U.S. Department of Labor

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

BRB No. 22-0143 BLA

KENNETH R. THOMPSON (Deceased)[1]	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LAUREL RUN RECLAMATION COMPANY	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 5/10/2023
	)	
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 on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

[1] Claimant died on September 11, 2021, and his daughter, Jill Reese, is pursuing the miner's claim on his behalf. Claimant's Remand Brief at 1.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits on Remand (2019-BLA-05721) rendered on a claim filed on May 7, 2018, 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 (Board) for the second time.

The Board previously vacated the ALJ's denial of benefits because he failed to adequately explain the basis for his determination that Claimant established fewer than fifteen years of coal mine employment and thus could not invoke the Section 411(c)(4) presumption.[2] *Thompson v. Laurel Run Reclamation Co.*, BRB No. 20-0252 BLA (Apr. 19, 2021) (unpub.). Additionally, in the interest of judicial economy, the Board held the ALJ failed to adequately explain his discrediting of Dr. Zlupko's opinion that Claimant suffered from legal pneumoconiosis. Therefore, the case was remanded to the ALJ for reconsideration as to whether Claimant established at least fifteen years of qualifying coal mine employment to invoke the Section 411(c)(4) presumption; if the presumption was invoked, whether Employer rebutted it; and, as necessary, whether Claimant established entitlement at 20 C.F.R. Part 718 without the aid of the presumption. 20 C.F.R. §§718.202(a), 718.204(c).

On remand, the ALJ determined Claimant established only 8.322 years of underground coal mine employment and thus found he could not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.101(a)(32)(iii).

[2] Under Section 411(c)(4), Claimant was entitled to a rebuttable presumption that he 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Initially, the ALJ found Claimant had 14.7 years of underground employment. ALJ's Denial at 3-5. The Board affirmed as unchallenged that all of Claimant's coal mine employment was underground and that he established he had a totally disabling respiratory or pulmonary impairment. *Thompson v. Laurel Run Reclamation Co.*, BRB No. 20-0252 BLA, slip op. at 7 n.10 (Apr. 19, 2021) (unpub.).

However, the ALJ concluded Claimant established legal pneumoconiosis and total disability due to legal pneumoconiosis and awarded benefits. 20 C.F.R. §§718.202(a), 718.204(c).

On appeal, Employer argues the ALJ erred by failing to follow the Board's directions to reconsider the medical opinions. It further argues the ALJ erred in finding Claimant established legal pneumoconiosis and disability causation. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.

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.[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).

Entitlement under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(4) presumption, 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. 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must demonstrate he had 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). The ALJ credited Dr. Zlupko's opinion that Claimant suffers from legal pneumoconiosis over Dr. Basheda's contrary opinion. Decision and Order on Remand at 16-26.

[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); Decision and Order on Remand at 8; Director's Exhibit 3.

Initially, we reject Employer's argument that the ALJ failed to account for the physician's qualifications in determining the weight to accord their opinions. The ALJ accurately noted Dr. Basheda is Board-certified in Internal Medicine with subspecialties in Pulmonary Diseases and Critical Care and has performed pulmonary evaluations on behalf of the Department of Labor Decision and Order on Remand at 15; Employer's Exhibit 2. He also correctly noted Dr. Zlupko is Board-certified in Internal Medicine, Director of the Lung Disease Center of Central Pennsylvania, Chairman of the Lung Disease Foundation of Central Pennsylvania, and has published several articles on cardiopulmonary science. Decision and Order on Remand at 16; Director's Exhibit 12. We see no error in his conclusion that the physicians are "roughly similarly qualified." Decision and Order on Remand at 16; *see Soubik v. Director, OWCP*, 366 F.3d 226, 235 (3d Cir. 2004); *Balsavage v. Director, OWCP*, 295 F.3d 390, 397 (3d Cir. 2002).

Moreover, we reject Employer's argument that the ALJ did not resolve the conflict in the medical opinions and explain the bases for his credibility determinations. Employer's Brief at 9. The Board previously affirmed, as unchallenged, the ALJ's discrediting of Dr. Basheda's opinion as not well-reasoned and inconsistent with the regulations and the preamble to the 2001 regulatory revisions. *Thompson*, BRB No. 20-0252 BLA, slip op. at 6 n.7. Because Employer has not shown the Board's decision was clearly erroneous, or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). On remand, the ALJ reiterated that he gave little weight to Dr. Basheda's opinion on legal pneumoconiosis for the same reasons, and we affirm that determination as supported by substantial evidence. *See Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011), *aff'g, J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986).

Dr. Zlupko diagnosed severe chronic obstructive pulmonary disease (COPD) due to smoking and coal mine dust exposure. Director's Exhibits 11, 17. The ALJ found Dr. Zlupko's opinion adequately reasoned and consistent with the preamble and regulations. Decision and Order on Remand at 16, citing 20 C.F.R. §718.201.

Employer's sole challenge to the ALJ's crediting of Dr. Zlupko's opinion on legal pneumoconiosis is that he did not discuss the difference between Dr. Zlupko's reliance on a fourteen-year coal mine employment history and the ALJ's remand finding of only 8.44 years. Employer's Brief at 7-8. Even so, any error would be harmless. *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).

Employer specifically stipulated at the hearing that Claimant had at least fourteen years of coal mine employment. Hearing Transcript at 5. Employer also stated in his Closing Memorandum to the ALJ "the Claimant was employed in the Nation's Coal Mines for fourteen years." 2019 Employer's Closing Memorandum at 3. It reiterated that same statement in its Remand Brief and also stated, "The original finding that Claimant only established 14.17 years of coal mine employment was not erroneous." 2021 Employer's Remand Brief at 2, 5. The ALJ originally found 14.17 years of coal mine employment, but did not adequately explain why Claimant had *less* than the fifteen years necessary to invoke the presumption. *Thompson*, BRB No. 20-0252 BLA, slip op. at 3-5; ALJ's Denial at 3-5. Thus, we remanded the case for the ALJ to explain why the record did not support a finding of *at least* fifteen years of coal mine employment. *Thompson*, BRB No. 20-0252 BLA, slip op. at 3-5. The ALJ's decision to credit Claimant with under nine years of coal mine employment on remand thus presumably suffers from the same errors as his original decision.

But we need not remand this case for a second time (adding years to its prosecution) for the ALJ to once again determine Claimant's coal mine employment given Employer's repeated stipulations that Claimant had at least fourteen years, which establishes a floor for the inquiry. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013) ("stipulations and concessions bind those who make them"); *Richardson v. Director, OWCP*, 94 F.3d 164, 167 (4th Cir. 1996) ("[A] stipulation of fact that is fairly entered into is controlling on the parties *and the court is bound to enforce it*.") (citation omitted, emphasis added). And because Dr. Zlupko relied on fourteen-years consistent with Employer's stipulation and the ALJ's original determination, Employer's assertions that his opinion possibly lacks credibility as based on a misunderstanding of Claimant's employment history is inaccurate. *See McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984); *Baker v. Director, OWCP*, 6 BLR 1-976, 1-977-78 (1984).

Because the ALJ acted within his discretion in otherwise finding Dr. Zlupko's opinion reasoned and documented regarding the contribution of both smoking and coal mine dust exposure to Claimant's COPD, we affirm the ALJ's finding that Claimant established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986).

We therefore affirm the ALJ's conclusion that Claimant established the existence of legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); Decision and Order on Remand at 15-19.

Disability Causation

To establish disability causation, Claimant must prove pneumoconiosis was a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling respiratory or pulmonary impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(i), (ii).

Dr. Zlupko opined that Claimant's is totally disabled due to COPD significantly related to both smoking and coal mine dust exposure. Director's Exhibits 11, 17. Because the ALJ found Dr. Zlupko's opinion reasoned and documented, and we affirmed the ALJ's finding that Claimant's COPD constitutes legal pneumoconiosis, it follows that Dr. Zlupko's opinion is sufficient to satisfy Claimant's burden of proving he is disabled due to legal pneumoconiosis. *See Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); *see also Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013). Further, the ALJ permissibly discredited Dr. Basheda's opinion on disability causation because he did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that Claimant has the disease. *See Soubik*, 366 F.3d at 234; *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (where a physician erroneously fails to diagnose pneumoconiosis, his opinion as to disability causation "is not worthy of much, if any, weight"); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013); Decision and Order on Remand at 26. Therefore, we affirm the ALJ's conclusion that Claimant established total disability due to legal pneumoconiosis at 20 C.F.R. §718.204(c). Decision and Order on Remand at 25-26.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge