U.S. Department of Labor

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

BRB No. 20-0375 BLA

THOMAS D. GASTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY, LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 12/22/2022
	)	
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 Noran J. Camp, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for Claimant.

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

Sarah M. Hurley (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, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Noran J. Camp's Decision and Order Awarding Benefits (2018-BLA-06131) rendered on a claim filed on May 16, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ initially found Heritage Coal Company, LLC (Heritage) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier. He found Claimant has twenty-one years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, the ALJ determined Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] He further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it liable for the payment of benefits. On the merits, Employer argues the ALJ erred in finding the Section 411(c)(4) presumption unrebutted. Claimant filed a response brief, urging the Benefits Review Board to affirm the award of benefits. The Director, Office of Workers' Compensation

[1] Claimant filed an initial claim on October 17, 1994, which the district director denied on March 14, 1995, but the basis of the denial is unclear as the claim was administratively closed and the file destroyed in accordance with the Department of Labor's records retention policy. Director's Exhibit 1. Because Claimant's prior claim record is unavailable, the ALJ treated Claimant's current claim as an initial claim and required him to establish all elements of entitlement. Decision and Order at 3. No party challenges the ALJ's treatment of Claimant's current claim as an initial claim.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes 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.

Programs (the Director), also filed a response brief, urging the Board to reject Employer's liability arguments,[3] but declined to address the merits of entitlement.[4]

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.[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 (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.[6] *Skrack v. Island Creek Coal Co.*, 6

[3] The Director responded in support of the ALJ's finding that Employer is the responsible operator but still urged the Board to vacate that finding in light of the ALJ's failure to discuss Employer's liability arguments which he acknowledged the Board has rejected. Moreover, while the Director urged the Board to vacate the ALJ's exclusion of the depositions of Messrs. Benedict and Breeskin, he asserted they were not relevant to the determinative issue of whether Peabody Energy is liable for benefits.

[4] We affirm, as unchallenged on appeal, the ALJ's findings of twenty-one years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and thus that Claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 5 n.17; Hearing Transcript at 37-38.

[6] Employer also states it intends to "preserve" its "ability to challenge" Black Lung Benefits Act (BLBA) Bulletin No. 16-01 as an invalid rule. Employer's Brief at 53. Employer generally argues Bulletin No. 16-01 contradicts liability rules under the Act, was issued without notice and comment, violates the Administrative Procedure Act, and the DOL has acted arbitrarily and capriciously by not following its own self-insurance regulations. *Id.* Apart from one sentence summarizing its arguments, Employer has not set forth sufficient detail to permit the Board to consider the merits of these issues. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986);

BLR 1-710, 711 (1983); *see* 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 31-32; Hearing Transcript at 9. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Black Lung Disability Trust Fund (the Trust Fund).

Patriot was initially another Peabody Energy subsidiary. Director's Brief at 2. In 2007, after Claimant ceased his coal mine employment with Heritage, Peabody Energy transferred a number of its other subsidiaries, including Heritage, to Patriot. Director's Exhibit 34. That same year, Patriot was spun off as an independent company. Director's Brief at 2. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. Director's Exhibit 38. 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 Brief at 2. 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. *Id*.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated as 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: (1) the district director is an inferior officer not properly appointed under the Appointments Clause[7]; (2) the DOL released Peabody Energy from liability; (3) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) the Director is equitably estopped from imposing liability on the company; (5) the regulatory scheme whereby the district director determines the liability of a responsible carrier and its operator, while also administering the Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing; (6) 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; and (7) 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act and the Administrative Procedure Act. Employer's Brief at 20-62. Employer further maintains that a separation agreement – a private contract

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Sarf v. Director, OWCP, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

[7] In a letter to the ALJ dated April 24, 2019 Employer first challenged the district director's authority, after the claim had already been transferred to the Office of Administrative Law Judges. Administrative Law Judge's Exhibit 4. Employer also raised the issue in its Post-Hearing Brief to the ALJ on January 14, 2020. Employer's Post-Hearing Brief at 2, 21-22.

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. *Id*.

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 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 reject Employer's arguments. We also reject Employer's arguments with regard to the exclusion of evidence for the reasons set forth below.

Employer asserts the ALJ erred in excluding liability evidence submitted as Employer's Exhibits 1-4, the depositions of Messrs. David Benedict and Steven Breeskin, two former Department of Labor (DOL) Division of Coal Mine Workers' Compensation officials. Employer's Brief at 18-20. In *Bailey*, the same documentary evidence and depositions were admitted and the Board held they do not support Employer's argument 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.[8] *Bailey*, BLR , BRB No. 20-0094 BLA at 15 n. 17. Given the Board has previously held the documentary and deposition evidence do not support Employer's argument, any error in excluding them here is harmless.[9] *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). 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.[10]

[8] This determination was necessary to the conclusion that Peabody was liable for benefits. *Bailey*, BLR , BRB No. 20-0094 BLA, slip op. at 15 n. 17.

[9] The ALJ excluded Employer's Exhibits 1 through 4 because he found Employer did not submit them to the district director or establish extraordinary circumstances for failing to do so. November 4, 2019 Order Sustaining Director's Objection to Breeskin and Benedict Transcripts and Exhibits; *see* 20 C.F.R. §§725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,989 (Dec. 20, 2000). This was proper. *Bailey*, BLR , BRB No. 20-0094 BLA, slip op. at 11-13; *Graham*, BLR , BRB No. 20-0221 BLA, slip op. at 6-7.

[10] Employer states that it wants to "preserve" its argument that its due process rights were violated because the ALJ "cut off" discovery "prematurely." Employer's Brief at 51-52. Employer neither asks the Board to address this issue nor sets forth any argument that

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,[11] 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 ALJ found Employer failed to establish rebuttal by either method.[12]

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), 718.305(d)(1)(i)(A). The United States Court of Appeals for the Sixth Circuit requires Employer establish the miner's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id.* at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

The ALJ credited the opinions of Claimant's doctors, Drs. Chavda, Baker, and Sood, and discredited the opinions of Employer's experts, Drs. Tuteur and Selby, to find Employer failed to rebut the existence of legal pneumoconiosis. Decision and Order at 24-

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would permit our review. *See Cox v. Director*, 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).

[11] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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).

[12] Because the ALJ found Employer did not disprove legal pneumoconiosis, he did not address whether Employer disproved clinical pneumoconiosis. Decision and Order at 20 n. 42, 21 n.43, 29 n.63.

29. Employer challenges the ALJ's smoking history determination and his decision to credit the opinions of Drs. Chavda, Baker, and Sood, over those of Drs. Tuteur and Selby.

Smoking History

Employer first argues the ALJ erred relying on Claimant's hearing testimony to find he smoked at least thirty-four pack years, when his deposition testimony, medical treatment records, and statements to Dr. Chavda indicate he smoked at least fifty pack years.[13] Employer's Brief at 11. But each physician in this case based his opinion on a smoking history that was greater than the thirty-four pack years the ALJ found[14] and he did not discredit any of the opinions for relying on an inflated smoking history. Moreover, Employer has not otherwise explained how a change in the years of smoking otherwise would affect the result in this case. Thus, Employer fails to explain why the ALJ's alleged error warrants remand. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278.

Weighing of the Medical Opinions

Employer argues the ALJ erred in "levying criticisms against Drs. Tuteur and Selby that were not applied equally to the [DOL's] or Claimant's experts." Employer's Brief at 11-12. However, because Employer has the burden of proof, and the ALJ may assess the credibility of a physicians' opinion in conjunction with the science underlying the regulations and preamble, it is not necessary that we consider the weight accorded the physicians diagnosing legal pneumoconiosis. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Larioni*, 6 BLR at 1-1276. And we see no error in the ALJ's

[13] Claimant testified he smoked one-quarter to one-half pack per day starting at age seventeen, closer to one-half pack per day for thirty to thirty-five years, then one pack per day for the additional nineteen years, stopping in 2005. Hearing Transcript at 24-25. At his deposition on December 8, 2017, Claimant testified that he started smoking four to five cigarettes per day from age 16 or 17 and smoked one pack per day before he quit in 2005. Employer's Exhibit 12 at 40-41. The treatment records reflected smoking histories ranging from fifty to fifty-five pack years. Employer's Exhibits 9, 15, 16, Claimant's Exhibit 4.

[14] Drs. Chavda and Selby relied on a smoking history of fifty-five pack-years. Director's Exhibit 12 at 2; Employer's Exhibit 8 at 25.[14] Dr. Tuteur relied on a fifty-three pack year history from ages twelve to sixty-five at a rate of one pack per day. Director's Exhibit 23 at 2. Dr. Baker relied on a forty-five pack-year history, Claimant's Exhibit 1 at 1, and Dr. Sood relied on a forty-five to fifty-five pack-year history, Claimant's Exhibit 3 at 3.

determination that the opinions of Employer's experts are not well-reasoned and insufficient to satisfy that burden.

Dr. Tuteur diagnosed Claimant with chronic obstructive pulmonary disease (COPD) due solely to smoking. He ruled out coal mine dust exposure as a causative factor for Claimant's COPD based on statistics showing the relative risks of developing COPD if you are smoker but not a coal miner versus a coal miner who never smoked cigarettes. Director's Exhibit 23 at 4-6; Employer's Exhibits 11 at 26-27; 19 at 3-4. The ALJ permissibly found Dr. Tuteur's opinion unpersuasive because he relied on statistics and not the specifics of Claimant's case and thus did not adequately explain why Claimant is not "in the small group of miners that develop COPD from coal mine dust exposure." Decision and Order at 26; *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985) (ALJ may permissibly discount a physician's reasoning because it is based on generalities and not the specifics of a claimant's case). The ALJ also permissibly found Dr. Tuteur's opinion less credible because he did not sufficiently address why Claimant's coal mine dust exposure did not have an additive effect on Claimant's respiratory condition even if it was primarily caused by smoking. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Barrett*, 478 F.3d at 356; *Rowe*, 710 F.2d at 255; Decision and Order at 27-29.

Regarding Dr. Selby's opinion, the ALJ correctly noted that he attributed Claimant's respiratory condition to asthma and is the only physician to do so. At his deposition, Dr. Selby ruled out coal mine dust exposure as causative factor for Claimant's COPD, reasoning that his fifty-five pack-year smoking history was "tremendously more harmful to his lungs" than the twenty-eight years of coal mine dust exposure. Employer's Exhibit 18 at 33-34 (emphasis added). The ALJ permissibly found that like Dr. Tuteur, Dr. Selby's explanation that Claimant's smoking was sufficient to cause Claimant's respiratory disease did not explain why coal mine dust exposure was not an additive factor. *See* 65 Fed. at 79,940; *Barrett*, 478 F.3d at 356; *Rowe*, 710 F.2d at 255; Decision and Order at 27.

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. Because the ALJ's credibility findings with respect to Employer's experts are supported by substantial evidence, we affirm the ALJ's finding that Employer failed to disprove that Claimant has legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A).

Disability Causation

To disprove disability causation, Employer must establish "no part of the [m]iner's respiratory or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R.

§718.305(d)(1)(ii). Contrary to Employer's contention, the ALJ applied the correct legal standard[15] and permissibly found Dr. Tuteur's opinion on disability causation unpersuasive because he did not diagnose legal pneumoconiosis. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 30-31; Employer's Brief at 18. Moreover, the ALJ found Dr. Selby's opinion unpersuasive as to the etiology of Claimant's disabling respiratory impairment for the same reasons he discredited it regarding legal pneumoconiosis, which we have affirmed. Decision and Order at 30. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption by establishing no part of Claimant's respiratory impairment was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 29-31.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[15] The ALJ considered the correct legal standard to the extent he acknowledged "Employer must establish that *no* part of the miner's respiratory or pulmonary *total disability* was caused by pneumoconiosis." Decision and Order at 29-30 (emphasis the ALJ's).