U.S. Department of Labor

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

BRB No. 21-0457 BLA

LARRY BLACKBURN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL OF KENTUCKY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 01/11/2023
PEABODY ENERGY CORPORATION	)	
	)	
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 of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Joseph D. Halbert (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Awarding Benefits (2019-BLA-06088) rendered on a claim filed on April 6, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulations that Claimant has twenty-two years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked 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] He further determined Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it did not rebut the presumption.[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 and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[4] or that "no part of [his] respiratory or pulmonary total disability

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar 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 finding 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 2, 4.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 5-12; Director's Exhibits 3-4.

[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

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.[5] Decision and Order at 20.

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 Co*., 25 BLR 1-149, 1-159 (2015). The United States Court of Appeals for the Sixth Circuit requires Employer to establish Claimant's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal-dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id*. at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relies on the medical opinions of Drs. Dahhan and McSharry, both of whom diagnosed a restrictive impairment caused by the residuals of Claimant's lung cancer treatment, including lobectomy and radiation therapy, and unrelated to coal mine dust exposure. Employer's Exhibits 1-2, 6-7, 11-12. The ALJ discredited both opinions and found them insufficient to rebut the presumed existence of legal pneumoconiosis. Decision and Order at 15-16. Employer contends the ALJ erred.[6] Employer's Brief at 8-10. We disagree.

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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).

[5] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 20.

[6] Employer also contends the ALJ imposed an improper burden on it by requiring it to disprove the existence of legal pneumoconiosis, even though, in Employer's view, there is no evidence in the record that would establish the existence of the disease. Employer's Brief at 4-8. We disagree. As the ALJ correctly observed, because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to affirmatively prove that Claimant does not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *Minich v. Keystone Coal Mining Co*., 25 BLR 1-149, 1-159 (2015); Decision and Order at 5, 16.

The ALJ accurately observed the record demonstrates Claimant's lobectomy removed only the middle lobe of his right lung, whereas Dr. Dahhan reported the removal of the right lower and right middle lobes. Decision and Order at 15; Employer's Exhibits 3 at 6; 8 at 4; 11 at 8. The ALJ thus reasonably discredited Dr. Dahhan's opinion because he attributed Claimant's impairment entirely to his lobectomy but had an inaccurate understanding of the amount of lung that had been removed. Decision and Order at 15; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

In addition, the ALJ permissibly discredited Drs. Dahhan's and McSharry's opinions because neither physician adequately explained why along with the residuals of his lung cancer treatment Claimant's twenty-two years of coal mine dust exposure did not contribute to or substantially aggravate his totally disabling impairment. *See Young*, 947 F.3d at 403-07; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); 20 C.F.R. §718.201(a)(2), (b). He further permissibly discredited their opinions because both physicians excluded a diagnosis of legal pneumoconiosis in part because of the length of time between the cessation of Claimant's coal mine employment and the onset of his symptoms, contrary to the regulation that recognizes pneumoconiosis may be "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."[7] 20 C.F.R. §718.201(c); *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014) (upholding ALJ's decision to discredit physician whose opinion regarding legal pneumoconiosis conflicted with the recognition that pneumoconiosis is a latent and progressive disease); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 15-16.

Because the ALJ permissibly discredited the opinions of Drs. Dahhan and McSharry, the only opinions supportive of Employer's burden on rebuttal, we affirm his finding that Employer did not disprove legal pneumoconiosis. Decision and Order at 16, 20. 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).

The ALJ next considered whether Employer established "no part of the miner'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). He permissibly discredited the opinions of Drs. Dahhan and McSharry because they did not diagnose legal

[7] Because the ALJ provided valid reasons for discrediting Drs. Dahhan's and McSharry's opinions, we need not address Employer's additional arguments regarding the ALJ's discrediting of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 8-10.

pneumoconiosis, contrary to his finding Employer failed to disprove Claimant has the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 21. We therefore affirm the ALJ's finding that Employer failed to prove that no part of Claimant's respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge