U.S. Department of Labor

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

BRB No. 20-0305 BLA

CHARLES E. ROBINSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 12/14/2022
	)	
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 Tracy A. Daly, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for Claimant.

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

Cynthia Liao (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Tracy A. Daly's Decision and Order Awarding Benefits (2017-BLA-05599) rendered on a claim filed on December 12, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Heritage Coal Company (Heritage), as self-insured through its parent company Peabody Energy Corporation (Peabody), is the responsible operator and carrier. He credited Claimant with twenty-one years and seven months of coal mine employment in underground mines or in conditions substantially similar to conditions in underground mines and found he established a totally disabling respiratory 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.[1] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer contends the district director and claims examiner, the Department of Labor (DOL) officials who initially process claims, are inferior officers who were not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[2] It also asserts the duties the district director performs create an inherent conflict of interest that violates its due process rights. Furthermore, it contends the ALJ erred in finding it liable for the payment of benefits. Finally, on the merits,

[1] 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.

[2] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

Employer argues the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption.[3]

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), urges the Benefits Review Board to reject Employer's Appointments Clause and evidentiary challenges. The Director also contends the ALJ properly determined Claimant established entitlement to benefits and Employer is responsible for payment of the 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.[4] 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

Employer does not challenge the ALJ's findings that Heritage is the correct responsible operator and it was self-insured by Peabody Energy on the last day Heritage employed Claimant; thus we affirm these findings.[5] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 9. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named

[3] We affirm, as unchallenged on appeal, the ALJ's finding Claimant established twenty-one years and seven months of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7-8.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Eighth Circuit because Claimant performed his coal mine employment in Missouri. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[5] Employer also "preserve[s]" its "ability to challenge" Black Lung Benefits Act (BLBA) Bulletin No. 16-01 as an invalid rule. Employer's Brief at 52-53. Employer generally argues Bulletin No. 16-01 contradicts liability rules under the Act, was issued without notice and comment, and violates the Administrative Procedure Act. *Id.* Apart from one sentence summarizing its arguments, Employer has not set forth sufficient detail to permit the Board to consider the merits of the issues identified. *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).

the responsible carrier and thus liability for the claim should transfer to the Black Lung Disability Trust Fund.

Patriot was initially another Peabody Energy subsidiary. Director's Exhibit 35. In 2007, after Claimant ceased his coal mine employment with Heritage, Peabody Energy transferred a number of its other subsidiaries, including Heritage, to Patriot. *Id*. That same year, Patriot was spun off as an independent company. *Id*. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. Director's Exhibit 37. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Heritage, Patriot later went bankrupt and can no longer provide for those benefits. Director's Exhibits 35, 37. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed by Heritage when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 9-12.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated the self-insured carrier in this claim and thus the Trust Fund, not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 37-57. It argues the ALJ erred in finding Peabody Energy liable for benefits because: (1) the district director and claims examiner are inferior officers not properly appointed under the Appointments Clause,[6] (2) the regulatory scheme, whereby the district director must determine the liability of a responsible operator and its carrier when the DOL at the same time administers the Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing; (3) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) before transferring liability to Peabody Energy, the DOL must establish it exhausted any available funds from the security bond Patriot gave to secure its self-insurance status; (5) the DOL released Peabody Energy from liability; (6) the Director is equitably estopped from imposing liability on Peabody Energy; (7) the ALJ's reliance on 20 C.F.R. §§725.495(a)(2)(i) and 725.493(b)(2) is misplaced; (8) 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act and the Administrative Procedures Act; and (9) the DOL violated its due process rights by not maintaining adequate records with respect to Patriot's bond and failing to comply with its duty to monitor Patriot's financial health. Employer's Brief at 37-57. It maintains that a separation agreement – a private contract between Peabody Energy and Patriot – released it from liability and the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure.

[6] Employer raised this argument for the first time in its brief to the Board. Employer's Brief at 25-31.

The Board has previously considered and rejected these arguments in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 11-13 (Oct. 25, 2022), *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 5-17 (Oct. 18, 2022), and *Graham v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022).[7] For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments. Thus we affirm the ALJ's determination that Heritage and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.

Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A miner may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ found the arterial blood gas studies did not establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 16-17. He also found Claimant could not establish total disability under 20 C.F.R. §718.204(b)(2)(iii) because there was no evidence of cor pulmonale with right-sided congestive heart failure. *Id.* at 17. But he found the pulmonary function studies and medical opinions established total disability. 20

[7] Employer also argues the ALJ erred in excluding the depositions of David Benedict and Steven Breeskin, two former DOL Division of Coal Mine Workers' Compensation (DCMWC) officials. Employer's Brief at 31-37. In *Bailey*, the same depositions were admitted and the Board held they do not support Employer's argument that the DOL released Peabody Energy from liability when it authorized Patriot to self-insure and released a letter of credit Patriot financed under Peabody Energy's self-insurance program. *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 15 n. 17 (Oct. 25, 2022). Given the Board has previously held the depositions do not support Employer's argument, any error in excluding them here is 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 (1984).

C.F.R. §718.204(b)(2)(i), (iv). Decision and Order at 16, 22. Weighing all the evidence together, he found the evidence established a totally disabling respiratory impairment. *Id.* at 22.

Employer argues the ALJ erred in finding the pulmonary function studies established total disability. Employer's Brief at 8-22.

The ALJ considered the results of two pulmonary function studies conducted on March 20, 2015, and October 27, 2017. Decision and Order at 13-16; Director's Exhibit 13; Employer's Exhibit 2. The ALJ noted Claimant was seventy-six years old at the time of the March 20, 2015 pulmonary function study and seventy-nine at the time of the October 27, 2017 study. Decision and Order at 13. Citing *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008), he noted studies performed on a miner over the age of seventy-one must be treated as qualifying if they qualify for a seventy-one-year-old, but the party opposing entitlement may offer evidence that the studies do not indicate disability for a miner over seventy-one.[8] *Meade*, 24 BLR at 1-47. The ALJ therefore considered the opinions of Drs. Rosenberg and Broudy that, using the "Knudson predictive equation," qualifying values could be extrapolated for the March 20, 2015 pulmonary function study for a seventy-six-year-old miner. Director's Exhibit 20; Employer's Exhibit 3. Drs. Rosenberg and Broudy opined that doing so revealed the study is not indicative of total disability. *Id*. However, the ALJ found Drs. Rosenberg's and Broudy's opinions insufficiently explained. Decision and Order at 15. Consequently, she used the values for a seventy-one-year-old man as set forth in the tables at Appendix B of 20 C.F.R. Part 718. *Id.*

Using the table values contained in Appendix B, the ALJ found the March 20, 2015 pulmonary function study was qualifying. *Id.* Noting that neither Dr. Rosenberg nor Dr. Broudy challenged the qualifying results of the October 27, 2017 study, the ALJ concluded the pulmonary function study evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.*

Employer does not specifically challenge the ALJ's finding Dr. Rosenberg's and Broudy's opinions inadequately explained and, thus, unpersuasive. Therefore, those findings are affirmed. *See Skrack*, 6 BLR at1-711. Instead, Employer invites the Board to overturn its holding in *Meade*. Employer's Brief at 14-22. It argues the Board's holding in *Meade* is contrary to comments to the Black Lung regulations, inconsistent with

[8] A "qualifying" pulmonary function study yields results equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields results exceeding those values. See 20 C.F.R. §718.204(b)(2)(i).

principles of equal protection, and violates its due process rights. *Id.* We decline Employer's invitation to revisit *Meade*. Here, as Employer concedes, the ALJ correctly followed *Meade* and, as noted above, permissibly found Drs. Rosenberg's and Broudy's opinions extrapolating qualifying values for a seventy-six year old miner unexplained and unpersuasive.

Further, we reject Employer's argument that the Director's change in litigation positions constitutes rulemaking violating the notice and comment requirements of the Administrative Procedure Act (APA). Employer's Brief at 17. Employer cites no legal authority to support its proposition that a change in a litigation position constitutes rulemaking subject to the APA's notice-and-comment requirements, 5 U.S.C. § 553(b). Rather, the case it cites, *Arch Coal, Inc. v. Acosta*, 888 F. 3d 493 (D.C. Cir. 2018), held that the APA's notice and comment requirement did not apply to an Office of Workers' Compensation bulletin. 888 F. 3d 493 (D.C. Cir. 2018) (notice and comment requirement "do[es] not apply to agency bulletins, policy statements, directives, guidances, opinion letters, press releases, advisories, warnings, or manuals that do not have the force of law."). As the Director correctly points out, briefs to the Board advocating litigation positions do not have the force of law. Director's Brief at 38.

Finally, Employer argues the approach set forth in *Meade* violates the Equal Protection clause of the Fourteenth Amendment. Employer's Brief at 18-19. As the Director correctly notes, the Fourteenth Amendment only applies to the states, not the federal government. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 543 n.21 (1987) (citing *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)); Director's Brief at 37. Further, although Employer asserts *Meade's* approach results in disparate treatment of miners, it fails to set forth how the approach results in unequal treatment of coal mine operators and thus violates its Fifth Amendment due process rights. *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).

Because it is supported by substantial evidence, we affirm the ALJ's finding that the pulmonary function study evidence supports a finding of total disability under 20 C.F.R. §718.204(b)(2)(i). We further affirm his finding that the evidence as a whole establishes total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 22. Consequently, we affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c). As Employer does not challenge the ALJ's finding that it failed to rebut the presumption, we affirm it. *Skrack*, 6 BLR at 1-711; Decision and Order at 30.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge