

U.S. Department of Labor

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



BRB No. 21-0615 BLA

| | | |
|-------------------------------|---|------------------------|
| GARLAND HONAKER |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| SEA "B" MINING COMPANY |) | |
| |) | DATE ISSUED: 5/08/2023 |
| 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 Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Granting Benefits (2019-BLA-05794) rendered on a claim filed on

August 3, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).¹

The ALJ accepted the parties' stipulation that Claimant had 26.49 years of qualifying coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.² 30 U.S.C. §921(c)(4) (2018). She further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer asserts the ALJ erred in finding it failed to rebut the presumption.³ Neither Claimant nor the Director, Office of Workers' Compensation Programs, filed response briefs.

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'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (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 Claimant has neither legal nor clinical pneumoconiosis,⁵ or that "no

¹ Claimant filed two prior claims but withdrew both of them. Director's Exhibits 1, 2, 4. Withdrawn claims are considered "not to have been filed." 20 C.F.R. §725.306(b).

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 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 9.

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 Tr. at 16.

⁵ "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the condition characterized by permanent deposition

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 did not establish rebuttal by either method.⁶ Decision and Order at 11-13.

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).

The ALJ considered the opinions of Drs. Green and Fino. Decision and Order at 11-12; Director’s Exhibits 16, 20; Claimant’s Exhibits 1, 2. Dr. Green diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD), specifically identifying Claimant’s occupational history of exposure to coal and rock dust as a significant contributing and aggravating factor in his COPD and concluding that his smoking history is “a minor factor.” Director’s Exhibits 16 at 3, 20 at 2; Claimant’s Exhibits 1 at 4, 2 at 3. Dr. Fino opined Claimant has an obstructive impairment with “a very significant bronchodilator response” on pulmonary function testing, which he asserted “would be particularly unusual” for an impairment related to coal mine dust exposure. Director’s Exhibit 19 at 9. As the ALJ observed, however, Dr. Fino conceded he was unable to “rule out coal mine dust as a contributing factor” to Claimant’s impairment. Decision and Order at 11; Director’s Exhibit 19 at 9. Crediting Dr. Green’s opinion over Dr. Fino’s, the ALJ determined Claimant’s COPD is “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” Decision and Order at 11-12. She therefore found Claimant established legal pneumoconiosis. *Id.*

Employer argues the ALJ applied an incorrect legal standard when addressing rebuttal, asserting she concluded “a simple diagnosis of obstructive pulmonary disease

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). Legal pneumoconiosis refers to “any chronic lung disease or impairment and its sequelae arising out of coal mine employment.” 20 C.F.R. §718.201(a)(2).

⁶ The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 11.

equates to a finding of legal pneumoconiosis” and thus incorrectly found Dr. Fino’s opinion supported a diagnosis of legal pneumoconiosis.⁷ Employer’s Brief at 7. We disagree.

As the ALJ correctly observed, because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to rebut the presumed existence of legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); *W. Va. CWP Fund v. Director, OWCP [Smith]*, 880 F.3d 691, 699 (4th Cir. 2018); Decision and Order at 10. She further correctly noted legal pneumoconiosis includes any chronic respiratory or pulmonary impairment “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.”⁸ Decision and Order at 11 (citing 20 C.F.R. §718.201(b)); *see also Minich*, 25 BLR at 1-155 (noting rebuttal of the presumed existence of legal pneumoconiosis requires the employer to prove the miner’s pulmonary impairment was not significantly related to, or substantially aggravated by, dust exposure in coal mine employment).

Moreover, contrary to Employer’s characterization of the ALJ’s analysis, she did not find Dr. Fino’s opinion supported a finding of legal pneumoconiosis, but rather correctly stated he did not make a diagnosis of legal pneumoconiosis. Decision and Order at 11. While she noted Dr. Fino diagnosed obstruction, Decision and Order at 11; Director’s Exhibit 19 at 9, she did not conclude that his diagnosis automatically equated to a diagnosis of legal pneumoconiosis. Rather, she found Dr. Green’s opinion that Claimant’s obstruction constituted legal pneumoconiosis to be worthy of greater weight. Decision and Order at 11-12. In addition, contrary to Employer’s contention, Dr. Fino did not opine Claimant does not have legal pneumoconiosis or that the contribution of coal mine dust exposure to Claimant’s impairment “was not substantial.” Employer’s Brief at 7; *see* Director’s Exhibit 19. Rather, as Employer acknowledges, Dr. Fino conceded Claimant has “pulmonary issues due to coal dust exposure,” Employer’s Brief at 7, and stated “[he could not] rule out coal mine dust as a contributing factor” to Claimant’s

⁷ Employer’s brief generally references a deposition of Dr. Fino. Employer’s Brief at 7. The record does not contain such a deposition, and there is no indication in the record Employer submitted a deposition during the proceedings below. *See* Hearing Tr.; Employer’s Evidence Summary Form.

⁸ In finding “Claimant establishe[d] legal pneumoconiosis,” the ALJ appears to have erroneously placed the burden on Claimant to establish the disease rather than on Employer to disprove its existence. Decision and Order at 12; *see* 20 C.F.R. §718.305. However, as the ALJ found in favor of Claimant, any error in applying a greater burden on Claimant and lesser burden on Employer is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

impairment. Director's Exhibit 19 at 9. We therefore reject Employer's argument that the ALJ erred in finding the presumption of legal pneumoconiosis unrebutted.

As the trier-of-fact, the ALJ is charged with assessing the credibility of the medical evidence and assigning it appropriate weight. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314-15 (4th Cir. 2012). We thus affirm the ALJ's conclusion that Claimant has legal pneumoconiosis. Decision and Order at 11-12; 20 C.F.R. §718.202. Claimant's establishing legal pneumoconiosis precludes a finding that Employer established Claimant does not have the disease. 20 C.F.R. §718.305(d)(1)(i).

We also affirm, as unchallenged on appeal, the ALJ's finding that Employer failed to rebut the presumption of disability causation. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12. Consequently, we affirm the ALJ's finding that Employer failed to rebut the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4)(2018).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge