U.S. Department of Labor

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

BRB No. 23-0067 BLA

HARVEY HESS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 12/04/2023
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 Carrie Bland, Associate Chief Administrative Law Judge, United States Department of Labor.

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

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Associate Chief Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Awarding Benefits (2019-BLA-05852) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on October 6, 2017.[1]

[1] On May 7, 1996, the district director denied Claimant's prior claim, filed on January 31, 1996, because he failed to establish any element of entitlement. Director's Exhibit 1. Where a miner files a claim for benefits more than one year after the denial of

The ALJ credited Claimant with at least 18.23 years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, she found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), and established a change in an applicable condition of entitlement. 20 C.F.R. §§718.305, 725.309(c). She further found Employer did not rebut the presumption and thus awarded benefits.

On appeal, Employer contends the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[3] 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.[4] 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).

---

a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "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). Claimant was therefore required to establish one element of entitlement to obtain review of his subsequent claim on the merits. *White*, 23 BLR at 1-3.

[2] 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.

[3] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established at least 18.23 years of underground coal mine employment, total disability, a change in an applicable condition of entitlement, and invocation of the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.204(b)(2), 718.305, 725.309(c); Decision and Order at 7, 19-22.

[4] 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); Hearing Transcript at 33.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[5] or that "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.[6]

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

Employer relied on Dr. McSharry's medical opinion to establish rebuttal. Director's Exhibit 17. Dr. McSharry diagnosed Claimant with a significant respiratory impairment in the form of "mild airflow obstruction and diffusion abnormality with associated arterial desaturation." *Id.* He attributed the impairment to cigarette smoking and opined it is unrelated to coal mine dust exposure. *Id.*

The ALJ discredited Dr. McSharry's opinion because the doctor required a positive chest x-ray of clinical pneumoconiosis to diagnose legal pneumoconiosis.[7] Decision and

[5] "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).

[6] The ALJ found Employer disproved the existence of clinical pneumoconiosis. Decision and Order at 22.

[7] Dr. McSharry opined that Claimant does not have legal pneumoconiosis because "[r]adiographic studies (including the highly specific CT scans) do not suggest pneumoconiosis despite his long history of exposure to coal and rock dust." Director's Exhibit 17 at 2 (unpaginated). He stated "[w]hen pneumoconiosis causes significant abnormalities like [pulmonary function test] findings or hypoxemia, there is generally

Order at 22-23; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012) (explaining that the regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that '[n]o claim for benefits shall be denied solely on the basis of a negative chest x-ray'"); 20 C.F.R. §§718.201, 718.202(a)(4), (b). The ALJ also found Dr. McSharry did not adequately explain why coal mine dust exposure did not contribute to Claimant's smoking-related impairment. *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 n.4 (4th Cir. 2017); *Hobet Mining, LLC v. Epling*, 783 F.3d 498 (4th Cir. 2015); Decision and Order at 22-23.

Employer argues the ALJ should have credited Dr. McSharry's opinion because it is reasoned and documented. Employer's Brief at 4-7 (unpaginated). We consider Employer's argument to be a request that the Board 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 discredited Dr. McSharry's opinion, the only opinion supportive of Employer's burden on rebuttal, and Employer does not point to any specific error in that determination, we affirm her finding Employer did not disprove legal pneumoconiosis.[8] 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 22-23. 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 also found Employer did not rebut the presumption by establishing "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. Because Employer raises no specific arguments on disability causation other than its argument with respect to legal pneumoconiosis, we affirm the ALJ's determination that Employer failed to prove that no part of Claimant's total disability

---

radiographic evidence of pulmonary scarring, usually high profusion of [coal workers' pneumoconiosis], or progressive massive fibrosis." *Id.* Dr. McSharry explained that because these findings are not present in Claimant, pneumoconiosis is not the cause of his pulmonary function and blood gas testing abnormalities. *Id.* at 3 (unpaginated).

[8] Employer argues the opinions of Drs. Green and Henry "should be afforded no weight" as to the existence of pneumoconiosis. Employer's Brief at 7 (unpaginated). The ALJ correctly found that Drs. Green and Henry diagnosed legal pneumoconiosis and, therefore, their opinions cannot assist Employer with its burden to disprove the disease. *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015); Decision and Order at 12-13, 15, 22-23.

was caused by pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 23-24.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge