U.S. Department of Labor

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

BRB No. 20-0045 BLA

ODIS L. HARVEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 12/21/2020
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 Lauren C. Boucher, 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.

Cynthia Liao (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Lauren C. Boucher's Decision and Order Awarding Benefits (2018-BLA-05860) rendered on a subsequent claim[1] filed on March 6, 2017 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge initially found Employer, self-insured through its parent company Peabody Energy Corporation (Peabody), is the responsible operator/carrier. Based on the parties' stipulation, she credited Claimant with thirty years of coal mine employment, at least fifteen years of which was qualifying coal mine employment, and found he established a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). She thus found Claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c), and 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). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues liability for the payment of benefits should transfer to the Black Lung Disability Trust Fund because the administrative law judge erred in finding Peabody is the responsible carrier. Employer also contends the administrative law judge erred in finding the Section 411(c)(4) presumption unrebutted.[3] Claimant responds in

[1] This is Claimant's second claim for benefits. On September 18, 2014, the district director denied his prior claim, filed on December 2, 2013, because he did not establish total disability. Director's Exhibits 1, 2. Claimant requested modification of his denied claim on March 30, 2015, which the district director denied on June 18, 2015. Director's Exhibit 2. Claimant filed another request for modification on September 2, 2015, which the district director denied on January 15, 2016. Claimant took no further action on his denied claim. *Id.*

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has 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) (2012); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant invoked the Section 411(c)(4) presumption and established a change in an

support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response arguing that the Benefits Review Board need not address Employer's responsible carrier arguments because they rely on evidence the administrative law judge excluded from the record as untimely submitted and Employer has not challenged the administrative law judge's evidentiary rulings. Alternatively, the Director urges the Board to reject Employer's allegations of error in the administrative law judge's finding that Peabody is the responsible carrier.

The Board's scope of review is defined by statute. We must affirm the administrative law judge'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 Associates, Inc.*, 380 U.S. 359, 362 (1965).

Responsible Carrier: Admissibility of Liability Evidence

The district director issued a Notice of Claim identifying Employer as the potentially liable operator and Peabody as the self-insurer.[5] Director's Exhibit 29. The Notice gave Employer thirty days to respond and ninety days to submit any liability evidence. *Id*. Employer, via its third-party claims administrator, responded to the Notice of Claim, denying all aspects of its potential liability. Director's Exhibit 31. It asserted, among other things, that Patriot Coal should be liable rather than Peabody, but submitted no evidence in support of its position. Director's Exhibit 30.

On July 13, 2017, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) giving "any party that wishes to submit liability evidence or identify liability witnesses" until September 11, 2017, to submit evidence in support of their positions. Director's Exhibit 35. Moreover, the SSAE stated "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability, or testimony

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applicable condition of entitlement. *Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4; *see* Hearing Transcript at 16-17.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1-3, 9.

[5] Employer's assertion that the district director never issued a Notice of Claim designating Peabody as a potentially liable self-insurer therefore lacks merit. Employer's Brief at 42.

of a witness not identified at this stage of the proceedings, may be admitted into the record once a case is referred to the Office of Administrative Law Judges [(OALJ)]." *Id*., *citing* 20 C.F.R. §725.456(b)(1).

On September 1, 2017, Employer requested an extension of time to submit evidence, and the district director granted it a six-month extension until March 10, 2018. Director's Exhibits 38, 39. The record does not reflect that Employer submitted any liability evidence prior to the extended deadline.

Thereafter the district director issued a Proposed Decision and Order naming Employer as the responsible operator and awarding benefits. Director's Exhibit 40. On April 26, 2018, Employer requested a formal hearing before an administrative law judge and, for the first time, submitted documents related to its argument that Patriot Coal is the liable carrier. *See* Director's Exhibit 46. On February 13, 2019, prior to the formal hearing scheduled for March 6, 2019, Employer filed a motion to be dismissed as the responsible operator, asserting Peabody was not the liable carrier. At the hearing, the administrative law judge postponed ruling on Employer's motion and instead instructed Employer to brief the issues raised in its motion and allowed the Director an opportunity to respond. Hearing Transcript at 15-16. The administrative law judge subsequently issued an Order setting a briefing schedule, and Employer and the Director filed briefs.

On May 3, 2019, the administrative law judge issued an Order denying Employer's motions, finding its liability evidence inadmissible because it was not submitted before the district director and Employer did not establish any extraordinary circumstances to admit the untimely evidence into the record. Order Denying Employer's Motions to Admit Depositions and to Dismiss Peabody at 8, *citing* 20 C.F.R. §§725.414(d), 725.456(b)(1). On June 14, 2019, the administrative law judge issued an Order Denying Employer's Motion to Reconsider, reiterating her previous determination regarding Employer's liability evidence.[6]

On appeal, Employer asserts the administrative law judge erred in finding Peabody liable for payment of benefits as Employer's self-insurer. Employer's Brief at 27-43. The Director responds that Employer's arguments are unsupported by record evidence because Employer failed to timely submit any liability evidence to the district director, the administrative law judge properly excluded its late-submitted evidence, and it has not

[6] Despite excluding all of Employer's liability evidence, the administrative law judge later addressed and rejected each of Employer's liability arguments. Decision and Order at 32-39.

challenged those rulings on appeal. Director's Response at 6. We agree with the Director's argument.

Because the district director must resolve identification of the responsible operator or carrier before a case is referred to the OALJ, the regulations require that absent extraordinary circumstances, liability evidence must be timely submitted to the district director.[7] 20 C.F.R. §725.456(b)(1). Employer does not dispute it failed to timely submit liability evidence before the district director. Nor does it assert extraordinary circumstances exist to excuse its failure. Rather, Employer indicates only that the excluded evidence supports its assertion that Peabody is not liable for payment of benefits. Employer's Brief at 31-34. We therefore affirm the administrative law judge's evidentiary rulings as unchallenged. *Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983).

As the "designated responsible operator," Employer has the burden to prove either that it does not have sufficient assets to secure the payment of benefits or that another potentially liable operator more recently employed the miner. 20 C.F.R. 725.495(c)(1), (2). To support a challenge to its liability, Employer, not the Director, is responsible for submitting any documentation relevant to its liability to the district director within specific timeframes. *See* 20 C.F.R. §§725.408(b)(1) (90 days from notification as a potentially liable operator), 725.410 (60 days from issuance of the SSAE), 725.456(b)(1) (documentary liability evidence "not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances"). Although Employer suggests some of the documents it intended to rely on are a matter of "public record," it does not explain why that fact relieved it of its obligation to identify and submit those documents when the matter was before the district director.[8] Employer's Brief at 28;

[7] A "carrier is required to discharge the statutory and regulatory duties imposed on the employer, thus stepping into its shoes." *Tazco, Inc. v. Director, OWCP* [*Osborne*], 895 F.2d 949, 951 (4th Cir. 1990). The regulations thus specifically include the insurance carrier as a party that must be given adequate notice of the claim and an opportunity to defend on the question of its direct liability to the claimant. 20 C.F.R. §§725.360(a)(4), 725.407(b); *see Osborne*, 895 F.2d at 952. The Board has consistently held that the rules and regulations regarding liability evidence apply to carriers as well as to operators. *See Olenick v. Olenick Bros. Coal Co.*, BRB No. 11-0833 BLA, slip op. at 4 (Sept. 19, 2012) (unpub.); *J.H.B.* [*Boyd*] *v. Peres Processing, Inc.*, BRB No. 08-0625 BLA, slip op. at 5 (June 30, 2009) (unpub.).

[8] As the Director notes, Employer does not contest it is Claimant's most recent coal mine employer, it was self-insured through Peabody at the time of Claimant's employment, and Peabody is financially capable of paying for benefits. Director's Brief at 1-2, 16. Employer instead alleges some of the "public record" documents it failed to timely submit

see 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 446-47 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

Because Employer does not allege any error with regard to the administrative law judge's determination that its liability evidence was inadmissible because it was untimely submitted, 20 C.F.R. §725.456(b)(1), we affirm the exclusion of that evidence. As Employer's arguments regarding Peabody's liability for payment of benefits depend on evidence the administrative law judge properly excluded, we need not address those arguments. We therefore affirm the administrative law judge's denial of Peabody's motion to be dismissed from the case, and affirm her finding that Peabody is the liable carrier for this claim. 20 C.F.R. §725.495.

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,[9] or "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 administrative law judge found Employer failed to establish rebuttal by either method.[10]

Legal Pneumoconiosis

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." 20 C.F.R. §§718.201(a)(2),(b),

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to the district director prove the DOL "shifted" liability for Employer's Black Lung claims to Patriot Coal and absolved Peabody of any further liability. Employer's Brief at 28-34.

[9] "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). "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).

[10] The administrative law judge found Employer disproved clinical pneumoconiosis. Decision and Order at 26.

718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

Employer relies on the opinions of Drs. Rosenberg and Zaldivar to disprove legal pneumoconiosis. Both physicians opined Claimant has chronic obstructive pulmonary disease (COPD)/emphysema, and that the condition was caused entirely by smoking and unrelated to coal mine dust exposure. Director's Exhibit 21; Employer's Exhibits 2, 10. Dr. Zaldivar also diagnosed asthma unrelated to coal mine dust exposure. Director's Exhibit 21 at 10. The administrative law judge discounted their opinions because she found they did not sufficiently explain why coal mine dust exposure did not contribute to Claimant's obstructive impairment. Decision and Order at 28-30.

Employer argues the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Zaldivar. Employer's Brief at 6-22. We disagree. Contrary to Employer's contentions, in light of the Department of Labor's recognition that the effects of smoking and coal dust exposure are additive, the administrative law judge permissibly found Drs. Rosenberg and Zaldivar failed to adequately explain why Claimant's thirty year history of coal mine dust exposure did not significantly contribute, along with his smoking, to his COPD/emphysema. *See* 20 C.F.R. §718.201(b); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989); Decision and Order at 28-30.

Additionally, she permissibly found Dr. Zaldivar did not adequately explain why Claimant's response to bronchodilators on pulmonary function testing showing partial reversibility of his impairment necessarily eliminated coal mine dust exposure as a contributing factor for the irreversible portion of his impairment that remained even after bronchodilators were administered. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order on at 28-29; Director's Exhibit 21; Employer's Exhibit 10. She also permissibly found Dr. Rosenberg's opinion that Claimant's reduced FEV1/FVC ratio on pulmonary function testing indicated his disease was due to cigarette smoking, rather than coal mine employment, conflicts with the scientific premise set forth in the preamble that "coal miners have an increased risk of developing COPD . . . . [that] may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC." 65 Fed. Reg. at 79,943 (internal citations omitted); *see Stallard*, 876 F.3d at 671-72; *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013) (Traxler, C.J., dissenting); Decision and Order at 29.

In challenging the above findings, Employer quotes the opinions of Drs. Rosenberg and Zaldivar at length, and asserts they provided reasoned explanations for their conclusions that "fully answered" the administrative law judge's concerns. Employer's Brief at 6-22. Employer's arguments are requests to reweigh the evidence which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge permissibly discounted the opinions of Drs. Rosenberg and Zaldivar, we affirm her determination that Employer did not disprove Claimant has legal pneumoconiosis.[11] Decision and Order at 30-31. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(i).

Disability Causation

Employer also contends the administrative law judge erred in finding it did not establish that "no part of [Claimant'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); Employer's Brief at 26-27. We disagree. The administrative law judge permissibly discredited Drs. Rosenberg's and Zaldivar's opinions on disability causation because they premised their conclusions on their beliefs that Claimant did not have legal pneumoconiosis, contrary to her finding Employer did not disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (such an opinion "may not be credited at all" on disability causation absent "specific and persuasive reasons" for concluding the doctor's view on disability causation is independent of his erroneous opinion on pneumoconiosis); Decision and Order at 31-32; Director's Exhibit 21; Employer's Exhibit 2. We therefore affirm the administrative law judge's finding that Employer did not establish Claimant's respiratory disability is unrelated to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 26.

[11] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Rosenberg and Zaldivar, we need not address Employer's arguments regarding the additional reasons the administrative law judge gave for rejecting their opinions on legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 28-30.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge