U.S. Department of Labor

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

BRB No. 22-0131 BLA

LAHOMA STEELE (o/b/o JODY A. STEELE)	)	
Claimant-Respondent	)	
v.	)	
JESSE CREEK MINING, LLC	)	DATE ISSUED: 5/10/2023
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 Patrick M. Rosenow, Acting District Chief Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Stone Piper Law, LLC), Birmingham, Alabama, for Claimant.

Jeannie B. Walston and P. Andrew Laird, Jr. (Webster Henry), Birmingham, Alabama, for Employer.

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

PER CURIAM:

Employer appeals Acting District Chief Administrative Law Judge (ALJ) Patrick M. Rosenow's Decision and Order Awarding Benefits (2020-BLA-05017) rendered on a

claim filed on July 29, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant[1] established the Miner had at least forty-two years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he 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). He also found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established at least fifteen years of underground coal mine employment and therefore invoked the Section 411(c)(4) presumption. It also asserts he erred in finding it did not rebut the presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a brief, unless requested.

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

[1] The Miner died on November 16, 2018. Director's Exhibit 13. Claimant is the Miner's widow and is pursuing this claim on his behalf. Director's Exhibit 24.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory 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 established total disability at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 22.

[4] The Board will apply the law of the United States Court of Appeals for the Eleventh Circuit because the Miner performed his last coal mine employment in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 9, 10; Hearing Transcript at 18.

Invocation of the Section 411(c)(4) Presumption – Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines, or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i).

Employer concedes the Miner had at least 19.3 years of coal mine employment. Employer's Brief at 34 ("giving the Miner all benefits of doubt, the most, possible [coal mine employment] years is only 19.3 years.").[5] It also stipulated that eight of the Miner's years of coal mine employment with Employer constitute underground coal mine employment. Employer's Brief at 3; Joint Prehearing Statement; Hearing Tr. at 7-8. Employer argues, however, that the ALJ erred in finding the remaining years of the Miner's coal mine employment with operators other than Employer took place in underground coal mines and, therefore, erred in finding the Miner had at least fifteen years of underground coal mine employment. Employer's Brief at 6-36. We disagree.

The ALJ summarized Claimant's testimony on the nature of the Miner's employment as follows:

> Claimant and [the] Miner married in 1972 and he was already a miner at that time. She recalled the names of only two of the companies he worked for between 1969 and 1972. The claims examiner at [Office of Workers' Compensation] called her to identify the coal mining companies listed on the Social Security [r]ecords. Most of the mines were in West Virginia until 1997 when they went to Alabama. *All of [the] Miner's jobs were underground until the last five years when he was stationed above ground as a mechanic and electrician but went underground to do the jobs*. Prior to his last five years, when he worked primarily as a mechanic and an electrician, he ran every type of machinery in the coal mines. [The] Miner complained to Claimant about the dust and mud he worked in. She had to wash his clothes two or three times to get them clean and the dust was in his hair and everywhere. Claimant described the coal dust in [the] Miner's truck and stated that they had to pressure wash it twice a month to clean it out.

Decision and Order at 3-4 (emphasis added); *see* Hearing Tr. 16-22.

[5] Although Employer argues the ALJ erred in finding at least forty-two years of coal mine employment, Employer's Brief at 6-36, it has not explained how this alleged error would make a difference for purposes of invoking the Section 411(c)(4) presumption. *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").

The ALJ found Claimant's testimony credible because she "was fully familiar with her husband's employment, including whether the employment related to coal mining and whether it was underground" and she "was specific about what she could recall and what she could not recall." Decision and Order at 12-15. In light of Claimant's testimony that all of the Miner's coal mine jobs took place at underground coal mines, including the last five years when he worked aboveground at an underground coal mine site, the ALJ found all of the Miner's coal mine employment constitutes underground coal mining. *Id.*

Employer argues the ALJ erred in crediting Claimant's testimony because she did not specifically set forth the nature of the Miner's coal mine employment or discuss each company he worked for and thus was not adequately detailed to constitute credible testimony. Employer's Brief at 12-16. The ALJ evaluates the credibility and weight of the evidence, including witness testimony. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (ALJ is granted broad discretion in evaluating the credibility of the evidence, including witness testimony); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (declining to reweigh witness testimony on smoking history in spite of alleged inconsistencies that the employer identified); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989). The Board will not disturb an ALJ's credibility findings unless they are inherently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc). Employer's argument amounts to a request to 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 permissibly found that Claimant established that all of the Miner's employment took place at underground coal mines,[6] and Employer concedes he had at least fifteen years of coal mine employment, we affirm the ALJ's finding that Claimant established at least fifteen years of underground[7] coal mine employment and invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(i).

[6] Employer argues the other evidence of record, including the Miner's Social Security Administration earnings records, other statements from Claimant and the Miner's son, and documentary evidence, is not credible and does not establish at least fifteen years of underground coal mine employment. Employer's Brief at 6-36. It has not explained how this allegation of error makes a difference in this case for purposes of invoking the Section 411(c)(4) presumption because Claimant established at least fifteen years of underground coal mine employment through Claimant's sworn hearing testimony and Employer's concession. *See Shinseki*, 556 U.S. at 413 (2009).

[7] To the extent Employer argues the ALJ erred in failing to address whether the Miner was regularly exposed to coal mine dust, we reject this argument. The type of mine (underground or surface), rather than the location of where the particular miner worked (below ground or aboveground), determines whether a miner is required to show

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[8] 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.[9]

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[10] *See* 20 C.F.R. §§718.201(a)(2), (b),

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comparability of conditions. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013); *Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-28-29 (2011). Thus, a miner who worked aboveground at an underground mine site need not otherwise establish that his working conditions were substantially similar to those in an underground mine. *Ramage*, 737 F.3d at 1058-59; *Muncy*, 25 BLR at 1-29. Because Claimant established at least fifteen years of underground coal mine employment, she was not required to establish the Miner was regularly exposed to coal mine dust.

[8] "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).

[9] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 23.

[10] Employer repeatedly argues Claimant did not credibly establish pneumoconiosis. Employer's Brief at 40, 42-43, 50, 54-55. This assertion misstates Employer's burden on rebuttal. The ALJ correctly noted that once Claimant invoked the Section 411(c)(4) presumption, Employer bears the burden to rebut a finding of legal pneumoconiosis. *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) ("Once the presumption is invoked, there is no need for the claimant to prove the existence of pneumoconiosis; instead, pneumoconiosis arising from coal mine employment is presumed, subject only to rebuttal by the employer . . . ."); *see* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 22, 23.

718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the opinions of Drs. Hasson and Rosenberg that the Miner did not have legal pneumoconiosis.[11] Decision and Order at 24-27.

Dr. Hasson opined the Miner had chronic obstructive pulmonary disease (COPD) due to cigarette smoking and wood working, and unrelated to coal mine dust exposure. Employer's Exhibit 3 at 7. The ALJ found Dr. Hasson's opinion not credible because the doctor did not "discuss in any way his analysis with respect to legal pneumoconiosis," did not "explain how he arrived at the conclusion that [the] Miner's COPD was caused solely by cigarette smoke" and wood working, and did not address how he excluded coal mine dust exposure as a contributing cause of the smoking-related COPD. Decision and Order at 24; *see U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989); *Stallard*, 876 F.3d at 673-74 n.4 (ALJ permissibly discredited medical opinions that "solely focused on smoking" as a cause of obstruction and "nowhere addressed why coal dust could not have been an additional cause").

Dr. Rosenberg opined the Miner had COPD and emphysema due to cigarette smoking and unrelated to coal dust exposure. Employer's Exhibit 4 at 10-12. The ALJ found Dr. Rosenberg's opinion not credible because the doctor focused on the effects of cigarette smoking but did not address whether coal mine dust also contributed to the smoking-related COPD. *Jones*, 386 F.3d at 992; *Jordan*, 876 F.2d at 1460; *Stallard*, 876 F.3d at 673-74 n.4; Decision and Order at 24-26. He also discredited Dr. Rosenberg's opinion as based on statistical generalities and studies that "appear to have little relevance to the issue at hand." Decision and Order at 24-26; *see Jones*, 386 F.3d at 992; *Jordan*, 876 F.2d at 1460; *Stallard*, 876 F.3d at 671-72; *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). The ALJ further found the doctor's opinion is based on reasoning that is inconsistent with the studies relied upon by the Department of Labor in the preamble to the 2001 revised regulations. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A&E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Decision and Order at 24-26. Finally, the ALJ found Dr. Rosenberg did not address whether the Miner's bronchitis evidenced by his treatment records constitutes legal pneumoconiosis.

[11] Employer argues Dr. Connolly excluded legal pneumoconiosis. Employer's Brief at 49. We disagree. The record reflects that Dr. Connolly diagnosed chronic obstructive pulmonary disease (COPD) due to cigarette smoking, but did not specifically opine the COPD is unrelated to coal mine dust exposure. *Smith*, 880 F.3d at 699; Employer's Exhibit 6 at 51-52. Thus his opinion does not aid Employer on rebuttal.

See W. Va. CWP Fund v. Director, OWCP [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) (the rebuttal inquiry is "whether the employer has come forward with affirmative proof that the [miner] does not have legal pneumoconiosis, because his impairment is not in fact significantly related to his years of coal mine employment").

Employer summarizes the opinions of Drs. Hasson and Rosenberg and argues that the ALJ should have credited their opinions based on their qualifications. Employer's Brief at 36-56. It argues their opinions are well-reasoned[12] and documented, and adequately explain why the Miner did not have legal pneumoconiosis. *Id*. Employer does not identify any specific error in the ALJ's credibility findings. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b). Rather, Employer's arguments amount to 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 permissibly discredited the opinions of Drs. Hasson and Rosenberg, the only opinions supportive of Employer's burden on rebuttal, we affirm his determination that Employer did not disprove legal pneumoconiosis.[13] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. Therefore, we affirm the ALJ's conclusion that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

[12] Employer argues the ALJ substituted his opinion for that of a medical expert by finding the opinions of Drs. Hasson and Rosenberg unpersuasive. Employer's Brief at 50-51. Contrary to Employer's argument, the "question of whether [a] medical report is sufficiently documented and reasoned is one of credibility for the fact finder." *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989).

[13] The ALJ found the Miner's treatment records support a finding of legal pneumoconiosis because they "repeatedly note [the] Miner's history of coal [mine] dust exposure, implying without explicitly stating, that the coal [mine] dust exposure was a contributing cause of [the] Miner's chronic respiratory ailments." Decision and Order at 24. Although Employer argues this finding is erroneous, it does not allege that the treatment records include an opinion, other than its assertion with respect to Dr. Connolly discussed above, where a doctor affirmatively excluded legal pneumoconiosis. *Smith*, 880 F.3d at 699. We therefore need not address Employer's contentions regarding the ALJ's consideration of the treatment records. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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); Decision and Order at 27-28. He discredited the opinions of Drs. Hasson and Rosenberg because they failed to diagnose legal pneumoconiosis, contrary his finding that Employer did not rebut the disease. Decision and Order at 27-28. Because Employer raises no specific arguments on disability causation apart from its assertion that the ALJ erred in finding it failed to disprove the existence of legal pneumoconiosis, we affirm the ALJ's determination that the opinions of Drs. Hasson and Rosenberg are not credible to prove that no part of the Miner's total disability was due to pneumoconiosis. *See Oak Grove Res., LLC v. Director, OWCP* [*Ferguson*], 920 F.3d 1283, 1289 (11th Cir. 2019); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Skrack*, 6 BLR at 1-711; Decision and Order at 27-28; Employer's Brief at 56. We therefore affirm the ALJ's finding that Employer failed to rebut disability causation. 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge