U.S. Department of Labor

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

BRB Nos. 22-0316 BLA
and 22-0317 BLA

JACKIE PUCKETT (o/b/o and Widow of TERRY PUCKETT) Claimant-Respondent v. ISLAND CREEK POCAHONTAS Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/17/2023 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

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

Joseph D. Halbert and Jarrod R. Portwood (Shelton, Branham, & Halbert PLLC), Lexington, Kentucky, for Employer.

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

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

Employer appeals Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Awarding Benefits (2019-BLA-05250, 2020-BLA-05231) rendered on claims

filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on December 15, 2017, and a survivor's claim filed on August 21, 2019.

The ALJ credited the Miner with 14.4 years of coal mine employment and thus found Claimant[1] could not invoke the presumption of total disability or death due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718 in the miner's claim, the ALJ found Claimant established the Miner had legal pneumoconiosis. 20 C.F.R. §718.202(a). He also found Claimant established the Miner had a totally disabling respiratory or pulmonary impairment, which was due to his legal pneumoconiosis. 20 C.F.R. §718.204(b), (c). Thus, he awarded benefits in the miner's claim. In the survivor's claim, the ALJ found Claimant entitled to derivative benefits pursuant to Section 422(*l*) of the Act.[3] 30 U.S.C. §932(*l*) (2018).

On appeal, Employer contends the ALJ erred in finding Claimant established the Miner had legal pneumoconiosis and his total disability was due to pneumoconiosis.[4] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

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

[1] Claimant is the widow of the Miner, who died on June 13, 2019. Survivor's Claim (SC) Director's Exhibit 4. She is pursuing both his claim and her survivor's claim.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled or his death was 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.

[3] Section 422(*l*) of the Act provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established the Miner had 14.4 years of coal mine employment and a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2); Decision and Order at 8, 33.

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, 362 (1965).

Miner's Claim – Part 718 Entitlement

To obtain benefits without the aid of a statutory 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 of these elements precludes an award. *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).

Smoking History

Initially, we reject Employer's assertion that the ALJ erred in not making a more specific finding of the length of the Miner's smoking history, arguing that the difference between a 21.5 to 43 pack-year smoking history is too significant a range. Employer's Brief at 4. The ALJ considered widely varied smoking histories reported in the Miner's treatment records by physicians and given by the Miner and Claimant. Miner's Claim (MC) Director's Exhibits 14, 20, 36-38; Claimant's Exhibit 4; Hearing Transcript at 22-23. He found "the earliest Miner began smoking is 1976, the latest he stopped smoking is 2019, and the most he smoked was one-half pack to one pack per day." Decision and Order at 5; MC Director's Exhibits 14, 20, 36-38; Claimant's Exhibit 4; Hearing Transcript at 22-23. The ALJ rationally found that he could not determine the true length of the Miner's smoking history, but reasonably found it was between 21.5 to 43 pack-years. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985); Decision and Order at 5.

Moreover, even if we were to agree with Employer that the ALJ erred in "failing to make a more specific" smoking history finding, it has not explained why the range he found would require remand. *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). In considering Dr. Forehand's medical opinion that the Miner had legal pneumoconiosis, the ALJ considered his own finding on

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Miner's Claim (MC) Director's Exhibit 7; Hearing Transcript at 14.

the length and rate of the Miner's smoking in noting that Dr. Forehand's reliance on a 39-year smoking history at one-half pack per day is at the lower end of the range, but finding it does not undermine his opinion as the physician recognized that the Miner had a "prolonged exposure to cigarette smoke" and that this exposure played a significant role in his respiratory impairment. Decision and Order at 15; MC Director's Exhibit 14. Moreover, as discussed below, the ALJ did not discredit the contrary opinions of Drs. Jarboe and Vuskovich based on their understanding of the Miner's smoking history; rather, he found the rationale underlying their opinions lacked credibility. Decision and Order at 20-22, 25-27. Consequently, we reject Employer's arguments.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must establish the Miner suffered from 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 United States Court of Appeals for the Fourth Circuit, whose law applies to this claim, has held a claimant can establish legal pneumoconiosis by showing coal mine dust exposure contributed "in part" to a miner's respiratory or pulmonary impairment. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311 (4th Cir. 2012); *see also Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (A miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment.").

The ALJ considered the opinions of Drs. Forehand, Jarboe, and Vuskovich. Decision and Order at 13-27. Dr. Forehand diagnosed legal pneumoconiosis in the form of a totally disabling obstructive lung disease caused by exposure to coal mine dust and cigarette smoking. MC Director's Exhibit 14. Drs. Jarboe and Vuskovich diagnosed totally disabling chronic obstructive pulmonary disease (COPD) caused by the Miner's history of smoking cigarettes and unrelated to his coal mine dust exposure.[6] MC Director's Exhibit 20; Employer's Exhibits 1, 2, 4. The ALJ credited Dr. Forehand's opinion as well-reasoned and documented. Decision and Order at 14-15. He further discredited the opinions of Drs. Jarboe and Vuskovich as inadequately explained and inconsistent with the medical science underlying the regulations. *Id.* at 20-22, 25-27. He thus found Claimant established legal pneumoconiosis based on Dr. Forehand's opinion. *Id.* at 27.

[6] Drs. Jarboe and Vuskovich also diagnosed asthma, which they opined was unrelated to the Miner's coal mine dust exposure. MC Director's Exhibit 20; Employer's Exhibits 1, 2, 4.

Employer contends the ALJ erred in his weighing of the medical opinion evidence. Employer's Brief at 5-12. We disagree.

Contrary to Employer's arguments, the ALJ was not required to discredit Dr. Forehand's opinion because he considered less evidence than the other physicians. Employer's Brief at 5-7. Rather, an ALJ may credit a physician who did not review all the medical evidence when the opinion is otherwise well-reasoned, documented, and based on the physicians' own examination of the miner and objective testing results. 20 C.F.R. §718.202(a)(4); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987) (a reasoned opinion is one in which the ALJ finds the underlying documentation adequate to support the physician's conclusion).

Nor was the ALJ required to discredit Dr. Forehand for relying on inaccurate histories of smoking or coal mine dust exposure. Employer's Brief at 5-7. Instead, as the trier of fact, the ALJ is charged with determining the credibility of the evidence and whether a physician's opinion is adequately reasoned. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). Dr. Forehand conducted the Department of Labor (DOL) sponsored evaluation of the Miner on January 3, 2018. MC Director's Exhibit 14. He noted the Miner's medical, social, and occupational histories, and symptoms of wheezing attacks, daily productive cough, and dyspnea for the last seven years. *Id.* On physical examination, he noted no unusual findings, a clear chest x-ray, and no arterial hypoxemia, and no acute damage on an electrocardiogram. *Id.* However, a pulmonary function study demonstrated an obstructive ventilatory pattern. *Id.* He opined that the Miner's obstructive impairment is a direct result of "prolonged exposure to cigarette smoke for 39 years and to coal mine dust on a regular basis for 16 years while working at the face of underground coal mines." *Id.* Specifically, he explained that cigarette smoking and coal mine dust are "inhaled irritants that injured [the Miner's] airways by causing inflammation and narrowing of the bronchi," that the effects of these two exposures were additive, and his cigarette smoke exposure would have enhanced the impact of the coal mine dust. *Id.*

The ALJ acknowledged that Dr. Forehand relied on a smoking history on the lower end of the range that the ALJ had found and on a slightly higher length of coal mine employment. Decision and Order at 15. However, the ALJ permissibly found that it did not affect the credibility of Dr. Forehand's opinion as the doctor recognized that the "Miner had 'prolonged exposure to cigarette smoke' and that such exposure played a significant role in his respiratory impairment," and his reliance on a coal mine employment 1.6 years greater than his own finding was "insignificant and did not compel rejection of his conclusion." *Id.*; *see Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick*, 13 BLR at 1-54; *Maypray*, 7 BLR at 1-686 (the ALJ is responsible for making a factual determination as to the length and extent of a miner's smoking history and the effect of an

inaccurate smoking history on the credibility of a medical opinion). As it is supported by substantial evidence, we affirm the ALJ's crediting of Dr. Forehand's opinion that the Miner's exposure to coal mine dust and smoking were additive in causing his obstructive lung disease and thus the Miner had legal pneumoconiosis because his obstructive lung disease was significantly related to, or substantially aggravated by, coal mine dust exposure. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 14; MC Director's Exhibit 14.

We further reject Employer's arguments that the ALJ gave impermissible reasons for discrediting its experts, Drs. Jarboe and Vuskovich. Employer's Brief at 8-13.

Dr. Jarboe relied, in part, on his opinion that the Miner's FEV1 value, in comparison to his FVC value, on his pulmonary function tests was too reduced and his residual volume too elevated to be accounted for by his coal mine dust exposure to find the Miner's COPD did not constitute legal pneumoconiosis. MC Director's Exhibit 20; Employer's Exhibit 1. The ALJ permissibly discredited his opinion as inconsistent with the medical studies that the DOL cited in the preamble to the 2001 revised regulations that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017) (the ALJ permissibly discredited a medical opinion inconsistent with the DOL's recognition that coal mine dust exposure can cause clinically significant obstructive disease that can be shown by a reduction in the FEV1/FVC ratio on pulmonary function testing); *Cochran*, 718 F.3d at 323; *Looney*, 678 F.3d at 313; *see* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000). Dr. Jarboe further opined that coal mine dust exposure could not account for the reversible portion of the Miner's impairment, and generally opined cigarette smoking is more harmful than coal mine dust exposure. The ALJ permissibly discredited his opinion as he failed to adequately explain how the Miner's partial response to bronchodilators on pulmonary function testing precluded coal mine dust exposure from contributing to the fixed component of the Miner's obstruction. *See Looney*, 678 F.3d at 313-14 (an ALJ may accord less weight to a physician who fails to adequately explain why a miner's chronic lung disease "was not due at least in part to his coal dust exposure"); *Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356 (6th Cir. 2007) (an ALJ may accord less weight to a physician who fails to adequately explain why a miner's response to bronchodilators on pulmonary function testing necessarily eliminated coal dust exposure as a cause of his obstructive lung disease); Decision and Order at 21. Finally, the ALJ also permissibly rejected Dr. Jarboe's opinion as it was based on statistical generalities rather than the specific facts of the Miner's case, and he failed to "adequately consider whether coal mine dust exposure would have aggravated Miner's asthma or obstructive pulmonary impairment." *See Stallard*, 876 F.3d at 671-72; *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 20.

Similarly, Dr. Vuskovich opined that the Miner's obstructive disease was due to asthma caused by smoking and unrelated to coal mine dust exposure. Employer's Exhibit 2 at 13. Dr. Vuskovich opined dust exposure does not cause asthma and the Miner's disease was more consistent with it as his impairment was "significantly reversible," he had symptoms of wheezing, and he had normal oxygen transfer. Employer's Exhibits 2, 4. The ALJ permissibly found Dr. Vuskovich's opinion inadequately reasoned as he failed to explain why coal mine dust exposure was not additive along with smoking in causing or aggravating his obstructive impairment and asthma. 20 C.F.R. §718.201(a)(2), (b); *see Owens*, 724 F.3d at 558; *Looney*, 678 F.3d at 313-14; *Barrett*, 478 F.3d at 356; Decision and Order at 25. Further, the ALJ also permissibly found his explanation unpersuasive in light of the DOL's recognition in the preamble to the revised 2001 regulations of credible scientific studies showing coal dust exposure may cause clinically significant airways obstruction in the absence of smoking and that the risks of smoking and coal dust exposure are additive. *See Stallard*, 876 F.3d at 671-72; *see also Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); 65 Fed. Reg. at 79,939-42; Decision and Order at 8.

Consequently, we affirm the ALJ's determination that the medical opinion evidence establishes the existence of legal pneumoconiosis in the form of an obstructive impairment due in part to coal mine dust exposure. 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); Decision and Order at 27.

Disability Causation

To establish disability causation, Claimant must prove pneumoconiosis was a "substantially contributing cause" of the Miner's 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 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)(1)(i), (ii); *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 37-38 (4th Cir. 1990). Employer generally argues the ALJ's errors in weighing the medical opinion evidence on the existence of legal pneumoconiosis apply to his findings on disability causation. Employer's Brief at 7-13; *see* 20 C.F.R. §718.204(c).

Because the ALJ found Dr. Forehand's opinion reasoned and documented, and therefore sufficient to prove the Miner's totally disabling obstructive lung disease constitutes legal pneumoconiosis, the ALJ rationally found the physician's opinion also establishes the Miner was totally disabled due to the disease; it is the only logical conclusion from the facts. *See Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 186-87 (4th Cir. 2014); *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); *Hawkinberry v. Monongalia Cnty. Coal Co*., 25 BLR 1-249, 1-255-57 (2019); Decision and Order at 33-34. Consequently, we affirm the ALJ's determination that the Miner was totally disabled due to legal pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 35. We therefore affirm the award of benefits in the miner's claim. Decision and Order at 36.

Survivor's Claim

The ALJ found Claimant entitled to survivor's benefits based on the award in the miner's claim pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018). Decision and Order at 35-36. Employer raises no specific error with regard to this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Having affirmed the ALJ's award of benefits in the miner's claim, we affirm his determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 35.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge