value in its own right on the issue of legal pneumoconiosis in the current claim filed June 11, 2019." *Id*. Because Employer does not challenge the ALJ's discrediting of Dr. Rasmussen's opinion, it is affirmed. *See Skrack*, 6 BLR at 1-711; Decision and Order 34.

[9] The ALJ cited the United States Court of Appeals for the Fourth Circuit's decision in *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 667 (4th Cir. 2017) and the United States Court of Appeals for the Sixth Circuit's decision in *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014) when discrediting Dr. Rosenberg's opinion. Decision and Order at 35 n. 35. In both decisions, the courts held an ALJ may permissibly evaluate expert opinions in conjunction with the DOL's discussion of the prevailing medical science set forth in the preamble. *Id*.

2011); *Consol. Coal Co. v. Kramer*, 305 F.3d 203, 209-10 (3d Cir. 2002); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 667 (4th Cir. 2017); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738 (6th Cir. 2014).

Dr. Rosenberg also opined the Miner's "severely reduced diffusing capacity indicates" he had "widespread emphysematous lung destruction related to smoking" and not coal mine dust exposure. Employer's Exhibit 6 at 10. He explained "emphysema related to cigarette smoking is more diffuse than emphysema due to coal [mine] dust and results in lower diffusing capacity measurements, marked air trapping, and bullae formation because the particles in cigarette smoke are smaller and more numerous than coal particles and distribute deeper throughout the lungs." *Id*. In addition, he acknowledged the Miner's computed tomography scan testing and autopsy results were consistent with centrilobular emphysema. *Id*. at 2-3, 8. Nonetheless, he concluded "coal [mine] dust described pathologically in association with observed emphysema [with] diffuse destruction of the capillary bed in relationship to [the Miner's] long and continuing smoking history … are not representative of [coal mine dust-induced] emphysema." *Id*. at 10.

The ALJ cited the preamble to the 2001 revised regulations, which states that "without qualification or limitation as to a particular form," coal mine dust can cause emphysema, that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms, and that centrilobular emphysema is a form of emphysema that may be caused by coal mine dust exposure. 65 Fed. Reg. at 79,939, 79,941-42; *see* Decision and Order at 35 n. 34. Thus, she permissibly found this rationale for excluding coal mine dust exposure as a cause of the Miner's emphysema improper, as it too is contrary to the preamble. *See Obush*, 650 F.3d at 257; *Stallard*, 876 F.3d at 667; *Sterling*, 762 F.3d at 491 Decision and Order at 35.

Because we can discern the ALJ's rationale underlying her credibility finding,[10] we are not persuaded by Employer's argument that her findings do not satisfy the explanatory

[10] We reject Employer's argument that Dr. Rosenberg's Board-certification as a pulmonologist compelled the ALJ to credit his opinion. Employer's Brief at 10. While an ALJ may consider an expert's qualifications in resolving the conflicting evidence, she is not required to afford the interpretation of a physician with a certain credential greater weight. *Bateman v. E. Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); Employer's Brief at 10. As the trier-of-fact, the ALJ has broad authority to assess the credibility of the medical opinions and assign them

requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[11] *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 she did it, the duty of explanation under the APA is satisfied); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002) (APA satisfied where the ALJ properly addressed the relevant evidence and provided a sufficient rationale for her findings).

Employer next argues the ALJ erred in failing to consider Dr. Swedarsky's autopsy report, which it contends is relevant to the issue of legal pneumoconiosis. Employer's Brief at 7-8, 17-19. We are not persuaded. At the hearing, Employer acknowledged Dr. Swedarsky's report constitutes both a medical opinion as well as an autopsy report under the evidentiary limitations. Hearing Transcript at 8-12; *see* 20 C.F.R. §725.414(a)(3). As Employer had met its full complement of medical opinions, it requested the ALJ limit her consideration of his opinion to his review and analysis of the autopsy slides and not consider the portion of his medical opinion based on his review of medical records. Hearing Transcript at 8-12.

To support its argument to the Board that the ALJ should have considered Dr. Swedarsky's conclusions, Employer cites his medical opinion excluding legal pneumoconiosis. Employer's Brief at 7-8 (citing Director's Exhibit 20; Employer's Exhibit 5). It also cites his deposition testimony that "the amount of coal [mine] dust that was found in [the Miner's] lungs would not be enough to cause a significant pulmonary impairment." *Id.* at 17-19 (citing Employer's Exhibit 7 at 62-63). Employer concedes, however, that these conclusions were based on the doctor's review of "the clinical record and looking at the tissue pathology" evidence. Employer's Brief at 19 ("Based upon Dr. Swedarsky's review of the slides and objective medical data, his opinion should be provided with greater weight."). And it has not otherwise identified any portion of Dr. Swedarsky's autopsy report or relevant deposition testimony based on his review of the

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appropriate weight. *See Balsavage* v. *Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986).

[11] The Administrative Procedure Act (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).

autopsy slides alone and not on his review of the clinical record.[12] *Cox v. Director*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b). Thus we are not persuaded by its argument that the ALJ erred in failing to adequately consider his conclusions.[13]

Because the ALJ permissibly rejected the only opinion supportive of a finding that the Miner did not have legal pneumoconiosis, we affirm her finding that Employer failed to disprove the existence of the disease.[14] 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). Thus, we affirm the ALJ's finding

[12] For the same reasons, we reject Employer's argument that the ALJ erred in failing to consider Dr. Swedarsky's opinion on the issue of total disability due to pneumoconiosis. Employer's Brief at 7-8, 17-19.

[13] Employer similarly argues the ALJ erred in failing to consider the findings of the autopsy prosector, Dr. Whaley, on the issues of legal pneumoconiosis and total disability due to pneumoconiosis because he attributed the Miner's death to an acute myocardial infarction. Employer's Brief at 14 (citing Director's Exhibit 17). We disagree. Dr. Whaley did not opine that the Miner's emphysema is not significantly related to, or substantially aggravated by, coal mine dust exposure. Director's Exhibit 17. Nor did he opine that no part of the Miner's total disability is due to legal pneumoconiosis. Thus his opinion cannot support Employer's burden to rebut the Section 411(c)(4) presumption. *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) (rebuttal inquiry is "whether the employer has come forward with affirmative proof that the [miner] does not have legal pneumoconiosis, because his impairment is not in fact significantly related to his years of coal mine employment").

[14] Although the ALJ found Dr. Rosenberg's rationale for excluding legal pneumoconiosis contrary to the regulations and the preamble, she nonetheless found his opinion entitled to equal weight compared to Dr. Perper's opinion diagnosing legal pneumoconiosis. She thus found the evidence "at best in equipoise." Decision and Order at 36-37. Employer argues the ALJ erred in finding Dr. Perper's opinion reasoned and documented. Employer's Brief at 5-7. Because we have affirmed the ALJ's finding that Dr. Rosenberg's rationale for excluding legal pneumoconiosis is contrary to the regulations and the preamble, and thereby insufficient to rebut the presumption of legal pneumoconiosis, we need not address Employer's argument that the ALJ erred in finding Dr. Perper's opinion reasoned and documented and the evidence is "at best in equipoise." Decision and Order at 36-37; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

that Employer failed to rebut the Section 411(c)(4) presumption by establishing that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 36-37.

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."[15] 20 C.F.R. §718.305(d)(1)(ii). Contrary to Employer's contention, the ALJ correctly found Dr. Rosenberg opined the Miner's totally disabling respiratory impairment was due, in part, to emphysema, which she found Employer failed to disprove, constitutes legal pneumoconiosis. Decision and Order at 37-38; Employer's Exhibits 6 at 12; 8 at 54, 59-60; Employer's Brief 21-22. Thus she rationally found his opinion insufficient to establish no part of the Miner's total disability was caused by legal pneumoconiosis.[16] *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 38; Employer's Brief at 22. Therefore, we affirm the ALJ's finding that Employer failed to establish no part of the Miner's respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

[15] We are not persuaded by Employer's argument that the ALJ applied the wrong legal standard at 20 C.F.R. §718.305(d)(2)(ii). Employer's Brief at 11. She correctly noted Employer can establish rebuttal at this prong by proving "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis" as defined by the regulations. Decision and Order at 31; *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013) (an employer's burden on rebuttal of disability causation is to rule out coal mine employment as a cause of disability or show that pneumoconiosis played no part in causing disability).

[16] As the ALJ found Dr. Rosenberg's opinion insufficient to establish rebuttal, we need not address Employer's contention that the ALJ erred in weighing Dr. Perper's opinion at disability causation. *See Larioni*, 6 BLR at 1-1278; Decision and Order at 38; Employer's Brief at 17.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge