U.S. Department of Labor

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

BRB No. 23-0023 BLA

JERRY W. GILLESPIE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL BUCHANAN MINING COMPANY, LLC	)	DATE ISSUED: 04/11/2024
	)	
Employer-Petitioner	)	
	)	
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 Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

Jason A. Mullins (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Awarding Benefits (2020-BLA-05803) rendered on a claim filed on April 24, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant has thirty-six years of qualifying coal mine employment and found he suffers from a totally disabling respiratory or pulmonary impairment. Thus, the ALJ found Claimant invoked the rebuttable

presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). Finally, the ALJ determined that Employer did not rebut the presumption and awarded benefits. He ordered the payments of benefits to commence from April 2018, the month in which the claim was filed.

On appeal, Employer asserts the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption. Employer further argues the ALJ erred in awarding benefits commencing in April 2018.[2] Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed 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, 362 (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,[4] or that "no part of

[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); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's determination 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 12.

[3] 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 Virginia. *See Shupe v.* Director, *OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[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 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

[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 rebut the presumption by either method.[5]

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); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the opinions of Drs. Sargent and McSharry to rebut the existence of legal pneumoconiosis. Dr. Sargent opined Claimant does not have legal pneumoconiosis, but instead has a totally disabling respiratory impairment due to smoking. Employer's Exhibits 2, 11. Dr. McSharry opined that, while it is "possible" Claimant has legal pneumoconiosis, it is unlikely. Employer's Exhibits 5, 12 at 15. He further opined that Claimant has a rapidly deteriorating respiratory impairment that could "conceivably" be due to a reactive airway disease or asthma but was not what one would expect from coal dust or cigarette smoking. Employer's Exhibit 12 at 14-15. The ALJ found neither opinion to be well-reasoned or documented and therefore found Employer did not rebut the existence of legal pneumoconiosis. Decision and Order at 17-23.

Employer contends the ALJ erred in discrediting the opinions of Drs. Sargent and McSharry because they "are the only physicians who clearly and extensively explain the reason for their findings," they reviewed all of the medical records, and "[t]he evidence clearly shows that the claimant does not have legal pneumoconiosis." Employer's Brief at 4-9. We disagree.

Dr. Sargent examined Claimant on August 14, 2020, and diagnosed him with a mild, non-disabling obstructive impairment consistent with asthma and unrelated to coal mine dust exposure. Employer's Exhibit 2. After reviewing additional evidence, he opined Claimant now suffers from a totally disabling respiratory impairment but again attributed the deterioration to asthma and cigarette smoking. Employer's Exhibit 11 at 16-20. Dr. Sargent relied, in part, on Claimant's response to bronchodilators on pulmonary function

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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 found Employer rebutted the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 17.

testing to exclude coal mine dust exposure as a cause of his impairment. *Id*. The ALJ permissibly discredited his opinion as he failed to explain how Claimant's partial response to bronchodilators precluded coal mine dust exposure from contributing to the fixed component of his impairment. *See 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 chronic lung disease "was not due at least in part to his coal dust exposure"); *Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356 (6th Cir. 2007) (ALJ may accord less weight to a physician who fails to adequately explain why a miner's response to bronchodilators on pulmonary function testing necessarily eliminated coal dust exposure as a cause of his obstructive lung disease); Decision and Order at 19.

Dr. Sargent further opined that Claimant's impairment is unrelated to his coal mine dust exposure because it is "highly unusual" for coal dust exposure to cause more than a 10% decrease in lung function in the absence of a positive x-ray. Employer's Exhibit 2 at 2. The ALJ permissibly found this reasoning unpersuasive as the physician relied on generalities and not on Claimant's specific condition. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985); Decision and Order at 19.

While Dr. Sargent recognized that pneumoconiosis may be latent and progressive, he also opined that because Claimant's impairment deteriorated after he left the mines, any deterioration is due solely to cigarette smoking. Employer's Exhibit 11 at 18-20. The ALJ permissibly found this reasoning unpersuasive given 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." 20 C.F.R. §718.201(c); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (medical opinion that is not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); Decision and Order at 20.

Finally, the ALJ permissibly found Dr. Sargent's opinion unpersuasive because he failed to explain why Claimant's history of coal mine dust exposure did not contribute to or aggravate his allegedly smoking- and asthma-related impairment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 20.

Dr. McSharry reviewed Claimant's medical records and initially opined that Claimant's impairment, if one existed, was not due to coal mine dust exposure because his symptoms were non-specific and "a normal chest radiograph *precludes* significant respiratory impairment as a result of coal dust exposure." Employer's Exhibit 5 at 2-3

(emphasis added). The ALJ permissibly found this explanation contrary to the Department of Labor's position that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of x-ray evidence of clinical pneumoconiosis. *See* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000); 20 C.F.R. §718.202(a)(4); *Looney*, 678 F.3d at 311-312; Decision and Order at 22.

Dr. McSharry subsequently opined that the deterioration in Claimant's lung function was too swift to be attributed to cigarette smoking or coal mine dust exposure, but "it is conceivable" that reactive airway disease or asthma could be the cause of the disease. Employer's Exhibit 12 at 14-15. He further opined that he was "not willing to say to a reasonable degree of medic[al] certainty that there is legal coal workers' pneumoconiosis" but admitted it was possible. *Id*. at 15. The ALJ permissibly found this reasoning to be equivocal based on his speculative opinion. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988) (ALJ may reject an equivocal medical opinion); Decision and Order at 22-23.

Employer's arguments amount to 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 acted within his discretion in rejecting the opinions of Drs. Sargent and McSharry, we affirm his finding that Employer did not disprove legal pneumoconiosis.[6] *See Looney*, 678 F.3d at 316-17; *Hicks*, 138 F.3d at 533; Decision and Order at 23. 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

The ALJ next considered whether Employer established "no part of [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); *see* Decision and Order at 23-24. He permissibly discredited Drs. Sargent's and McSharry's opinions on disability causation because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer did not disprove the existence of the disease. *See Epling*, 783 F.3d at 506; *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order at 23-24. We

[6] Because the ALJ permissibly discredited the opinions of Drs. Sargent and McSharry, the only opinions supportive of Employer's burden to disprove legal pneumoconiosis, we need not address its argument that the ALJ erred in crediting Dr. Forehand's diagnosis of legal pneumoconiosis. *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"); Employer's Brief at 4-9.

therefore affirm the ALJ's finding 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); Decision and Order at 24. Consequently, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits.

Commencement Date for Benefits

Benefits commence the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If that date is not ascertainable, benefits commence the month the claim was filed, unless credited evidence establishes the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 1119 n.4 (4th Cir. 1986); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990).

The ALJ found the record does not contain any medical evidence establishing when Claimant first became totally disabled due to pneumoconiosis and thus awarded benefits as of April 2018, the month the claim was filed. Decision and Order at 25 n.102. Employer argues the May 2, 2019 pulmonary function study is the first evidence of total disability and thus the ALJ erred in awarding benefits before that date. Employer's Brief at 1. We disagree.

Medical evidence of total disability does not establish the onset date of disability; it only shows Claimant became totally disabled at an earlier time. *See Owens*, 14 BLR at 1-50; *Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-109 (1985). Here, Claimant did not establish total disability based on the May 2, 2019 pulmonary function study, but rather established he has a totally disabling respiratory or pulmonary impairment based on a preponderance of the pulmonary function studies and arterial blood gas studies as well as the medical opinions of Drs. Forehand, Sargent, and McSharry. Decision and Order at 12. The ALJ did not find that Claimant was not disabled at any time subsequent to the filing of the claim.

Further, while the May 2, 2019 pulmonary function study is the first qualifying objective test,[7] it is not the first evidence of total disability. Dr. Forehand opined that Claimant's June 4, 2018 and February 21, 2019 pulmonary function studies, while non-qualifying, still demonstrated an impairment that would render Claimant unable to meet

[7] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

the physical requirements of his last coal mining job,[8] an opinion that the ALJ credited as reasoned and documented. Decision and Order at 19; Director's Exhibits 17, 20.

Moreover, neither Dr. McSharry nor Dr. Sargent opined that Claimant became disabled in May of 2019. Dr. McSharry opined that Claimant was "at baseline" disabled "dating back *at least* to May 2, 2019." Employer's Exhibit 12 at 13 (emphasis added). Dr. Sargent opined that the earliest test that "suggests disability" was the January 12, 2022 pulmonary function study and that "the one thing" he can rely on is the qualifying arterial blood gas study from March 4, 2022. Employer's Exhibit 11 at 19-20. Thus, the ALJ's finding that the medical evidence does not reflect the date upon which Claimant become totally disabled due to pneumoconiosis is supported by substantial evidence; we therefore affirm his determination that benefits commence as of April 2018. *Owens*, 14 BLR at 1-50; *Lykins*, 12 BLR at 1-182; Decision and Order at 25 n.102.

[8] The ALJ found Claimant's usual coal mine employment was as a belt man and required medium to heavy exertion. Decision and Order at 4.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge