U.S. Department of Labor

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

BRB No. 24-0097 BLA

JERRY LEE BALL Claimant-Respondent v. SOUTHERN APPALACHIAN COAL COMPANY and AMERICAN ELECTRIC POWER CORPORATION Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 09/05/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Austin), Norton, Virginia, for Claimant.

Mark J. Grigoraci (Robinson & McElwee PLLC), Charleston, West Virginia, 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) Patricia J. Daum's Decision and Order Awarding Benefits (2020-BLA-05988) rendered on a subsequent claim[1] filed on November 18, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with sixteen years of underground coal mine employment and determined he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, she 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). She further found Employer did not rebut the presumption and that Claimant established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). Thus, she awarded benefits.

[1] Claimant filed a prior claim for benefits in 1996 and the record was destroyed. Director's Exhibit 1. The ALJ noted there is no information from the prior claim available for consideration in this claim. Decision and Order at 2-4, 16 n.42, 30.

[2] Section 411(c)(4) 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] 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 "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). While there is no record establishing the basis for the prior denial, the ALJ found Claimant established a change in an applicable condition of entitlement. *See White*, 23 BLR at 1-3; Decision and Order at 30.

On appeal, Employer argues the ALJ erred in finding it failed to 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 not filed a response brief. Employer filed a reply brief, reiterating its contentions.

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.[5] 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).

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,[6] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established sixteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, and therefore invoked the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7, 23.

[5] 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); Hearing Transcript at 25; Director's Exhibit 4.

[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).

[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] Decision and Order at 24-30.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the opinions of Drs. Rosenberg and Zaldivar, and Claimant's treatment records, to disprove legal pneumoconiosis.[8] Decision and Order at 15-19, 27-28; Employer's Exhibits 1, 3, 6. Dr. Rosenberg diagnosed chronic obstructive pulmonary disease (COPD) and emphysema and noted Claimant developed asthma after he left his coal mine employment. Employer's Exhibit 3 at 5-13. He opined Claimant's disabling respiratory impairments are due solely to Claimant's history of smoking and unrelated to his coal mine dust exposure. *Id.* at 5-13. Dr. Zaldivar opined Claimant developed bronchitis after he left his coal mine work based on his review of Claimant's medical records. Employer's Exhibit 1 at 4-5. He diagnosed a mild restriction that was responsive to bronchodilators and a moderate obstruction with some response to bronchodilators, and opined Claimant's pulmonary impairments are due solely to his long history of smoking. *Id.* at 4-6. The ALJ discredited Dr. Rosenberg's and Zaldivar's opinions as not well-reasoned and thus insufficient to satisfy Employer's burden of proof. Decision and Order at 27-28.

Employer argues the ALJ erred in weighing Drs. Rosenberg's and Zaldivar's opinions, and that she failed to consider Claimant's treatment records. Employer's Brief at 7-15; Employer's Reply Brief at 1-6. We disagree.

The ALJ observed correctly that Dr. Rosenberg opined Claimant's COPD is due solely to smoking based, in part, on the 50% reduction of Claimant's FEV1 value on

[7] The ALJ determined Employer rebutted the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 25.

[8] The ALJ also considered Drs. Agarwal's, Gaziano's, and Werchowski's opinions diagnosing legal pneumoconiosis. Decision and Order at 14-20, 28. As the ALJ correctly determined they do not support Employer's burden of proof, we need not address Employer's assertion that their opinions are biased and not well-reasoned. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 15-18.

pulmonary function testing in relationship to his FVC value. Decision and Order at 18, 27; Employer's Exhibit 3 at 6-10. Specifically, Dr. Rosenberg indicated that Claimant's reduced FEV1/FVC ratio is unrelated to coal mine dust exposure because coal mine dust exposure causes a parallel reduction in FEV1 and FVC values. Decision and Order at 18, 27; Employer's Exhibit 3 at 6-10. The ALJ permissibly found Dr. Rosenberg's rationale to be inconsistent with the Department of Labor's recognition in the preamble to the 2001 regulatory revisions that coal mine dust exposure can cause clinically significant obstructive lung disease as measured by a reduction in FEV1 and the FEV1/FVC ratio. 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Wilgar Land Co. v. Director, OWCP* [*Adams*], 85 F.4th 828, 840 (6th Cir. 2023); Decision and Order at 27.

Regarding Dr. Zaldivar's opinion, the ALJ accurately noted he excluded a diagnosis of legal pneumoconiosis because Claimant's treatment records did not document Claimant's respiratory complaints while he was working in the mines or later, until noting a cough in 2015, indicating that Claimant's chronic bronchitis developed more recently and is attributable to smoking as opposed to his earlier coal mine dust exposure. Decision and Order at 16, 28; Employer's Exhibit 1 at 4-5. The ALJ permissibly discounted Dr. Zaldivar's opinion as inconsistent with the regulatory definition of pneumoconiosis as a latent and progressive disease that "may first become detectable only after the cessation of coal mine dust exposure."[9] 20 C.F.R. §718.201(c); *see* 65 Fed. Reg. at 79,971; *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); Decision and Order at 24, 28.

Furthermore, the ALJ permissibly found that although Drs. Rosenberg and Zaldivar provided various reasons why Claimant's pulmonary impairments were caused by smoking, they did not persuasively explain why Claimant's coal mine dust exposure did not "at least contribute" to his disabling impairments. *See* 20 C.F.R. §718.201(b) (legal pneumoconiosis includes "any chronic . . . respiratory or pulmonary impairment

[9] Employer maintains Dr. Zaldivar only discussed when Claimant's respiratory symptoms began in an attempt to undermine Dr. Agarwal's notation that Claimant had "long standing symptoms[,]" including a cough. Employer's Brief at 13; Employer's Reply Brief at 3-4. While this may be true, Dr. Zaldivar also specifically stated "[Claimant's bronchitis] began only recently and, therefore, *could have no relation at all to any coal dust that he may have inhaled decades before*." Employer's Exhibit 1 at 4-5 (emphasis added); Director's Exhibit 18 at 5. Thus, we see no error in the ALJ's finding that Dr. Zaldivar's opinion is inconsistent with the regulations which recognize that pneumoconiosis may be latent and progressive. 20 C.F.R. §718.201(c); Decision and Order at 24, 28.

significantly related to, or substantially aggravated by, dust exposure in coal mine employment"); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012) (ALJ may accord less weight to a physician who fails to adequately explain why a miner's obstructive disease "was not due at least in part to his coal dust exposure"); Decision and Order at 15-18, 27-28; Employer's Exhibits 1, 3. Thus, we affirm the ALJ's determination that the opinions of Drs. Rosenberg and Zaldivar fail to disprove legal pneumoconiosis and therefore do not satisfy Employer's burden of proof.

Additionally, Employer argues the ALJ did not properly consider that Claimant's treatment records fail to document any respiratory complaints by Claimant before April 8, 2020, which is consistent with Dr. Zaldivar's explanation that Claimant's recent onset of chronic bronchitis is unrelated to his prior coal mine dust exposure.[10] Employer's Brief at 12-13; Employer's Reply Brief at 4-6; Employer's Closing Argument at 6, 11-12; Employer's Exhibit 6. While the ALJ did not specifically discuss Claimant's treatment records in regard to legal pneumoconiosis, we consider any error to be harmless. The ALJ provided a detailed summary of the treatment records and noted Dr. Zaldivar's review of them in weighing his opinion. Decision and Order at 15-16, 20-21, 28. As we have already rejected Employer's contention that the ALJ erred in discrediting Dr. Zaldivar's opinion – and Employer has not explained the treatment records' relevance, beyond them supporting Dr. Zaldivar's discredited rationale that Claimant's chronic bronchitis is not legal pneumoconiosis – we decline to remand this case for further consideration of them.[11] 20

[10] Employer argues the ALJ drew an improper inference from the fact that Claimant had filed a prior claim when he considered Dr. Zaldivar's opinion that Claimant did not have long-standing breathing issues. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 12; Employer's Reply Brief at 5. We consider any such error harmless, as the ALJ ultimately gave permissible reasons for discrediting Dr. Zaldivar's opinion. Decision and Order at 28.

[11] Employer contends that Claimant's treatment records demonstrate his impairment is not a fixed impairment such as is the case with pneumoconiosis. Employer's Reply Brief at 5-6. It also contends that the treatment records support a finding of rebuttal because none of Claimant's treatment providers diagnosed pneumoconiosis or attributed any of his symptoms to coal mine dust exposure. Employer's Brief at 13; Employer's Reply Brief at 5. To the extent that Employer argues the treatment records independently establish rebuttal, rather than just support the opinions of Drs. Rosenberg and Zaldivar, Employer did not raise this argument before the ALJ and makes it for the first time on appeal. Thus we decline to address it. *See Edd Potter Coal Co. v. Director, OWCP* [*Salmons*], 39 F.4th 202, 206-08 (4th Cir. 2022) (parties forfeit arguments before the Board not first raised to the ALJ); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-4-7 (1995) (cannot raise argument

C.F.R. §802.211(b); *see Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); Employer's Brief at 12-13; Employer's Reply Brief at 4-6; Employer's Closing Argument at 6, 11-12.

Employer's arguments are 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 rationally discredited the opinions of Drs. Zaldivar and Rosenberg, the only medical opinions supportive of Employer's burden, we affirm her finding Employer did not disprove legal pneumoconiosis.[12] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order at 28. Employer's failure to rebut the presumption of legal pneumoconiosis precludes a rebuttal finding that Claimant did not have pneumoconiosis.[13] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of the [Claimant'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 29-30. The ALJ permissibly discounted the opinions of Drs. Zaldivar and Rosenberg regarding the cause

---

before the Board for the first time on appeal); *see* Employer's Closing Argument at 6, 11-12. To the extent that they are raised with respect to providing support for the opinions of Drs. Zaldivar and Rosenberg, the ALJ permissibly discredited their opinions, as noted above. Employer has not shown that the treatment records undermine the ALJ's permissible rationales for discrediting their opinions.

[12] Because the ALJ gave permissible reasons for rejecting Drs. Rosenberg's and Zaldivar's opinions, we need not address Employer's additional challenges to the ALJ's evaluation of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 27-28; Employer's Brief at 7-15; Employer's Reply Brief at 1-6. Moreover, because we find the ALJ permissibly discredited the only opinions supportive of rebuttal, it is not necessary to address Employer's arguments regarding the opinions of Drs. Gaziano, Agarwal, and Werchowski, as they do not assist Employer in establishing rebuttal.

[13] We reject Employer's argument that Claimant failed to establish disease causation at 20 C.F.R. §718.203, as Claimant did not have the burden of proof after invoking the Section 411(c)(4) rebuttable presumption, and his presumed legal pneumoconiosis subsumes any inquiry as to whether the disease arose from his coal mine employment. *See Kiser v. L & J Equipment Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co., Inc.*, 21 BLR 1-147, 1-151 (1999); Employer's Brief at 18.

of Claimant's respiratory disability because they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the existence of the disease.[14] *See Epling*, 783 F.3d at 504-05; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 29-30. While Employer asserts "[t]here are numerous specific findings in this claim that establish that no part of the [C]laimant's total pulmonary disability is due to pneumoconiosis[,]" Employer raises no new arguments on disability causation other than to reiterate its contentions that Claimant does not have legal pneumoconiosis, which we have rejected. Employer's Brief at 18-20. We therefore affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory disability is caused by legal pneumoconiosis, and that Claimant established a change in an

[14] Drs. Rosenberg and Zaldivar did not address whether legal pneumoconiosis caused Claimant's total respiratory disability independent of their conclusion that he does not have the disease.

applicable condition of entitlement. 20 C.F.R. §§718.305(d)(1)(ii), 725.309(c); Decision and Order at 29-31.

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