U.S. Department of Labor

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

BRB No. 20-0403 BLA

RICKY GENE PRINCE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RIVERS EDGE MINING, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 12/20/2022
	)	
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 Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Patricia J. Daum's Decision and Order Awarding Benefits (2018-BLA-05092) rendered on a subsequent claim filed on February 25, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ initially found Rivers Edge Mining, Inc. (Rivers Edge), self-insured through its parent company, Peabody Energy Corporation (Peabody Energy) is the responsible operator liable for payment of the benefits awarded. The ALJ further found Claimant established at least 27 years of underground coal mine employment. She also determined Claimant established the presence of complicated pneumoconiosis, thus invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.203. Therefore, she found Claimant established a change in an applicable condition of entitlement.[2] 20 C.F.R. §725.309(c). She further determined Claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.302, and awarded benefits.

On appeal, Employer argues the Department of Labor (DOL) district director, who initially processes claims, is an inferior officer who was not appointed in a manner consistent with the Appointments Clause of the U.S. Constitution, Art. II §2, cl. 2.[3] It

[1] Claimant's prior claim was denied by ALJ Richard A. Morgan in an August 7, 2009 Decision and Order, for failure to establish pneumoconiosis. Director's Exhibit 1.

[2] Where a miner files a claim for benefits more than one year after the denial of a previous claim, the ALJ must also deny the subsequent claim unless he finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c)(1); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant did not establish pneumoconiosis in his prior claim, he had to submit evidence establishing this element to obtain review of the merits on his current claim. 20 C.F.R. §725.309(c)(3); *White,* 23 BLR at 1-3; Director's Exhibit 1.

[3] 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

further contends the ALJ erred in finding Peabody Energy is the liable carrier. Additionally, Employer contends the ALJ erred in finding Claimant established complicated pneumoconiosis.[4] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director) has not filed a response.

The Benefit Review 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 Carrier

Employer does not challenge the ALJ's findings that Rivers Edge is the correct responsible operator and it was self-insured by Peabody Energy on the last day Rivers Edge employed Claimant; thus we affirm these findings.[6] *See Skrack v. Island Creek Coal Co.*,

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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.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant has at least twenty-seven years of underground coal mine employment. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 11.

[5] We will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989); Hearing Transcript at 22.

[6] We reject Employer's assertion the ALJ's order limiting the parties' briefs to twenty pages was arbitrary and capricious. Employer's Brief at 2. In the Notice of Hearing issued on August 27, 2018, the parties were informed that "[n]o brief shall exceed twenty (20) pages, except with prior permission of the undersigned," and that any excess pages would be returned to the party if submitted without permission. Hearing and Prehearing Order at 4. After requesting a second extension of time to file its brief because it had "accidentally overwrote approximately 20 pages of arguments," Employer filed a brief in excess of twenty pages without seeking permission to do so. Employer's Motion for Extension of Time (April 16, 2019). As the Notice of Hearing warned, the portion of Employer's brief that was over twenty pages in length was returned to it. Consequently,

6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 12. 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). Employer's Brief at 6-52.

Patriot was initially another Peabody Energy subsidiary. Director's Exhibit 38. In 2007, after Claimant ceased his coal mine employment with Rivers Edge, Peabody Energy transferred a number of its other subsidiaries, including Rivers Edge, 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. *Id*. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Rivers Edge, Patriot later went bankrupt and can no longer provide for those benefits. *Id*. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed by Rivers Edge when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 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 6-52. It argues (1) the district director is an inferior officer not properly appointed under the Appointments Clause;[7] (2) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (3) 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; (4) the DOL released Peabody Energy from liability; (5) the Director is equitably estopped from imposing liability on the company; and (6) the DOL violated its due process rights by not maintaining adequate records with respect to Patriot's bond and failing to monitor Patriot's financial health. *Id.* Employer maintains that a separation agreement—a private contract between Peabody Energy and Patriot—released Peabody Energy from liability and DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. *Id*. Employer further asserts that allowing the district director to make an initial determination of the responsible carrier

any limitation on Employer's brief was attributable to its failure to seek leave to file its additional pages.

[7] Employer raised this argument for the first time in its appeal to the Board. Employer's Brief at 6-8.

in instances involving potential Trust Fund liability violates its due process rights.[8] *Id*. at 12-16.

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), *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. Thus we affirm the ALJ's determination that Rivers' Edge and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.

Employer also asserts the ALJ erred in excluding documentary evidence, Employer's Exhibits 3 through 9, that it submitted in support of its argument that Patriot is the responsible carrier.[9] Employer's Brief at 4-5; *see* 20 C.F.R. §725.456(b)(1); Order Excluding Employer Exhibits 3-9 and Exhibits 11-12 at 2-7 (March 6, 2019 Order); *see* Decision and Order at 3; Hearing Transcript at 13-14. For the reasons set forth in *Bailey*, BRB No. 20-0094 BLA, slip op. at 11-13; *Howard*, BRB No. 20-0229 BLA, slip op. at 10-12; and *Graham*, BRB No. 20-0221 BLA, slip op. at 6-7, we affirm the ALJ's determination that Employer's failure to timely submit the documentary evidence pertaining to its liability or establish extraordinary circumstances justifying its failure

[8] Employer states it wants to preserve its challenges to the issuance of the November 12, 2015, BLBA Bulletin No. 16-01, providing guidance to district directors in determining liability for claims potentially impacted by Patriot's bankruptcy. *Id*. at 48-49. Employer neither asks the Board to address this issue nor sets forth any argument that would permit our review. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

[9] Employer argues that the ALJ was required to first determine that Employer possessed the proffered documents while the claim was pending with the district director, before requiring Employer to show extraordinary circumstances for submission of this evidence to the ALJ. Employer's Brief at 4. Alternatively, Employer argues that this is a case of "carrier liability" and the ALJ erred in requiring it to establish extraordinary circumstances for failing to submit Employer's Exhibit 3 through 9 while the case was before the district director. *Id*. at 4-5.

precluded admission of the evidence before the ALJ.[10] March 6, 2019 Order; Employer's Brief at 4-6.

Finally, Employer asserts the ALJ erred in excluding the deposition testimony of David Benedict and Steven Breeskin, two former Department of Labor (DOL) Division of Coal Mine Workers' Compensation officials.[11] Employer's Brief at 3-4; March 6, 2019 Order; Order Rejecting Employer's Exhibits 14 and 15 (March 19, 2019 Order). In *Bailey*, the employer moved to submit the same evidence for the purposes of establishing Peabody Energy was improperly designated as the responsible carrier for claims that Patriot had been authorized to self-insure. *Bailey*, BLR , BRB No. 20-0094 BLA, slip op. at 15 n. 17. For the reasons stated in *Bailey*, we conclude error, if any, by the ALJ in excluding these depositions 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).

Finally, Employer generally asserts the ALJ "cut off" discovery prematurely, violating its due process rights because it potentially could have obtained "additional information" through discovery. Employer's Brief at 46-49. Rather than explaining its allegation of error, Employer states it raises the issue "out of an abundance of caution" with the intent to preserve its argument, presumably for review by a circuit court. *Id*. We do not address Employer's argument as it is impermissibly vague, does not seek any action from the Board, and does not identify basic information such as the date on which discovery was ended or what evidence it was prevented from obtaining. 20 C.F.R. §802.211(b) (arguments to the Board must include references to transcripts, pieces of evidence, and

[10] As the ALJ found, Employer did not seek discovery from the Director in this case until it filed its October 23, 2018 request for subpoenas and associated documents, two months prior to the hearing. March 6, 2019 Order at 4. Of the witnesses it identified while the case was before the district director, Employer only sought to depose Messrs. Breeskin and Benedict. Director's Exhibit 38; Employer's Request for Subpoenas. As we have held that any error in not admitting the depositions is harmless, Employer has not shown how it was harmed by the close of discovery. *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).

[11] Employer argues the ALJ erred in excluding the deposition testimony of Messrs. Benedict and Breeskin when they were properly designated as liability witnesses before the district director. Employer's Brief at 3-4; Director's Exhibit 38.

other parts of the record to which the petitioner wishes the Board to refer); *see Fish v. Dir., OWCP*, 6 BLR 1-107, 1-109 (1983).

Complicated Pneumoconiosis

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The ALJ must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether Claimant has invoked the irrebuttable presumption. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

20 C.F.R. §718.304(a)-X-ray Evidence

The ALJ considered four readings of three new chest x-rays taken on May 10, 2016, December 7, 2016, and May 10, 2017, each of which was read by a dually qualified B reader and Board-certified radiologists. Decision and Order at 19-21; Director's Exhibits 22, 25; Claimant's Exhibit 2. Because all of the physician who interpreted the chest x-rays identified Category "A" or "B" large opacities of complicated pneumoconioses, the ALJ found the x-ray evidence establishes complicated pneumoconiosis. Decision and Order at 38; 20 C.F.R. §718.304(a). We affirm this determination as unchallenged on appeal.[12] *See Skrack*, 6 BLR at 1-711.

20 C.F.R. §718.304(b) – Biopsy Evidence

The ALJ noted that the only new biopsy evidence was Dr. Caffrey's review of the September 15, 2009 biopsy of the right upper lobe. Decision and Order at 44; Employer's Exhibit 10. Dr. Caffrey opined that the lung tissue did not have any anthracotic pigment or fibrosis, but also stated "[t]he biopsy is very tiny and fragmented and may well not represent what may be present in the lung tissue." Employer's Exhibit 10. The ALJ also

[12] We further affirm, as unchallenged on appeal, the ALJ's determination that the x-ray evidence developed in the prior claim, identifying large opacities due to sarcoidosis, is unpersuasive. *See Skrack*, 6 BLR at 1-711; Decision and Order at 38-41.

considered the reviews of this biopsy by Dr. Oesterling in the prior claim, in which he opined the biopsy did not have sufficient tissue to make a diagnosis of any specific nature. Decision and Order at 44; Director's Exhibit 1. Because Drs. Caffrey and Oesterling opined the biopsies were of limited or no use in making a diagnosis in this case, the ALJ found that the affirmative biopsy evidence neither supports nor undermines a finding of complicated pneumoconiosis. Decision and Order at 44-45.

The ALJ also considered biopsy reports from Claimant's treatment records submitted in the prior claim. Decision and Order at 44-45. Dr. Farver opined the September 23, 2010 biopsy showed lymph node tissue with "marked" anthracotic pigment with fibro histiocytic proliferation suggestive of occupational exposure without findings consistent with sarcoidosis or granulomas and negative for acid fast organisms, fungal organisms. Director's Exhibit 1. Dr. Oesterling reviewed this biopsy sample and opined it did not produce enough tissue to document any interstitial lung disease; however, he noted mild dust deposit with some fibrotic response but opined there was no evidence of complicated pneumoconiosis. *Id*. Dr. Wheeler reviewed Dr. Oesterling's opinion and agreed the biopsy was inadequate; he also stated the lack of a granuloma on biopsy did not rule out the absence of a granuloma. *Id*.

The ALJ found the lack of findings of complicated pneumoconiosis on biopsy was not persuasive evidence that Claimant does not have complicated pneumoconiosis based on the physician's opinions that the tissue samples were too small. Decision and Order at 45. She further found that while Dr. Farver's findings of anthracotic pigment and fibrosis in the lymph node supports a finding of pneumoconiosis, it is not dispositive of the issue. *Id*. Consequently, she found the biopsy evidence did not establish or refute a diagnosis of complicated pneumoconiosis. *Id*.

Employer suggests the pathology evidence undermines a finding of complicated pneumoconiosis because it does not diagnose the disease. Employer's Brief at 3. Contrary to Employer's contention, because "lung biopsies are usually unrepresentative of the whole lung," 45 Fed. Reg. 13,678, 13,684 (Feb. 29, 1980), the regulations specifically provide that "[a] negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis." 20 C.F.R. §718.106(c). Moreover, the ALJ accurately found that each of Employer's physicians who reviewed the biopsies opined they were too small for diagnostic purposes, or their size was such that they may not represent Claimant's complete condition. Decision and Order at 44-45; Director's Exhibit 1; Employer's Exhibit 10. We see no error in the ALJ's analysis and thus affirm her determination that the biopsy evidence neither supports nor refutes a diagnosis of complicated pneumoconiosis. 20 C.F.R. §718.106(c); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); Decision and Order at 44-45.

20 C.F.R. §718.304(c) – "Other" Medical Evidence

The ALJ found the single new CT scan submitted in this claim was not sufficient to establish complicated pneumoconiosis because, while it diagnosed complicated pneumoconiosis, there was no evidence that it would appear as greater than one centimeter in diameter on an x-ray. Decision and Order at 41. Similarly, she found the CT scans and PET scans from prior claims neither established nor refuted a diagnosis of complicated pneumoconiosis. *Id*. at 41-43. Finally, the ALJ found the medical opinion evidence supports a finding of complicated pneumoconiosis, crediting the opinions of Drs. Bass and Werchowski and Claimant's treating physicians that the larges masses are complicated pneumoconiosis over the contrary medical opinions submitted in the current and past claims. Decision and Order at 16, 46; Director's Exhibit 22 at 4; Claimant's Exhibits 1 at 7; 3 at 4. As these findings are not challenged, they are affirmed. *Skrack*, 6 BLR at 1-711. Consequently, we affirm the determination that the "Other" medical evidence supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 46.

Weighing the evidence as a whole, the ALJ determined the evidence establishes complicated pneumoconiosis. Decision and Order at 46. Employer argues the ALJ erred in crediting the positive x-ray evidence over the allegedly more reliable pathology evidence which did not diagnose the disease. Employer's Brief at 2-3. As we have rejected Employer's argument that the ALJ erred in finding the biopsy evidence neither supports nor refutes a finding of complicated pneumoconiosis, we reject its arguments. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); 20 C.F.R. §718.106(c). Because it is supported by substantial evidence, we affirm the ALJ's determination that the evidence as a whole establishes complicated pneumoconiosis. *Addison*, 831 F.3d at 252-54; *Adkins*, 958 F.2d at 52; Decision and Order at 26.

As Employer raises no further arguments, we affirm the ALJ's findings that Claimant established a change in a condition of entitlement since his last denial, 20 C.F.R. §725.309(c), and that his complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.302; Decision and Order at 46.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge