U.S. Department of Labor

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

BRB No. 20-0323 BLA

JERRY PIERCY Claimant-Respondent v. EASTERN ASSOCIATED COAL LLC and PEABODY ENERGY CORPORATION Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/07/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

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: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Awarding Benefits (2019-BLA-05288) rendered on a claim filed on July 15, 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. He credited Claimant with at least nineteen years of qualifying coal mine employment, based on the parties' stipulation, and found Claimant established 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 district director, the Department of Labor (DOL) official who initially processes claims, is an inferior officer who was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[1] It further argues the ALJ erred in finding Peabody Energy is the liable carrier.[2] Claimant did not file a response. The Director, Office of Workers' Compensation Programs (the Director), filed a response urging the Benefits Review Board to reject Employer's constitutional arguments as well as its discovery and evidentiary arguments. The Director concedes, however, that the ALJ did not properly address whether Peabody Energy

---

[1] 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.

[2] 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 12.

Corporation is the liable carrier and therefore his liability finding must be vacated and remanded for additional consideration.

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).

Employer does not challenge Eastern's designation as the responsible operator and that it was self-insured by Peabody Energy on the last day Eastern employed Claimant; thus, we affirm these findings. *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 5. Patriot Coal Corporation (Patriot) was initially a subsidiary of Peabody Energy. Director's Exhibit 49. In 2007, twenty-two years after Claimant's coal mine employment ended, Peabody Energy transferred a number of its subsidiaries, including Eastern, to Patriot. Director's Exhibits 5, 7, 49. That same year, Patriot was spun off as an independent company. *Id.* On March 4, 2011, Patriot was authorized to self-insure itself and its subsidiaries retroactive to 1973. Director's Exhibit 49. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Eastern, Patriot later went bankrupt and can no longer provide for those benefits. Director's Exhibit 26. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed by Eastern when Peabody Energy owned and provided self-insurance to that company.

Employer argues the ALJ erred in failing to address several arguments that Peabody Energy should not be held liable in this case.[4] Employer's Brief at 2-50. The Board has

---

[3] 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); Director's Exhibit 2.

[4] Employer argues Peabody Energy is not liable for benefits because: (1) the district director is an inferior officer not properly appointed under the Appointments Clause (Employer raised this argument for the first time at the September 11, 2019 hearing and waited until filing its January 3, 2020 post-hearing brief to provide any substantive argument supporting its position.) Hearing Tr. at 6; Employer's Post-Hearing Brief at 6-12.); (2) allowing the district director to make an initial determination of the responsible carrier in instances involving potential liability of the Black Lung Disability Trust Fund violates its due process rights; (3) before transferring liability to Peabody Energy, the DOL must establish it exhausted any available funds from the security bond Patriot gave to

previously considered and rejected these arguments in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022) (en banc); *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). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we are not persuaded by these arguments. Any error by the ALJ in failing to address these arguments is thus 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). Therefore, we affirm the ALJ's finding that Eastern and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

---

secure its self-insurance status; (4) the DOL released Peabody Energy from liability; (5) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (6) the DOL failed to maintain adequate records with respect to Patriot's bond and failing to comply with its duty to monitor Patriot's financial health; and (7) the Director is equitably estopped from imposing liability on Peabody Energy. Employer's Brief at 2-50. It maintains that a separation agreement—a private contract between Peabody Energy and Patriot—released Peabody Energy from liability and that the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. *Id.* at 28.