U.S. Department of Labor

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

BRB No. 20-0221 BLA

JAMES F. GRAHAM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 06/23/2022
PEABODY ENERGY CORPORATION	)	
	)	
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 of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Awarding Benefits (2018-BLA-05601) rendered on a claim filed on August 17, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Eastern Associated Coal Company (Eastern) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier. She also determined Claimant established at least fifteen years of coal mine employment and that he suffers from complicated pneumoconiosis arising out of that employment. 20 C.F.R. §§718.304, 718.203. Thus, the ALJ found Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, and awarded benefits. 30 U.S.C. §921(c)(3) (2018).

On appeal, Employer argues the ALJ erred in finding Peabody Energy is the liable carrier.[1] Claimant responds, asserting he is entitled to benefits regardless of which operator or carrier is liable; alternatively, if Peabody Energy is relieved of liability, he contends the Benefits Review Board should hold the Black Lung Disability Trust Fund (the Trust Fund) liable for the payment of benefits.

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.[2] 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).

Responsible Insurance Carrier

Claimant last worked in coal mine employment from 2000 to August 18, 2007 for Eastern, a subsidiary of Peabody Energy. Director's Exhibit 37 at 11; Hearing Transcript at 13-14, 31. On November 1, 2007, Peabody Energy sold Eastern to Patriot Coal Corporation (Patriot). In 2011, the Department of Labor (DOL) authorized Patriot to self-

[1] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, and the award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 30 U.S.C. §921(c)(3) (2018); Decision and Order at 15-16 (unpaginated).

[2] 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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 18.

insure for black lung liabilities relating to the Peabody Energy subsidiaries it purchased, including Eastern, retroactive to July 1, 1973. Employer's Brief at 4, 7; Employer's Closing Argument at 5, 8. This authorization required Patriot to make an initial deposit of negotiable securities in the amount of $15 million. Employer's Brief at 6. In 2015, Patriot went bankrupt. *Id*. at 16-17.

Employer admits Eastern is the correct responsible operator and was self-insured through Peabody Energy on the last day Eastern employed Claimant.[3] Employer's Brief at 3. However, it contests Peabody Energy's liability as the responsible carrier. *Id*. at 3-18. Employer maintains Patriot is the responsible carrier because Patriot last insured Eastern's black lung liabilities, the DOL released Peabody Energy from liability, and the Director is equitably estopped from imposing liability on Peabody Energy. *Id*. at 5-15. It further maintains Black Lung Benefits Act Bulletin (BLBA Bulletin) Nos. 12-07 and 14-02 place liability on the Trust Fund when a private insurer is unable to assume liability. *Id*. at 14, 15-19.

District Director Proceedings

After Claimant filed his claim on August 17, 2016, the district director identified Eastern, self-insured through Peabody Energy, as the "potentially liable operator" in a September 8, 2016 Notice of Claim. Director's Exhibit 25. This notice gave Employer ninety days to submit evidence disputing its designation as a potentially liable operator or carrier. *Id*. In response, Employer denied liability, asserting Patriot is the responsible carrier and requesting that the district director dismiss Peabody Energy as the liable carrier. Director's Exhibit 27.

On April 3, 2017, the district director issued a Schedule for the Submission of Additional Evidence (SSAE), identifying Eastern as the responsible operator and Peabody Energy as its insurer. Director's Exhibit 28. The district director informed Eastern and

[3] Eastern Associated Coal Company (Eastern) qualifies as a potentially liable operator because it is undisputed that: (1) Claimant's disability arose at least in part out of employment with Eastern; (2) Eastern operated a mine after June 30, 1973; (3) Eastern employed Claimant for a cumulative period of at least one year; (4) Claimant's employment included at least one working day after December 31, 1969; and (5) Eastern is capable of assuming liability for the payment of benefits through Peabody Energy Corporation's (Peabody Energy's) self-insurance coverage. 20 C.F.R. §725.494(a)-(e). Because Eastern was the last potentially liable operator to employ Claimant, the ALJ found Eastern is the responsible operator and Peabody Energy is the responsible carrier. Decision and Order at 20 (unpaginated).

Peabody Energy that they had until July 2, 2017, to submit additional documentary evidence relevant to liability and identify any liability witnesses they intended to rely on if the case were referred to the Office of Administrative Law Judges (OALJ). *Id*. The district director advised that, "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability, or testimony of a witness not identified at this stage of the proceedings, may be admitted into the record once a case is referred to the [OALJ]." *Id*. at 3 (citing 20 C.F.R. §725.456(b)(1)).

Employer responded to the SSAE on April 24, 2017, and contested liability. Director's Exhibit 29. Thereafter, it requested two extensions of time to submit medical evidence. Director's Exhibits 30, 35. The district director gave Employer until December 1, 2017, to submit evidence. Director's Exhibit 36. It did not submit additional evidence to the district director to support its controversion of liability or identify any liability witnesses.

The district director issued a Proposed Decision and Order (PDO) on January 22, 2018, awarding benefits and designating Eastern as the responsible operator and Peabody Energy as the responsible carrier. Director's Exhibit 37. In a January 26, 2018 response to the PDO, Employer denied liability and requested a hearing. Director's Exhibit 43.

ALJ Proceedings

After the case was transferred to the OALJ, Employer submitted documentary evidence pertaining to its liability. Specifically, it submitted Employer's Exhibits 1 through 7[4] and an unmarked exhibit – the transcript of the deposition of a DOL employee, Mr. David Benedict, it had conducted as part of other black lung claims and which it had

[4] Employer's Exhibit 1 is Patriot Coal Corporation's (Patriot's) authorization to self-insure; Employer's Exhibit 2 is the March 4, 2011 letter from Mr. Steven Breeskin, former Director of the Division of Coal Mine Workers' Compensation (DCMWC), to Patriot; Employer's Exhibit 3 is a November 23, 2010 letter from Mr. Breeskin returning to Patriot two unsigned copies of an indemnity bond; Employer's Exhibit 4 is an undated letter from Mr. Michael Chance, the Director of the DCMWC, regarding Patriot's self-insurance reauthorization audit requiring retroactive coverage for all claims through July 1, 1973; Employer's Exhibit 5 is a March 4, 2011 indemnity agreement releasing Bank of America from liability arising from the loss of an original letter of credit for $13 million issued for Peabody Energy's self-insurance because the DOL had either lost or destroyed it; Employer's Exhibit 6 is documentation dated November 17, 2015, showing a transfer of $15 million from Patriot to the Trust Fund; and Employer's Exhibit 7 is Peabody Energy's indemnity bond.

not previously submitted to the district director in this claim. Employer's March 28 and March 29, 2019 Letters. The ALJ excluded Employer's Exhibits 1 through 7 and the deposition transcript because Employer did not submit this evidence to the district director, timely identify Mr. Benedict as a liability witness, or establish extraordinary circumstances for failing to do so. 20 C.F.R. §725.456(b)(1); Order Addressing Employer's Submission of Deposition Testimony and Deposition Exhibits (October 24, 2019 Order) at 3-5; *see* Decision and Order at 18 n.13 (unpaginated).

In her Decision and Order, the ALJ found Claimant entitled to benefits. She determined Eastern satisfied the responsible operator criteria at 20 C.F.R. §725.494, and it had not shown its self-insurer, Peabody Energy, was incapable of paying benefits pursuant to Sections 725.494(e) and 725.495(b). Decision and Order at 19-20 (unpaginated). Specifically, she rejected Employer's argument that the Director had released Peabody Energy from liability by authorizing Patriot to self-insure and releasing Peabody Energy's surety bond. *Id.* at 21-22 (unpaginated). She found Employer incorrectly relied on 20 C.F.R. §726.203 as a basis for shifting liability because the regulation applies only to commercial insurance, not self-insurance.[5] *Id.*

In addition, the ALJ rejected Employer's arguments that the Director was estopped from imposing liability on it and that the Director committed affirmative misconduct or misrepresentation. Decision and Order at 22-23 (unpaginated). She disagreed that Patriot's self-insurance agreement with DOL relieved Peabody Energy of liability, and she considered the status of Patriot's surety bond to be irrelevant to the responsible carrier analysis. *Id.* at 23-24 (unpaginated). Thus, the ALJ rejected Employer's argument that Patriot is the liable carrier and concluded Eastern and Peabody Energy were correctly designated the responsible operator and carrier, respectively. *Id.* at 25 (unpaginated).

[5] Before the ALJ, Employer argued that Patriot is liable as a successor operator pursuant to 20 C.F.R. §726.203(c)(2) regardless of whether or not Claimant worked for it. Employer's Closing Argument at 8. Employer references this regulation in its briefing to the Board but does not explain why the ALJ erred in finding it inapplicable. We thus decline to address the issue as it is inadequately briefed. 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Issues on Appeal

Exclusion of Employer's Liability Evidence

Employer contends the ALJ erred in excluding Employer's Exhibits 1 through 7 and Mr. Benedict's deposition transcript.[6] It generally asserts "good cause" exists for admission of its liability evidence because the evidence was in the Director's control. Employer's Brief at 3-6. Employer's arguments lack merit.

It is Employer's responsibility, not the Director's, to submit any evidence relevant to its liability by the deadline set forth in the SSAE. 20 C.F.R. §§725.410, 725.412(a), 725.456(b)(1). As explained below, Employer did not satisfy the regulatory deadlines and does not argue on appeal that it demonstrated extraordinary circumstances for its failure to meet them.

The regulations require that, absent extraordinary circumstances, liability evidence pertaining to the responsible operator or carrier must be timely submitted to the district director. 20 C.F.R. §§725.414(d), 725.456(b)(1) ("Documentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances."). Moreover, an employer must also designate to the district director potential liability witnesses "[i]n accordance with the schedule issued by the district director" and such testimony may not be admitted at the ALJ hearing unless "the lack of notice should be excused due to extraordinary circumstances." 20 C.F.R. §725.414(c).

The district director's SSAE informed Employer that it had until July 2, 2017, to submit its liability evidence and designate any potential liability witnesses. But Employer did not submit any liability evidence before the district director, instead waiting until the case was transferred to the OALJ. Employer's March 28 and March 29, 2019 Letters. In excluding the evidence, the ALJ correctly found in her first evidentiary order that Employer did not present any arguments to support extraordinary circumstances for the late submission of Employer's Exhibits 1 through 7, and did "not timely identify Mr. Benedict as a potential liability witness" or show that extraordinary circumstances excused its failure

[6] Employer also argues the ALJ erred in excluding the deposition transcript of Mr. Breeskin, but it was never submitted in this case. Employer's Brief at 3-6. Therefore, Employer's assertion of error is moot.

to do so.[7] October 24, 2019 Order at 4.[8] As Employer does not challenge these specific findings by the ALJ, we affirm them. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer's only argument on appeal is that the excluded evidence is relevant, and therefore admissible, because it supports Employer's contention that Peabody Energy is not liable for Claimant's benefits. Employer's Brief at 4-5. But even if good cause (not extraordinary circumstances) were enough, relevancy alone is insufficient to meet that standard. *See Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d. 278, 297 n.18 (4th Cir. 2007) (if relevancy were enough to meet the good cause standard for exceeding black lung evidentiary limitations at Section 725.414, it would render those limitations "meaningless"). Because the ALJ acted within her discretion in rendering her evidentiary rulings, we affirm them. 20 C.F.R. §725.414(c); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc) (ALJ has broad discretion over procedural matters); October 24, 2019 Order at 4; Decision and Order at 18 n.13 (unpaginated). Consequently we affirm the ALJ's exclusion of Employer's liability evidence.

Equitable Estoppel

Employer next asserts it should be relieved of liability under the doctrine of equitable estoppel. Employer's Brief at 12-15. To invoke equitable estoppel, Employer must show both that the DOL engaged in affirmative misconduct and that Employer reasonably relied on the DOL's action to its detriment. *See Premo v. U.S.*, 599 F.3d 540, 547 (6th Cir. 2010); *Reich v. Youghiogheny & Ohio Coal Co.*, 66 F.3d 111, 116 (6th Cir. 1995). Affirmative misconduct is "more than mere negligence. It is an act by the

[7] Even if we were to consider the deposition transcript to be "documentary evidence," rather than testimony, it also would be subject to an extraordinary circumstances standard for admission by the ALJ. 20 C.F.R. §725.456(b)(1) ("Documentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances.").

[8] Following the ALJ's October 24, 2019 Order excluding its evidence, Employer first asserted extraordinary circumstances in its December 17, 2019 closing argument brief. Employer's Closing Argument Brief at 5-6, 21-22. The ALJ did not address Employer's arguments in her decision. However, apart from its general assertion of good cause, Employer does not allege on appeal that extraordinary circumstances existed to admit its evidence or otherwise explain why the ALJ erred. Employer's Brief at 3-6**.**

government that either intentionally or recklessly misleads. The party asserting estoppel against the government bears the burden of proving an intentional act by an agent of the government and the agent's requisite intent." *U.S. v. Mich. Express, Inc.*, 374 F.3d 424, 427 (6th Cir. 2004); *see also Reich*, 66 F.3d at 116. Employer has not met its burden.

Employer alleges the Director's release of Peabody Energy from liability without securing proper funding from Patriot constitutes affirmative misconduct. Employer's Brief at 12-15. However, it identifies no evidence establishing the DOL released Peabody Energy from liability or made a representation of such a release. It further does not challenge the ALJ's finding that "there is no evidence in the record whatsoever regarding the intent of the Department or those acting on its behalf." Decision and Order at 23 (unpaginated); *see Skrack*, 6 BLR at 1-711. We therefore affirm the ALJ's rejection of Employer's equitable estoppel argument because it has failed to establish the necessary elements. Decision and Order at 22-23 (unpaginated); *see Premo*, 599 F.3d at 547; *Reich*, 66 F.3d at 116.

Liability under 20 C.F.R. §725.495(a)(4)

Referencing 20 C.F.R. §725.495(a)(4),[9] Employer contends the DOL's failure to secure proper funding from Patriot absolves Peabody Energy of liability and places it on the Trust Fund. Employer's Brief at 15-19. This argument has no merit.

Section 725.495(a)(4) transfers liability to the Trust Fund in certain cases in which "the miner's most recent employment by an operator ended while the operator was authorized to self-insure its liability" and that operator no longer possesses sufficient funds to pay benefits. 20 C.F.R. §725.495(a)(4). In this case, however, Claimant's "most recent employment by an operator" for over one year was in August 2007 when he worked for

[9] The regulation states:

> If the miner's most recent employment by an operator ended while the operator was authorized to self-insure its liability under part 726 of this title, and that operator no longer possesses sufficient assets to secure the payment of benefits, the provisions of paragraph [20 C.F.R. §725.495](a)(3) shall be inapplicable with respect to any operator that employed the miner only before he was employed by such self-insured operator. If no operator that employed the miner after his employment with the self-insured operator meets the conditions of [a potentially liable operator], the claim of the miner or his survivor shall be the responsibility of the Black Lung Disability Trust Fund.

20 C.F.R. §725.495(a)(4).

Eastern, which was self-insured by Peabody Energy. As Patriot never employed Claimant, the ALJ correctly found Section 725.495(a)(4) cannot apply by its unambiguous language.[10] Decision and Order at 23-24 (unpaginated). Rather, she found Eastern met the requirements for a responsible operator under the Act and that Eastern did not allege its carrier, Peabody Energy, is financially incapable of assuming liability. *Id.* at 20 (unpaginated); 20 C.F.R. §§725.494(e), 725.495(a)(3). Employer identifies no error in these findings. *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); 20 C.F.R. §802.211(b).

Employer alternatively asserts the ALJ failed to properly determine whether the DOL exhausted Patriot's surety bond before holding Peabody Energy the responsible insurance carrier. Employer's Brief at 20-21. This argument incorrectly presumes Patriot, rather than Peabody Energy, meets the requirements for primary liability under the Act because it was the last self-insurer for Eastern. 20 C.F.R. §§725.494(e), 725.495(a)(1). Peabody Energy's liability, however, flows from the following facts: (1) Claimant was last employed by Eastern, the properly designated responsible operator in this claim; (2) Peabody Energy provided self-insurance to Eastern on the last day of Claimant's employment; (3) although the Director subsequently authorized Patriot to insure Peabody Energy's black lung liabilities, there is no evidence he released Peabody Energy from liability as part of that authorization or any other agreement; (4) Patriot was liquidated and thus is incapable of assuming Peabody Energy's liabilities; and (5) there is no dispute Peabody Energy, which insured Eastern on Claimant's last day of work, is financially capable of paying benefits. 20 C.F.R. §725.495(c).

Additionally, we reject Employer's contention that the Director failed to present evidence to show Peabody Energy self-insured Eastern. Employer's Brief at 2-3, 5 n.2, 12. Once the Director established Eastern as a potentially liable operator, the burden

[10] We affirm, as unchallenged, the ALJ's findings that Eastern satisfies the definition of a responsible operator under the Act and that Eastern has not shown its carrier, Peabody Energy, is financially incapable of assuming liability. Decision and Order at 20 (unpaginated); *see* 20 C.F.R. §§725.494(e), 725.495(a)(3), 802.211(b); *Cox*, 791 F.2d at 446-47; *Sarf*, 10 BLR at 1-120-21. Although Peabody Energy disputes it was authorized to self-insure Eastern's obligations on Claimant's last day of coal mine employment in August 2007, that contention is based solely on its flawed theory that it was absolved from liability when the DOL authorized Patriot to self-insure claims of Eastern miners retroactively. Employer's Brief at 12. Peabody Energy neither disputes it was the self-insurer of Eastern on Claimant's last day of employment nor denies it is financially capable of paying benefits; instead, it only contends it should not be required to self-insure claims of Eastern miners.

shifted to Employer to prove that it is incapable of assuming liability. 20 C.F.R. §725.495(b), (c)(1). Employer has never alleged Eastern was not self-insured by Peabody Energy on the last day of Claimant's employment with it and does not argue Peabody Energy is financially incapable of paying benefits. Thus, we reject Employer's contention that Peabody Energy is absolved of liability pursuant to 20 C.F.R. §725.495(a)(4).

DOL Bulletins

Finally, Employer contends BLBA Bulletins 12-07 and 14-02 establish the Trust Fund must assume liability based on Patriot's inability to pay benefits as a bankrupt self-insurer for Eastern. Employer's Brief at 10, 15. We disagree. First, Employer's argument again improperly presumes Eastern, as self-insured by Peabody Energy, does not meet the requirements for primary liability. 20 C.F.R. §§725.494(e), 725.495(a)(1). Second, these Bulletins do not establish a policy applicable to all bankrupt self-insurers but are specific to two self-insured coal mine operators unrelated to Peabody Energy's liability under the facts of this case. BLBA Bulletin 12-07 concerns a settlement between the Director and Frontier Insurance Company over an expired surety bond.[11] BLBA Bulletin 14-02 concerns a settlement between the Director and Travelers Casualty and Surety Company, a private self-insurer, rather than a policy applicable to all self-insured coal mine operators and their bankrupt self-insurers.[12] Thus, we reject Employer's argument regarding the significance of these Bulletins.

For the above reasons, we conclude the ALJ properly excluded Employer's liability evidence; properly found Eastern is the responsible operator, 20 C.F.R. §§725.494(e), 725.495(a)(1); and properly determined that Peabody Energy is the responsible carrier.

[11] BLBA Bulletin 12-07, issued on July 20, 2012, states in relevant part that "when adjudicating claims involving a self[-]insured Responsible Operator for whom the miner's last and qualifying employment was during a period covered by a bond issued by Frontier Insurance Company (Frontier)," the Trust Fund assumes liability. BLBA Bulletin 12-07 at 1 (July 20, 2012). The Bulletin does not establish a policy applicable to all self-insurers, but a settlement reached specifically between the Director and Frontier. *Id*. at 1-2.

[12] BLBA Bulletin 14-02, issued on April 29, 2014, states that in claims involving Travelers Casualty and Surety Company (Travelers), liability will transfer to the Trust Fund for those claims in which the date of the miner's last employment "was with a coal mine operator during the period of self-insurance covered by New Horizons Holdings (parent of Great Western Resources) whose surety bond was issued by Travelers[.]" BLBA Bulletin 14-02 at 1 (Apr. 29, 2014). The Bulletin is specific to Travelers, and thus does not cover Peabody Energy or Patriot. *Id*. at 1-2.

Thus we affirm the ALJ's finding that Eastern as self-insured by Peabody Energy is liable for benefits.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge