U.S. Department of Labor

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

BRB No. 22-0091-BLA

EDWARD J. KLINE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
J.R. MINING CONSTRUCTION, INCORPORATED	)	
	)	
Employer-Respondent	)	DATE ISSUED: 5/04/2023
	)	
and	)	
	)	
STATE WORKERS' INSURANCE FUND (PA)	)	
	)	
Carrier	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Margaret M. Hock (Thomson, Rhodes & Cowie, P.C.), Pittsburgh, Pennsylvania, for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Denying Benefits (2021-BLA-05025) rendered on a claim filed on December 23, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment and, thus, concluded he 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] However, the ALJ found Employer rebutted the presumption and therefore denied benefits.

On appeal, Claimant argues the ALJ erred in finding Employer rebutted the Section 411(c)(4) presumption. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response in this appeal.[2]

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 & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

[1] 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); 20 C.F.R. §718.305(b).

[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); 30 U.S.C. §921(c)(4) (2018); Decision and Order at 18.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 6.

To be entitled to benefits under the Act, 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. Statutory presumptions may assist claimants if certain conditions are met, but 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).

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, 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 established Claimant has neither legal nor clinical pneumoconiosis.[4]

Legal Pneumoconiosis[5]

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." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015). The ALJ considered the opinions of Drs. Zlupko and Fino. Decision and Order at 22-24.

[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 that is 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).

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Employer disproved the existence of clinical pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 22.

Dr. Zlupko diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to both smoking and coal dust exposure. Director's Exhibits 10 at 4, 13 at 1. The ALJ found Dr. Zlupko's opinion not well-reasoned and gave it reduced weight.[6] Decision and Order at 22.

Dr. Fino evaluated Claimant on Employer's behalf on October 20, 2020.[7] He opined Claimant has a restrictive impairment due to an elevated left diaphragm, which he characterized as an extrinsic restrictive impairment as opposed to an intrinsic restrictive impairment caused by a respiratory disease such as pneumoconiosis. Employer's Exhibits 1, 3, 4, 6. Dr. Fino opined Claimant's most accurate lung volumes test (conducted during his own 2020 examination) indicates Claimant has no loss of lung function caused by an intrinsic lung condition to explain his restriction, while a comparison of his February and October 2020 x-rays with his December 2017 x-ray shows a worsening diaphragm elevation and impingement on lung space. Employer's Exhibit 6 at 25-27, 33-36, 44-47. The ALJ found Dr. Fino's opinion well-documented and well-reasoned because he considered all the evidence of record and explained why he excluded coal dust exposure as a contributing factor to Claimant's restrictive pulmonary impairment. *Id.* at 23.

Claimant asserts the ALJ's crediting of Dr. Fino's opinion does not comport with the Administrative Procedure Act (APA).[8] Specifically, Claimant argues the ALJ did not address Dr. Fino's statements that, Claimant alleges, are either contrary to applicable regulations or internally inconsistent among his reports. Claimant's Brief at 5-7. We disagree.

Initially, we reject Claimant's assertion that the ALJ failed to consider whether Dr. Fino expressed views that are contrary to the regulatory definition of pneumoconiosis.

[6] We affirm the ALJ's discrediting of Dr. Zlupko's opinion as it is unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 22.

[7] At the time he authored his initial report on November 3, 2020, Dr. Fino had reviewed additional medical records, including Dr. Ahmed's January 8, 2018 complete pulmonary evaluation report and December 15, 2017 objective tests and x-ray reading, and Dr. Ahmed's March 11, 2020 complete pulmonary evaluation report and February 3, 2020 testing and x-ray reading. Employer's Exhibit 1 at 7.

[8] The APA provides that every adjudicatory decision must include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Claimant's Brief at 5; *see* 20 C.F.R. §718.201(c) (recognizing clinical and legal pneumoconiosis "as a latent and progressive disease[s] which may first become detectable only after the cessation of coal mine dust exposure"). In his November 3, 2020 initial report, Dr. Fino opined Claimant suffers from a disabling restriction due, at least in part, to an elevated left diaphragm. Employer's Exhibit 1 at 9. Contrary to Claimant's characterization, Dr. Fino did not state that he eliminated coal dust exposure as a cause of Claimant's restriction because Claimant's lung function declined more than seventeen years after leaving coal mine employment. Claimant's Brief at 5-6. Rather, Dr. Fino explicitly conceded pneumoconiosis may be latent and progressive; however, he was unsure as to the cause of Claimant's worsening restriction between 2017 and 2020 because he found "no evidence of clinical or legal pneumoconiosis." Employer's Exhibit 1 at 9-10. Rather, he opined the progression could be due to a worsening impingement on lung space caused by Claimant's elevated diaphragm and stated that a review of Claimant's prior x-rays would be helpful in determining whether his diaphragm elevation worsened.[9] *Id*. at 10. Further, Dr. Fino evaluated additional x-rays in his March 11, 2021 second report and confirmed Claimant's 2020 x-rays showed a greater diaphragm elevation that accounts for Claimant's progression in pulmonary impairment.[10] Employer's Exhibits 3 at 2-3, 6 at 33-39. As Dr. Fino did not predicate his opinion of an absence of legal pneumoconiosis on the belief that the disease cannot be latent or progressive, we reject Claimant's assertion that the ALJ failed to consider this aspect of Dr. Fino's opinion.

[9] Dr. Fino noted Claimant's December 5, 2017 and February 3, 2020 x-rays "described a moderate elevation of the left diaphragm that appeared as a severe elevation on the chest x-ray performed at the time of my [October 20, 2020] evaluation." Employer's Exhibit 1 at 9.

[10] Dr. Fino measured Claimant's December 5, 2017 x-ray as showing a diaphragm elevation that allowed 17.56 cm of space for his left lung to expand. Employer's Exhibits 1 at 9, 3 at 3. Comparing this measurement with the 13.77 cm and 14.2 cm of lung space he observed on the February 3 and October 20, 2020 x-rays, he characterized the 2020 measurements as "definitely worse," a "definite difference," and showing "worsening of the elevated diaphragm." Employer's Exhibits 1 at 9; 3 at 3; 6 at 33-38, 54. Further noting Claimant's December 5, 2017 pulmonary function study demonstrated a mild, non-disabling impairment, his February 3, 2020 study demonstrated a moderate impairment that "likely" precludes "very heavy labor," and his October 20, 2020 pulmonary function study demonstrates a totally disabling impairment that precludes "heavy labor," Dr. Fino stated Claimant's greater diaphragm elevation is "consistent with" and "would certainly account for the change in spirometry over time." Employer's Exhibits 1 at 9, 3 at 3, 6 at 36-37.

We similarly reject Claimant's assertions that the case must be remanded for the ALJ to address inconsistencies in Dr. Fino's opinion. Claimant alleges Dr. Fino's statement in his second report that "[Claimant] has lost lung volume due to the elevated diaphragm" contradicts his statement in his third report that an elevated diaphragm "would not result in a reduction of lung volumes." Employer's Exhibits 3 at 3, 4 at 3; Claimant's Brief at 6. But Dr. Fino discussed "lung volume" in his second report as indicating "the amount of lung space [seen on Claimant's x-ray] that's not comprised by the diaphragm [impingement]," whereas in his second report he was discussing "lung volumes" testing to determine "whether there is fibrosis in the lung or the lung tissue is actually normal." Employer's Exhibit 6 at 26-27, 36, 53 (emphases added). We see no inconsistency in Dr. Fino's reports regarding whether Claimant has a loss of lung volume due to coal mine dust exposure or whether his lung volumes testing supports a conclusion that coal mine dust exposure substantially contributed to his impairment.[11] Employer's Exhibit 6 at 26-27, 36, 53.

Claimant next asserts the documentation underlying Dr. Fino's opinion is inconsistent with his conclusion that Claimant's elevated diaphragm is causing his restriction. Claimant's Brief at 6. Although Dr. Fino predicated his opinion on the belief that "the greater the [diaphragm's] elevation the worse the impairment," Claimant asserts the "opposite happened in [this] case." Claimant's Brief at 6. While Claimant correctly states Dr. Fino measured 14.2 cm of lung space on Claimant's October 20, 2020 x-ray and measured 13.77 cm of lung space on Claimant's February 3, 2020 x-ray, Dr. Fino interpreted these measurements as showing "essentially the same" diaphragm elevation because there was a minimal degree of difference. Employer's Exhibit 6 at 54. He also noted that he could not recall the exact points where he took each measurement on either x-ray. *Id*. at 56. Moreover, Dr. Fino explained that Claimant's 2020 x-rays show a consistent diaphragm elevation when compared to each other but show a worse elevation when compared to his February 3, 2017 x-ray. He also consistently opined Claimant's 2020 pulmonary function tests show a deterioration in lung function when compared to the February 3, 2017 pulmonary function study. Thus, we see no need to remand this case for the ALJ to reconsider whether Dr. Fino's opinion is reasoned and documented based on his rationale, which the ALJ thoroughly summarized. *See Kertesz v. Crescent Hills Coal*

[11] Dr. Fino refers to the availability of left lung space as measured in one direction on Claimant's 2017 and 2020 x-rays as reflecting a "loss" or "decrease" in left lung volume. Employer's Exhibits 3 at 3 (concluding Claimant lost "lung volume" by "measuring from the apex of the lung to the diaphragm on x-ray films"); 6 at 33-36 (Dr. Fino explaining he reviewed Claimant's x-rays between 2017 and 2020 to assess whether a difference in diaphragm elevation reduced the capacity of the left lung and concluding the x-rays show "left lung volume dec[r]eased").

Co., 788 F.2d 158, 163 (3d Cir. 1986) (interpretation of medical data is for experts, not the ALJ); *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23-24 (1993) (same); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987) (same).

We consider Claimant's arguments on legal pneumoconiosis to be a request to reweigh the evidence which we are not empowered to do. *See Sun Shipbuilding & Dry Dock Co. v. McCabe*, 593 F.2d 234, 237 (3d Cir. 1979); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The ALJ accurately observed Dr. Fino considered all of the medical evidence of record, explained how it supports his diagnosis of a disabling restriction with no reduction in lung volumes, and explained how Claimant's clinical presentation is consistent with a paralyzed diaphragm due to Claimant's prior thymus surgery. Decision and Order at 22-24; Employer's Exhibit 6 at 19-26, 30. Because the ALJ permissibly found Dr. Fino's opinion reasoned and documented, and persuasive to establish that Claimant does not have legal pneumoconiosis, we affirm his credibility determination. Decision and Order at 23. In doing so, we also conclude the ALJ's finding comports with the APA. *See Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354-56 (3d Cir. 1997) (APA's duty to explain is satisfied if reviewing court is able to determine the analytic process behind the result); *Lango v. Director, OWCP*, 104 F.3d 573, 578 (3d Cir. 1997) (ALJ may credit reasoned opinion); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987) (physician's report is "documented" if it sets forth the clinical findings, observations, facts, etc., on which the doctor has based his diagnosis; his report is reasoned if the documentation supports the doctor's assessment of the miner's health). We thus affirm the ALJ's conclusion that Employer disproved the existence of pneumoconiosis and thereby rebutted the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 25.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge