U.S. Department of Labor

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

BRB No. 23-0111 BLA

DONALD R. BAKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VIRGINIA CREWS COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 03/11/2024
	)	
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 on Remand Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

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

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

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order on Remand Granting Benefits (2017-BLA-05633) rendered on a subsequent claim filed on May 2, 2014,[1] 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 her March 12, 2020 Decision and Order Awarding Benefits, the ALJ found Claimant established at least thirty years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant established a change in an applicable condition of entitlement,[2] 20 C.F.R. §725.309, and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] She further found Employer did not rebut the presumption and awarded benefits.

[1] Claimant filed four prior claims. Decision and Order at 2; Employer's Brief at 1; Director's Exhibits 2, 51 at 5. The district director denied Claimant's most recent prior claim because he failed to establish a totally disabling respiratory or pulmonary impairment. *Baker v. Virginia Crews Coal Co.*, BRB No. 20-0233 BLA, slip op. at 2 n.1 (Apr. 19, 2021) (unpub.).

[2] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she 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). Because the district director denied Claimant's prior claim for failure to establish total disability, he had to submit new evidence establishing that element to obtain review of his current claim on the merits. *White*, 23 BLR at 1-3.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if they have 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.

Pursuant to Employer's appeal, the Board affirmed the ALJ's findings that Claimant established at least fifteen years of qualifying coal mine employment, total disability, and invocation of the Section 411(c)(4) presumption. *Baker v. Virginia Crews Coal Co.*, BRB No. 20-0233 BLA, slip op. at 3 n.4 (Apr. 19, 2021) (unpub.). However, it vacated her finding that Employer did not rebut the existence of clinical pneumoconiosis, legal pneumoconiosis, or disability causation. *Id.* at 4-6. Specifically, the Board determined the ALJ erred in weighing the x-ray and medical opinion evidence regarding clinical pneumoconiosis and failed to make a sufficient finding regarding rebuttal of legal pneumoconiosis. *Id.* at 3-5. Further, the Board held the ALJ applied an incorrect legal standard in determining that Employer failed to rebut disability causation. *Id.* at 6. Thus the Board vacated the award of benefits and remanded for further consideration.

On remand, the ALJ again found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer contends the ALJ erred in finding it did not rebut the presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to submit a substantive response.

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.[5] 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, 361-62 (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,[6] or "no part of [his]

[4] Because we previously affirmed the ALJ's finding Claimant established total disability and as it is unchallenged on appeal, we affirm the ALJ's finding that Claimant established a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *Baker*, BRB No. 20-0233 BLA, slip op. at 3 n.4; 20 C.F.R. §725.309(c); Decision and Order at 13.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 21.

[6] "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

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 did not establish rebuttal by either method.[7]

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).

In her initial Decision and Order, the ALJ considered the opinions of Drs. Castle and Zaldivar that Claimant has an obstructive pulmonary impairment caused by smoking and unrelated to coal mine dust exposure.[8] Decision and Order at 11-13; Director's Exhibit 34; Employer's Exhibits 3-5. The ALJ discredited both opinions as not well-reasoned. Decision and Order at 11-13. However, the Board vacated the ALJ's finding as she failed to make a finding regarding whether the evidence rebuts the existence of legal pneumoconiosis. Thus the Board remanded the case, instructing the ALJ to make such a determination. *Baker*, BRB No. 20-0233 BLA, slip op. at 6-7. On remand, the ALJ found the opinions of Drs. Castle and Zaldivar are insufficient to rebut the existence of legal pneumoconiosis. Decision and Order on Remand at 6-7.

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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).

[7] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order on Remand at 4.

[8] The ALJ also considered the opinions of Drs. Forehand and Green that Claimant has legal pneumoconiosis in the form of chronic obstructive pulmonary disease and that coal mine dust was a "substantial" and "significant . . . and aggravating" contributing factor, respectively. Decision and Order at Remand at 6-7; Director's Exhibit 12; Claimant's Exhibits 1, 3. She found they support a finding of legal pneumoconiosis and thus do not aid Employer in rebutting the presumption. Decision and Order on Remand at 7.

Employer argues the ALJ has not sufficiently explained her finding it did not rebut the presumption of legal pneumoconiosis. Employer's Brief at 5-9, 11-15. We disagree.

Dr. Castle opined that Claimant's airway obstruction was caused by smoking because he had "a marked degree of reduction" in his FEV1/FVC ratio on pulmonary function testing, whereas coal mine dust exposure is associated with a normal FEV1/FVC ratio because it causes a parallel reduction in both the FEV1 and FVC. Employer's Exhibit 3 at 7. Contrary to Employer's argument, the ALJ permissibly discredited Dr. Castle's opinion as inconsistent with the Department of Labor's recognition that coal dust exposure may cause obstruction with associated decrements in the FEV1/FVC ratio. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 34.

The ALJ also considered Dr. Zaldivar's opinion that Claimant's chronic obstructive pulmonary disease is not legal pneumoconiosis based, in part, on the absence of evidence of pneumoconiosis on his x-rays, as this indicates "the amount of dust retained within the lungs must be very small if there is any dust retention at all." Director's Exhibit 34 at 5-7; Employer's Exhibit 4 at 43. She permissibly found his opinion unpersuasive because the regulations provide that legal pneumoconiosis may be present even in the absence of a positive x-ray for clinical pneumoconiosis. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012) (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); Decision and Order on Remand at 6-7.

Moreover, while Drs. Castle and Zaldivar acknowledged that Claimant has sufficient coal mine dust exposure to cause legal pneumoconiosis, they found that Claimant's obstructive impairment is caused by only asthma and smoking. Director's Exhibit 34 at 5-7; Employer's Exhibits 3 at 6-8, 4 at 17, 29, 39-41, 52, 5 at 5. The ALJ permissibly found their opinions unpersuasive because they failed to adequately explain why Claimant's history of coal mine dust exposure, along with asthma and smoking, was not a significantly contributing or aggravating factor in Claimant's obstructive impairment. *See Stallard*, 876 F.3d at 671-72 n.4; *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); Decision and Order at 12-13.

Because the ALJ acted within her discretion in rejecting the opinions of Drs. Castle and Zaldivar, the only medical opinions supportive of Employer's burden on rebuttal, we affirm her finding that Employer did not disprove the existence of legal pneumoconiosis.[9]

[9] Consequently, we reject Employer's argument that remand is required because the ALJ found the medical opinion evidence supports a finding of legal pneumoconiosis.

20 C.F.R. §§718.201(a)(2), 718.305(d)(1)(i)(A); Decision and Order at 11-13; Decision and Order on Remand at 6-7. 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); Decision and Order on Remand at 7-8. Employer challenges the ALJ's finding that the opinions of Drs. Castle and Zaldivar are insufficient to rebut the presumption of disability causation.[10] Decision and Order on Remand at 8; Employer's Brief at 9-15.

Drs. Castle and Zaldivar opined Claimant is totally disabled due to an obstructive impairment caused by asthma and smoking rather than legal pneumoconiosis. Director's Exhibit 34 at 6-7; Employer's Exhibits 3 at 8, 4 at 28-29, 5 at 5. Considering the physicians' opinions that Claimant's obstructive impairment is causing his total disability, and that we have affirmed the ALJ's finding the obstructive impairment constitutes legal pneumoconiosis, we see no error in the ALJ's finding that Employer did not rebut the presumption that Claimant's disability is caused by legal pneumoconiosis. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order on Remand at 7-8.

Further, Drs. Castle and Zaldivar opined Claimant's disability was unrelated to legal pneumoconiosis because he did not have the disease, contrary to the ALJ's finding, rendering their opinions not credible on causation. *See Hobet Mining, LLC v. Epling*, 783

Employer's Brief at 6, 12-13. We have affirmed the ALJ's finding the opinions of Drs. Castle and Zaldivar are insufficient to rebut the presumption of legal pneumoconiosis, regardless of the weight given to the opinions of Drs. Forehand and Green. *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[10] The ALJ also considered the opinions of Drs. Forehand and Green that Claimant's total disability is due to his legal pneumoconiosis. Decision and Order on Remand at 7; Director's Exhibits 16, 19; Claimant's Exhibit 3 at 4. Because their opinions do not aid Employer in rebutting the presumption of disability causation, we need not address Employer's arguments regarding the weight afforded to their opinions. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 10, 12-13.

F.3d 498, 504-05 (4th Cir. 2015) (citing *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (where a physician erroneously fails to diagnose pneumoconiosis, an ALJ "may not credit" their opinion on causation absent "specific and persuasive reasons" that are independent of the mistaken belief the miner did not have the disease)); Director's Exhibit 22; Employer's Exhibits 1, 2, 11, 14.

We 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). Consequently, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits.

Accordingly, the ALJ's Decision and Order on Remand Granting Benefits is affirmed.

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