U.S. Department of Labor

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

BRB No. 23-0285 BLA

BILLY MULLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GREATER WISE, INCORPORATED	)	
	)	DATE ISSUED: 04/05/2024
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE	)	
	)	
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 on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor

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

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

GRESH, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits on Remand (2018-BLA-05780) rendered on a claim filed on January 19, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for the second time.

In his initial Decision and Order Awarding Benefits, the ALJ credited Claimant with 18.34 years of coal mine employment, but found that only eight years were spent underground or on the surface in conditions substantially similar to those found in underground coal mine employment. The ALJ therefore found Claimant did 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).[1] Addressing Claimant's entitlement under 20 C.F.R. Part 718, the ALJ found he established clinical pneumoconiosis arising out of coal mine employment, legal pneumoconiosis, and total disability due to legal pneumoconiosis. Accordingly, the ALJ awarded benefits.

Upon consideration of Employer's appeal, the Board affirmed the ALJ's findings that Claimant established clinical pneumoconiosis arising out of coal mine employment, but vacated his findings that the existence of legal pneumoconiosis and total disability due to legal pneumoconiosis were established because the ALJ failed to consider Claimant's treatment records when determining the length of Claimant's smoking history. *See Mullins v. Greater Wise, Inc.*, BRB No. 20-0548 BLA, slip op. at 3-9 (May 24, 2022) (unpub.). The Board therefore vacated the award of benefits and remanded the case for the ALJ to reweigh all the relevant evidence regarding Claimant's smoking history and the medical opinions as to whether Claimant has legal pneumoconiosis and is totally disabled by that disease. *Id*. at 5-9. Further, the Board instructed the ALJ to consider if Claimant established total disability due to clinical pneumoconiosis as his decision was unclear as to whether he had addressed that issue. *Id*. at 9.

On remand, the ALJ again found that Claimant established fewer than fifteen years of qualifying coal mine employment and therefore did not invoke the Section 411(c)(4) presumption. The ALJ determined Claimant has a thirty pack-year smoking history and further found that Claimant established legal pneumoconiosis. Additionally, the ALJ

[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.

concluded that Claimant is totally disabled due to legal pneumoconiosis and awarded benefits.[2]

On appeal, Employer argues the ALJ erred in determining the length of Claimant's smoking history and erred in finding Claimant established legal pneumoconiosis and total disability due to legal pneumoconiosis. Employer further asserts the ALJ erred in not following the Board's instruction to determine if Claimant is totally disabled due to clinical pneumoconiosis. Neither Claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief.

The 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 (1965).

Entitlement Under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3) or (c)(4) presumptions,[4] 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

[2] The ALJ did not determine whether Claimant's total disability is due to clinical pneumoconiosis. *See Mullins v. Greater Wise, Inc.*, BRB No. 20-0548 BLA, slip op. at 9 (May 24, 2022) (unpub.).

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Mullins*, BRB No. 20-0548 BLA, slip op. at 2 n.3.

[4] Claimant cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) because there is no evidence of complicated pneumoconiosis in the record. *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Director's Exhibits 11, 14, 16-19; Claimant's Exhibits 1, 2; Employer's Exhibit 1.

[5] The Board previously affirmed, as unchallenged, the ALJ's finding that Claimant established a totally disabling respiratory or pulmonary impairment. *See Mullins*, BRB No. 20-0548 BLA, slip op. at 2 n.2.

1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Smoking History

Employer first asserts the ALJ erred in determining Claimant has a thirty pack-year smoking history and maintains the record establishes at least a forty pack-year history. Employer's Brief at 7 (unpaginated). We reject Employer's contention.

The length and extent of Claimant's smoking history is a factual determination for the ALJ to make. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985). Here, the ALJ considered Claimant's hearing testimony, the smoking histories contained in his treatment records, and what he told Drs. Ajjarapu and Fino.[6] Decision and Order on Remand at 9; Hearing Transcript at 17-20; Director's Exhibits 11, 19; Claimant's Exhibits 5, 6; Employer's Exhibit 9. After reviewing the conflicting accounts, the ALJ observed that while "it is not possible to determine the length or extent of . . . Claimant's smoking history with precision," the record supports a smoking history of thirty-pack years. Decision and Order on Remand at 9.

Employer does not allege the ALJ failed to consider any specific evidence, but simply avers substantial evidence supports a different smoking history. Employer's Brief at 3-7 (unpaginated). We consider Employer's argument to be a request to reweigh the evidence, which we cannot do. *See Anderson*, 11 BLR at 1-113; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc) (Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable). Because the ALJ followed the Board's remand instruction to consider all the relevant evidence, and he acted within his discretion in reaching a factual determination based on the record, we affirm his finding Claimant smoked for thirty pack-years. *See Grizzle*, 994 F.2d at 1096; *Maypray*, 7 BLR at 1-686; Decision and Order on Remand at 9.

[6] Claimant testified at the hearing that he smoked approximately thirty years and not more than one pack per day, but had recently cut down to one-half pack per day. Hearing Transcript at 17-20. He reported to his treating physicians that he smoked one pack per day for forty years, although he also reported a smoking history as low as one-half pack per day for forty years and as high as two packs per day for forty years. Director's Exhibit 19; Claimant's Exhibits 5, 6; Employer's Exhibit 9. Dr. Ajjarapu reported a smoking history of one-half pack per day for twenty years since 1996. Director's Exhibit 11 at 7. Dr. Fino reported a smoking history of twenty pack-years, reduced to two cigarettes a day for the last five years. Director's Exhibit 19 at 4.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must establish he suffers from 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).

On remand, the ALJ followed the Board's instruction to reconsider the medical opinion evidence. Decision and Order on Remand at 11-14, 17-18. Dr. Ajjarapu diagnosed chronic bronchitis, which she attributed to smoking and coal mine dust exposure. Director's Exhibit 11 at 7. Dr. Fino opined Claimant had no evidence of any respiratory or pulmonary impairment and thus excluded a diagnosis of legal pneumoconiosis. Director's Exhibit 19 at 4, 12. Dr. McSharry reviewed the medical records, including the reports of Drs. Ajjarapu and Fino, and opined Claimant's pulmonary function studies showed mild airflow obstruction which "may well be related to his prior smoking history, but is unlikely to be the result of coal dust exposure." Director's Exhibit 20 at 3.

The ALJ found Dr. Fino did not address the cause of Claimant's chronic bronchitis and that Dr. McSharry's opinion, stating Claimant's airflow limitation was "unlikely" due to coal mine dust exposure, was equivocal. Decision and Order on Remand at 18; Director's Exhibits 19; 20 at 3. He concluded Dr. Ajjarapu's opinion was reasoned and documented and sufficient to establish that Claimant has legal pneumoconiosis. Decision and Order on Remand at 17-18.

Employer contends the ALJ erred in finding Dr. Ajjarapu's opinion adequately reasoned because she relied on an inaccurate smoking history, admitted she could not distinguish between the effects of smoking and coal mine dust exposure, and failed to consider objective testing administered subsequent to her own examination. Employer's Brief at 7-10 (unpaginated). We reject Employer's contentions.

An ALJ has discretion to determine the effect of an inaccurate smoking history on the credibility of a medical opinion. *Huscoal, Inc. v. Director, OWCP* [*Clemons*], 48 F.4th 480, 491 (6th Cir. 2022). Here, the ALJ found Claimant had a thirty pack-year smoking history, while Dr. Ajjarapu understood Claimant to have a ten pack-year smoking history and a continuing smoking habit at the time of her examination. Decision and Order on Remand at 9; Director's Exhibit 11 at 2. Dr. Ajjarapu considered both Claimant's coal mine dust exposure and smoking histories in concluding that Claimant's pulmonary impairment "is due in part to his work in the coal mines." Director's Exhibit 11 at 7. She acknowledged Claimant "is a chronic smoker and he continues to smoke." *Id*. Moreover, in her supplemental report, she observed Claimant was exposed to both coal mine dust and smoking "simultaneously for many years" and concluded "[i]t [is] impossible to separate .

. . which toxin had how much of an impact individually and collectively." Director's Exhibit 24 at 2.

We see no error in the ALJ's permissible finding that Dr. Ajjarapu's opinion is credible despite her reliance on a smoking history that was less than what the ALJ found. *Clemons*, 48 F.4th at 491; Decision and Order on Remand at 11-12, 17-18; Director's Exhibits 11 at 7; 24 at 2. As the ALJ noted, Dr. Ajjarapu specifically found that Claimant's impairment was due in part to smoking, and she also explained "it was impossible to distinguish between the impact of smoking and coal mine dust exposure on Claimant's condition." Decision and Order on Remand at 17; *see* Director's Exhibits 11 at 7; 24 at 2; *see also Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006) (doctor need not apportion a specific percentage of a miner's lung disease to cigarette smoke versus coal mine dust exposure to establish the existence of legal pneumoconiosis). The ALJ also permissibly found Dr. Ajjarapu's attribution of Claimant's impairment to both exposures consistent with the Department of Labor's position in the preamble to the 2001 revised regulations that the effects of smoking and coal mine dust exposure may be additive. *Clemons*, 48 F.4th at 491; Decision and Order on Remand at 11-12, 17-18; Director's Exhibits 11 at 7; 24 at 2.

Moreover, we reject Employer's contention that the ALJ should have rejected Dr. Ajjarapu's opinion because she considered only her own objective testing. Employer's Brief at 10 (unpaginated). An ALJ is not required to discredit a physician who did not review all of the record evidence when the opinion is otherwise well-reasoned, documented, and based on the physician's own examination of the miner, objective test results, and exposure histories. *See Church v. E. Associated Coal Corp*., 20 BLR 1-8, 1-13 (1996); *Hess v. Clinchfield Coal Co*., 7 BLR 1-295, 1-296 (1984). The ALJ permissibly found Dr. Ajjarapu's opinion is reasoned and documented, as it is based on her physical examination, objective tests, and her understanding that Claimant had both a lengthy history of smoking and exposure to coal dust. *See Church*, 20 BLR at 1-13; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987) (reasoned opinion is one in which the ALJ finds the underlying documentation adequate to support the physician's conclusions); Decision and Order on Remand at 17-18; Director's Exhibits 11, 24. Consequently, we affirm the ALJ's conclusion that Dr. Ajjarapu's opinion is adequately reasoned to support a finding that Claimant has legal pneumoconiosis.

Regarding Employer's experts, we reject Employer's argument that the ALJ was required to accord more weight to the opinions of Drs. Fino and McSharry based on their qualifications. Employer's Brief at 8-9 (unpaginated). The ALJ accurately summarized the physicians' credentials when weighing their opinions. Decision and Order on Remand at 11-13. Employer does not offer any support for its contention that because Dr. Fino is Board-certified in internal and pulmonary medicine, his opinion is automatically entitled

to more weight than Dr. Ajjarapu's. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 307 (6th Cir. 2005) (not requiring the ALJ to credit one physician over the other because one was Board-certified in Pulmonary Disease while the other was not); Decision and Order on Remand at 11-13, 17-18. Further, Employer does not identify any error with regard to the ALJ's specific rationales for finding neither Dr. Fino's nor Dr. McSharry's opinion credible as to whether Claimant has legal pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the ALJ's finding that Claimant established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Disability Causation

To establish disability causation, Claimant must prove 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 of Claimant's totally disabling impairment 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).

Employer argues the ALJ erred in finding Claimant's total disability is due to legal pneumoconiosis for the same reasons it provided at legal pneumoconiosis. Employer's Brief at 13 (unpaginated). Because we have already rejected Employer's arguments that Dr. Ajjarapu's opinion is not entitled to determinative weight regarding the existence of legal pneumoconiosis, we reject Employer's same contentions of error as to disability causation. Moreover, because the ALJ credited Dr. Ajjarapu's opinion that Claimant's disabling obstructive impairment constitutes legal pneumoconiosis, he rationally found that opinion established disability causation. *See Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 186-87 (4th Cir. 2014); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015) ("no need for the ALJ to analyze the opinions a second time" at disability causation when Employer failed to establish that the impairment was not legal pneumoconiosis); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 1-255-56 (2019); Decision and Order on Remand at 21-22. We therefore affirm the ALJ's finding that Claimant established his legal pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(c).[7]

[7] Given our affirmance of the ALJ's finding that Claimant established he is totally disabled due to legal pneumoconiosis, any error in the ALJ's failure to determine whether Claimant is totally disabled due to clinical pneumoconiosis is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it]

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge

points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 13 (unpaginated).