U.S. Department of Labor

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

BRB No. 22-0521 BLA

ROGER L. HALE, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JEWELL SMOKELESS COAL CORPORATION c/o HEALTHSMART CASUALTY CLAIMS	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 12/04/2023
	)	
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 Noran J. Camp, Administrative Law Judge, United States Department of Labor.

Charity A. Barger (Street Law Firm, LLP), Grundy, Virginia, for Employer.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Noran J. Camp's Decision and Order - Awarding Benefits (2019-BLA-05060) (Decision and Order on Remand) rendered on a claim filed on January 10, 2017, 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 first decision, the ALJ credited Claimant with 13.19 years of coal mine employment, and thus found Claimant could 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] Considering entitlement under 20 C.F.R. Part 718, the ALJ accepted Employer's concession that Claimant has a totally disabling respiratory or pulmonary impairment and found the evidence established Claimant is totally disabled due to legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b), (c). Accordingly, he awarded benefits.

Upon Employer's appeal, the Board rejected Employer's arguments that the ALJ lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution and that the removal provisions applicable to the ALJ rendered his appointment unconstitutional.[2] *Hale v. Jewell Smokeless Coal Corp.*, BRB No. 20-0544 BLA, slip op. at 3-6 (Oct. 20, 2021) (unpub.). The Board also affirmed the ALJ's findings that Claimant established 13.19

[1] 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.

[2] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, §2, cl. 2.

years of coal mine employment and total disability[3] but vacated his determinations on legal pneumoconiosis and disability causation. *Id*. at 6-9. Thus, the Board vacated the award and remanded the case for further consideration.

On remand, the ALJ found Claimant established that he is totally disabled to due legal pneumoconiosis and therefore awarded benefits. 20 C.F.R. §§718.202(a)(4), 718.204(c).

On appeal, Employer again challenges the validity of the ALJ's appointment and reasserts the removal provisions applicable to ALJs render his appointment unconstitutional. On the merits, Employer contends the ALJ erred in finding Claimant established legal pneumoconiosis and disability causation.[4] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response asserting the ALJ had the authority to decide the case and urges

[3] Because the ALJ correctly found there is no evidence in the record to support a diagnosis of complicated pneumoconiosis, the Board held Claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304; *Hale v. Jewell Smokeless Coal Corp.*, BRB No. 20-0544 BLA, slip op. at 6 n.9 (Oct. 20, 2021) (unpub.).

[4] Employer again alleges the ALJ erred calculating the length of Claimant's coal mine employment and finding he worked in conditions substantially similar to underground mines. Employer's Brief at 19-21; Employer's Brief in BRB No. 20-0544 BLA at 13-15. However, as the Board previously noted, the ALJ accepted the parties' stipulation that Claimant has less than fifteen years of coal mine employment and found Claimant ineligible for the Section 411(c)(4) presumption. Thus, Employer has not explained how the ALJ's alleged error in calculating Claimant's length of coal mine employment at 13.19 years would make a difference. *Hale*, slip op. at 3 n.4. Further because Claimant established less than fifteen years of coal mine employment, the issue of substantially similarity is moot. Because Employer has not shown the Board's decision was clearly erroneous or established any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989-90 (1984).

the Board to reject the same arguments the Board previously rejected as they are now the law of the case.[5]

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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause and Removal Provisions Challenges

Employer contends the Board erred in rejecting its Appointments Clause and removal arguments. Employer's Brief at 21-29. We agree with the Director's position that Employer offers the same arguments that the Board rejected previously in *Hale*, BRB No. 20-0544 BLA, slip op. at 3-6. Director's Brief at 2. Because Employer has not shown the Board's decision was clearly erroneous or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *See Brinkley*, 14 BLR at 1-150-51; *Bridges*, 6 BLR at 1-989-90.

Entitlement Under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions, 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. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[5] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant is unable to invoke the Section 411(c)(4) presumption but established he has a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 4, 22.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine work in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); *Hale*, BRB No. 20-0544 BLA, slip op. at 3 n.5; Decision and Order on Remand at 14 n.22.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must establish that 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(b).

The ALJ considered four medical opinions. Decision and Order on Remand at 5-22. He credited the opinions of Drs. Forehand and Go that Claimant has legal pneumoconiosis over the contrary opinions of Drs. Fino and Rosenberg. *Id.* Employer contends the opinions of Drs. Forehand and Go are not reasoned and documented, the ALJ failed to explain his credibility findings, and he did not properly hold Claimant to his burden of proof. We disagree.

Dr. Forehand performed the Department of Labor (DOL) complete pulmonary evaluation of Claimant. Director's Exhibit 11. He reported Claimant had an extensive smoking history of 40.50 pack-years, 13 years of coal mine dust exposure, and respiratory symptoms including dyspnea, sputum, and cough. Director's Exhibit 11;[7] Claimant's Exhibit 3. Dr. Forehand diagnosed a disabling obstructive respiratory impairment based on the results of the pulmonary function study he obtained. Director's Exhibit 11 at 4. He opined that Claimant's occupational exposure put him "at an even higher risk of developing obstructive lung disease." *Id.* Specifically, he found both Claimant's smoking and coal mine dust exposures were "substantial" in causing Claimant's obstructive lung disease, noting that coal dust exposure, in particular, "contributed to and materially aggravated that part of his obstructive lung disease caused by cigarette smoke by worsening airways inflammation." *Id.* He further noted that even after administration of a bronchodilator on pulmonary function testing, "a significant, fixed, *irreversible* component to claimant's airway obstruction remained, pointing to the role of coal mine dust exposure as a factor substantially contributing to his airway obstruction." *Id.* (emphasis added).

An ALJ may find a medical opinion reasoned if it is based on an examination, exposure histories, and objective testing. 20 C.F.R. §718.202(a)(4); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000); *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 conclusion). Here, the ALJ acted

[7] The ALJ considered Dr. Forehand's supplemental letter stating that he continued to maintain Claimant has legal pneumoconiosis even after the DOL indicated that Claimant had only 7.33 years of coal mine dust exposure. Decision and Order at 6 n.7; Director's Exhibit 15. The ALJ determined that since he found that Claimant does in fact have 13.19 years of coal mining work, this letter has no effect on his consideration of this case. *Id.*

within his discretion in finding Dr. Forehand's opinion reasoned and documented because the doctor relied on Claimant's physical examination, symptoms, coal mine employment and smoking histories, objective testing, and medical literature to support his opinion. *See Compton*, 211 F.3d at 212; *Fields*, 10 BLR at 1-21-22; Decision and Order at 7, 20-21; Director's Exhibit 11; Claimant's Exhibit 3.

Dr. Go reviewed the medical record including the medical reports and objective testing by Drs. Forehand, Fino, and Rosenberg; x-ray readings; and Claimant's work, smoking, and medical histories. Claimant's Exhibit 2. He diagnosed chronic obstructive pulmonary disease (COPD) and opined Claimant has legal pneumoconiosis because his lung disease "was due in significant part to his coal mine dust exposure." *Id*. at 9. In addition, Dr. Go opined Claimant's extensive smoking history was "significantly contributory" to his COPD. *Id.* at 9.

We reject Employer's assertion that Dr. Go's opinion is entitled to less weight because he did not examine Claimant. Employer's Brief at 7-9. An ALJ may not discredit a physician's opinion solely because he was a "non-examining physician." *Millburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-33 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 121 F.3d 438, 441 (4th Cir. 1997); *Collins v. J & L Steel (LTV Steel)*, 21 BLR 1-182, 1-189 (1999). The ALJ permissibly found Dr. Go's opinion supported by the medical reports and objective testing he reviewed, as well as Claimant's smoking and work histories. *See Compton*, 211 F.3d at 212; *Fields*, 10 BLR at 1-21-22; Decision and Order at 19-21; Claimant's Exhibit 2 at 6, 9.

We also reject Employer's assertion that the opinions of Drs. Forehand and Go are not well-reasoned because they state Claimant has a "co-existing cigarette smoke-induced lung disease and coal mine dust-induced lung disease" but "did not acknowledge the extent of the contribution of [C]laimant's cigarette smoking history." Employer's Brief at 8, 10. Both physicians described an extensive smoking history, which they conclude was a significant contributing factor to Claimant's obstructive lung disease, along with coal mine dust exposure. Decision and Order on Remand at 6-7, 20; Director's Exhibit 11 at 6; BRBX[8] 92 at 27. A physician need not apportion the causes of a miner's lung disease to establish the existence of legal pneumoconiosis. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17 (2003). Rather, a physician need only credibly diagnose a chronic respiratory or

[8] The ALJ references the electronic file compiled by the Board while the case was on appeal as Benefits Review Board Exhibits (BRBXs).

pulmonary impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Moreover, the ALJ also permissibly found the opinions of Drs. Forehand and Go are persuasive that Claimant has legal pneumoconiosis because their attribution of Claimant's obstructive lung impairment to both smoking and coal mine dust exposure is consistent with the medical science the DOL credited in the preamble to the revised 2001 regulations indicating that the risks of both exposures may be additive in causing obstructive lung disease. 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000) ("Even in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis. The risk is additive with cigarette smoking."); *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); Decision and Order on Remand at 7 and n.10, 20-21; Director's Exhibit 11 at 6; BRBX 92 at 25-27, 38.

Lastly, Employer argues that Dr. Go's statement that "coal mine dust exposure *can* be an important contributor to clinically significant COPD" is equivocal. *See* Employer's Brief at 7 (Employer's emphasis) (citing BRBX 92 at 24). However, a physician's refusal to express a diagnosis in categorical terms is candor, not equivocation. *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006); *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763 (4th Cir. 1999) (opinion that pneumoconiosis "could be" a complicating factor in the miner's death was not equivocal). Dr. Go also specifically diagnosed that Claimant has legal pneumoconiosis and we see no error in the ALJ's reliance on Dr. Go's opinion.

Because it is supported by substantial evidence, we affirm the ALJ's conclusion that the opinions of Drs. Forehand and Go are adequately reasoned and documented, and sufficient to support a finding that Claimant has legal pneumoconiosis. *See Hicks*, 138 F.3d at 528; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Opinions of Drs. Fino and Rosenberg

Employer next contends the ALJ failed to provide valid reasons for discrediting the opinions of Drs. Fino and Rosenberg that Claimant does not have legal pneumoconiosis. Employer's Brief at 11-19. We disagree.

Dr. Fino opined Claimant has disabling COPD due entirely to smoking. He excluded a diagnosis of legal pneumoconiosis, in part, because Claimant's post-bronchodilator spirometry showed "significant reversibility" which he opined is inconsistent with the fixed and permanent nature of impairment related to coal mine dust exposure. BRBX 93 at 78-80. The ALJ permissibly discredited Dr. Fino's opinion because

he failed to explain why the fixed and irreversible portion of Claimant's respiratory impairment is not related to coal mine dust exposure.[9] *See Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); Decision and Order on Remand at 12; BRBX 93 at 78-80.

Dr. Fino also reasoned that Claimant does not have legal pneumoconiosis because Claimant's "minimal amounts of loss of FEV1" on pulmonary function testing indicated a "small amount of coal dust in the lungs." BRBX 93 at 79. The ALJ permissibly found Dr. Fino's rationale "undermined by the Act itself which states that even a negative X-ray finding - which could be related to low coal dust content in the lung - can result in a finding of pneumoconiosis." Decision and Order on Remand at 12; s*ee* 30 U.S.C. §923(b); 20 C.F.R. §718.202(a)(4), (b) (legal pneumoconiosis can exist in the absence of clinical pneumoconiosis). We therefore affirm the ALJ's conclusion that Dr. Fino's opinion is not well-reasoned. *See Hicks*, 138 F.3d at 528.

Dr. Rosenberg attributed Claimant's COPD solely to cigarette smoking. BRBX 64 at 3-9. Dr. Rosenberg eliminated coal dust exposure as a contributing cause of Claimant's impairment in part because his pulmonary function tests showed a reduced FEV1/FVC ratio, which Dr. Rosenberg opined is consistent with a smoking-related obstruction. BRBX 64 at 3. In addition, Dr. Rosenberg reasoned that Claimant's chronic bronchitis was due to smoking and not coal mine dust exposure because if it were due to coal mine dust exposure it would have "dissipate[d] within months after exposure cease[d]." BRBX 64 at 8.

The ALJ permissibly found Dr. Rosenberg's opinion contrary to the studies cited in the preamble to the revised 2001 regulations which recognize that COPD due to coal dust exposure may be detected by decrements in the FEV1/FVC ratio on pulmonary function testing. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); Decision and Order on Remand at 14. Further, the ALJ permissibly found Dr. Rosenberg's opinion contrary to the regulations which 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); 65 Fed. Reg. at 79,971; *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (medical opinion not in accord with the accepted

[9] The ALJ's finding that there was an irreversible portion to Claimant's pulmonary impairment is supported by the opinions of Drs. Forehand, Fino, and Rosenberg. *See* Decision and Order on Remand at 12 & n.19. Dr. Forehand described "a significant fixed, irreversible component." Director's Exhibit 11 at 6. Dr. Fino opined there was some "irreversible airway obstruction." Director's Exhibit 19 at 10. Dr. Rosenberg reported Claimant's "pulmonary functions did not totally reverse to normal." BRBX 64 at 8.

view that pneumoconiosis can be both latent and progressive may be discredited); *Lewis Coal Co. v. Director, OWCP*, 373 F.3d 570, 580 (4th Cir. 2004) (it is appropriate to give little weight to medical findings that conflict with the Act's implementing regulations); Decision and Order on Remand at 17.

Lastly, we see no error in the ALJ's overall conclusion that Dr. Rosenberg's opinion is not well-reasoned because he failed to adequately explain why Claimant's coal dust exposure did not substantially aggravate his disabling COPD even if it was primarily caused by smoking. *See Stallard*, 876 F.3d at 673-74 n.4 (ALJ permissibly discredited medical opinions that "solely focused on smoking" as a cause of obstruction and "nowhere addressed why coal dust could not have been an *additional* cause"); Decision and Order on Remand at 16-19.

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do.[10] *Anderson*, 12 BLR at 1-113. Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and based on the evidence as a whole.[11] 20 C.F.R. §718.202(a); *Compton*, 211 F.3d at 211; Decision and Order on Remand at 21-22.

Disability Causation

To establish disability causation, Claimant must prove his legal 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 a miner'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

[10] As the ALJ provided valid reasons for giving Dr. Fino's and Rosenberg's opinions little weight, we need not address Employer's remaining arguments regarding the ALJ's weighing of them. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 11-14.

[11] Employer asserts the ALJ erred by not relying on the qualifications of its experts; however, as the ALJ found their opinions not well-reasoned, this argument is moot. Employer's Brief at 9-10.

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 generally argues there is no evidence to support the ALJ's finding that Claimant's total disability is caused by legal pneumoconiosis. Employer's Brief at 6, 19. However, Dr. Forehand also specifically addressed disability causation, stating "[t]he full extent of claimant's totally disabling respiratory impairment of ventilation is a direct result of the obstructive lung disease due to the combined effects of smoking cigarettes and inhaling coal mine dust into his lungs on a daily, regular basis for 13 years, a sufficient length of time to cause a coal mine dust-induced lung disease." Director's Exhibit 11 at 5. Dr. Go also opined Claimant is totally disabled due to legal pneumoconiosis. BRBX 92 at 27. The ALJ permissibly credited the opinions of Drs. Forehand and Go for the same reasons he gave when weighing them on legal pneumoconiosis. *See Hicks*, 138 F.3d at 528; Decision and Order on Remand at 21.

Moreover, because all of the physicians agree that Claimant has disabling COPD, the ALJ's determination that Claimant's disabling COPD constitutes legal pneumoconiosis necessarily encompassed a finding that Claimant is totally disabled due to legal pneumoconiosis. *See Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 186-87 (4th Cir. 2014); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 1-255-56 (2019); Decision and Order on Remand at 21-22; Director's Exhibit 11 at 6; BRBXs 64 at 2; 92 at

27; 93 at 75-76. Thus, we affirm the ALJ's conclusion that Claimant established total disability due to legal pneumoconiosis at 20 C.F.R. §718.204(c).

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