U.S. Department of Labor

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

BRB No. 23-0385 BLA

CHARLES R. GILLI Claimant-Respondent v. CONSOLIDATION COAL COMPANY a/k/a CONSOL MINING COMPANY, LLC and CONSOL ENERGY, INCORPORATED c/o HEALTHSMART CASUALTY CLAIMS SOLUTIONS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 10/30/2024 DECISION and ORDER

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

Samuel B. Petsonk (Petsonk PLLC), Beckley, West Virginia, for Claimant.

Kara L. Jones (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for Employer and its Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS 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 (2021-BLA-05460) rendered on a claim filed on April 30, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation of twenty-one years of qualifying coal mine employment and found Claimant established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant invoked 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).[1] The ALJ further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer contends the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file 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 accordance with applicable law.[3] 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, 361-62 (1965).

[1] 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); 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant 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 4-5, 7-10.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 19; Director's Exhibit 4.

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, or "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.[4] Decision and Order at 24-25.

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). The Sixth Circuit holds this standard requires Employer to show Claimant's coal mine dust exposure "did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id.* at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relies on the opinions of Drs. Rosenberg and Fino that Claimant does not suffer from legal pneumoconiosis but instead has chronic obstructive pulmonary disease (COPD) caused by smoking and unrelated to coal mine dust exposure. Director's Exhibit 17; Employer's Exhibits 4-11. The ALJ found both physicians' opinions poorly reasoned and insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 22-23.

Employer argues that the ALJ erred in discrediting Drs. Rosenberg's and Fino's opinions. Employer's Brief at 5-23. We disagree.

Dr. Rosenberg excluded legal pneumoconiosis based, in part, on his view that Claimant's markedly decreased FEV1/FVC ratio on pulmonary function testing constitutes a pattern of impairment that is not characteristic of obstruction related to coal mine dust exposure. Employer's Exhibits 9 at 8-12; 10 at 1-7; 11 at 10-14. The ALJ permissibly

[4] "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). The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 24.

discounted this rationale as inconsistent with the position of the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions that coal miners have an increased risk of developing COPD and that legal pneumoconiosis may be shown by a reduced FEV1/FVC ratio. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A&E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 22.

The ALJ further noted Dr. Rosenberg relied on medical studies post-dating the preamble that the doctor argued show the effects of cigarette smoking may be worse than the DOL recognized in the preamble, including greater decrements in the FEV1/FVC ratio than those caused by coal mine dust exposure. Decision and Order at 21-22; Employer's Exhibits 9 at 8-12; 10 at 1-7; 11 at 10-14; *see* 65 Fed. Reg. at 79,943. She permissibly discredited his opinion, however, because medical studies showing smoking may be more detrimental to lung function than coal mine dust exposure do not preclude contribution or aggravation by coal mine dust exposure for a particular miner, and Dr. Rosenberg failed to adequately explain why coal mine dust exposure did not contribute to or aggravate Claimant's COPD. *See Young*, 947 F.3d at 405; *Adams*, 694 F.3d at 801-02; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); 65 Fed. Reg. at 79,943; Decision and Order at 22; Employer's Exhibits 9 at 8-12; 10 at 1-7; 11 at 10-14.

Dr. Fino excluded legal pneumoconiosis, in part, because Claimant was able to work another non-coal mine job for twelve years after he left the mines and continued to smoke. Employer's Exhibit 8 at 20. The ALJ permissibly found this reasoning inconsistent with the regulations' recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."[5] 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Young*, 947 F.3d at 407; *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738 (6th Cir. 2014); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (medical opinion not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); Decision and Order at 23.

[5] Because the ALJ provided permissible reasons for discrediting Dr. Fino's opinion, we need not address Employer's additional challenges to the ALJ's evaluation of his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 23; Employer's Brief at 22.

Whether a physician's opinion is sufficiently reasoned is a credibility matter for the ALJ to decide. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Although Employer parses Drs. Rosenberg's and Fino's opinions in detail to assert they adequately explained the rationale supporting their opinions, Employer's Brief at 8-17, 19-22, its arguments amount to a request for the Board to reweigh the evidence, which it is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Therefore, we affirm the ALJ's discrediting of Drs. Rosenberg's and Fino's opinions and her finding that Employer failed to disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 24-25. 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

To disprove disability causation, Employer must establish "no part of [Claimant's] disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii). The ALJ rationally discredited Drs. Rosenberg's and Fino's opinions on the cause of Claimant's disability because they did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove the disease. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 25-26. Employer raises no specific allegations of error regarding the ALJ's findings other than its assertion that Claimant does not have legal pneumoconiosis, which we have rejected. Employer's Brief at 23. We therefore affirm the ALJ's conclusion that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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

MELISSA LIN JONES
Administrative Appeals Judge