U.S. Department of Labor

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

BRB No. 20-0436 BLA

LORRAINE TRITSCHLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY fka PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 12/28/2022
and	)	
	)	
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 Christopher Larsen, Administrative Law Judge, United States Department of Labor.

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

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

William M. Bush (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, BUZZARD, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Christopher Larsen's Decision and Order Awarding Benefits (2019-BLA-05310) rendered on a claim filed on February 21, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established fewer than fifteen years of coal mine employment and thus could not invoke 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).[1] Considering Claimant's entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established the existence of clinical pneumoconiosis arising out of her coal mine employment, legal pneumoconiosis, and total disability due to legal pneumoconiosis. Accordingly, the ALJ awarded benefits. 20 C.F.R. §§718.202(a)(4), 718.203, 718.204(b)(2), (c).

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.[2] It also asserts the duties the district director performs create an inherent conflict of interest

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if she 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) (2018); 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.

that violates its due process rights. Further, it argues the ALJ erred in finding it liable for the payment of benefits. On the merits, Employer argues the ALJ erred in finding Claimant established the existence of clinical and legal pneumoconiosis. Claimant filed a response brief, urging the Benefits Review Board to affirm the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), also filed a response brief, urging the Board to reject Employer's Appointments Clause, conflict of interest, and liability arguments, but declined to address the merits of entitlement.[3] Further, the Director alleges an error Employer has not raised – that the ALJ erred in failing to make a responsible operator determination. Thus, although the Director agrees Heritage Coal Company (Heritage) and Peabody Energy Corporation (Peabody Energy) are the properly named responsible operator and carrier, he requests the Board remand this case to the ALJ for a specific liability determination.

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).

Merits of Entitlement-20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions, Claimant must establish disease (pneumoconiosis), disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

[3] We affirm, as unchallenged on appeal, the ALJ's finding of fewer than fifteen years of coal mine employment and thus Claimant cannot invoke the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because Claimant performed her coal mine employment in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 9; Employer's Exhibit 11 at 5.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove she has a "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).

The ALJ found the opinions of Drs. Sood and Harber sufficient to establish Claimant has legal pneumoconiosis and rejected Dr. Rosenberg's opinion that Claimant does not have the disease. Decision and Order at 6-8; 20 C.F.R. §718.202(a)(4). We disagree with Employer that neither Dr. Sood's nor Dr. Harber's opinion is adequate to support Claimant's burden of proof.

Employer argues Dr. Harber's opinion does not support a finding of legal pneumoconiosis because he diagnosed only clinical "coal workers[']s pneumoconiosis (CWP) based on exposure history and chest radiography." Employer's Brief at 11, citing Claimant's Exhibit 2 at 6. This is a mischaracterization of Dr. Harber's opinion as he specifically opined Claimant has a totally disabling respiratory impairment and attributed it "predominantly" to her coal mine employment, with other non-coal mine employment exposures "contributory." Claimant's Exhibit 2 at 6. Because Dr. Harber related Claimant's respiratory impairment to coal mine dust exposure, we see no error in the ALJ's reliance on his opinion.[5] *See Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (a miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that h[er] disease was caused 'in part' by coal mine employment."); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'"); Decision and Order at 7; Claimant's Exhibit 2 at 6; Employer's Brief at 11. Consequently, we affirm the ALJ's finding that Dr. Harber's opinion supports a finding of legal pneumoconiosis.

Dr. Sood opined Claimant has legal pneumoconiosis in the form of chronic bronchitis due to coal mine dust exposure and other dust exposure outside the coal mine industry. Director's Exhibit 18 at 5; Claimant's Exhibit 1 at 5. Employer argues the ALJ erred in crediting Dr. Sood's diagnosis of chronic bronchitis because his notation that

[5] Specifically, Dr. Harber related Claimant's totally disabling respiratory impairment "based on the reduced arterial oxygen tension at exercise," and also stated, "The impairment derives predominantly from her coal mining work. Her other exposures may have been contributory to the hypoxia as well to her chronic bronchitis symptoms." Claimant's Exhibit 2 at 6.

Claimant has a productive cough is at odds with her treatment records which do not document that she had a productive cough in the past. Employer's Brief at 10. We reject Employer's argument.

Dr. Lin's earlier treatment records, which Employer cites, report Claimant did not have a cough on November 24, 2014. But Dr. Sood reported Claimant had a productive cough starting in 2016 and thus her treatment records do not contradict his opinion. Director's Exhibit 18 at 5; Claimant's Exhibit 1 at 5; Employer's Exhibit 2 at 8. Moreover, although the Catalina Chest Clinic treatment records noted differing reports of symptoms of cough in 2019, they do not directly contradict Dr. Sood's report of Claimant having an intermittent productive cough "*most days*" for the past two years. Claimant's Exhibit 1 at 5 (emphasis added); Employer's Exhibit 15 at 1, 2, 6. Consequently, we affirm the ALJ's crediting of Dr. Sood's opinion.

Employer next asserts the ALJ erred in finding Dr. Rosenberg's opinion less credible for his referencing a negative x-ray reading by Dr. Adcock of the April 16, 2018 x-ray, which the ALJ erroneously concluded was not part of the record. Employer's Brief at 9-10; Employer's Exhibit 1. However, Employer has not shown how the ALJ's error affected the outcome of this case, as the ALJ otherwise gave a valid reason for rejecting Dr. Rosenberg's opinion unrelated to Dr. Adcock's x-ray reading. *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). Specifically, as discussed in detail below, *see* n.6 *infra*, the ALJ permissibly found Dr. Rosenberg's opinion not credible on legal pneumoconiosis because he disputed Claimant had suffered any respiratory or pulmonary impairment, contrary to the ALJ's findings that Claimant established a totally disabling impairment based on the blood gas study results.[6]

[6] Under the regulations, a blood gas study is "qualifying" for total disability if it yields results equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718, while a "non-qualifying" study yields results exceeding those values. 20 C.F.R. §718.204(b)(2)(ii). Dr. Rosenberg opined Claimant is not disabled from a pulmonary perspective, challenging the validity of the tables at Appendix C of 20 C.F.R. Part 718 because he believed they did not accurately account for barometric pressure. Employer's Exhibit 14 at 8-10, 14-17. But the ALJ rejected Dr. Rosenberg's criticisms of Appendix C, noting he was required to apply the regulations as written. Decision and Order at 10. He further noted that other than disputing the accuracy of Appendix C, Dr. Rosenberg failed to explain why Claimant did not have a disabling blood gas impairment given that a preponderance of the blood gas studies were qualifying. *See Cannelton Industries, Inc. v. Director, OWCP* [*Frye*], 93 Fed. App'x. 551, 560 (4th Cir. Apr. 5, 2004

See Poole v. Freeman United Coal Mining Co., 897 F.2d 888, 893 (7th Cir. 1990); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Finally, Employer contends the ALJ erred in failing to consider Claimant's treatment records in determining whether she established legal pneumoconiosis, but it does not explain its argument or why the ALJ's error, if any, affected the outcome of his determination that Claimant has legal pneumoconiosis.[7] *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278; Employer's Brief at 10.

Employer's arguments on appeal are a request to reweigh the evidence, which the Board may not do. *Anderson*, 12 BLR at 1-113. Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established legal pneumoconiosis based on the medical opinion evidence.[8] 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); *see Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484 (7th Cir. 2007) (it is the province of the ALJ to evaluate the medical evidence, draw inferences and assess probative value of the evidence); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order at 6-8. As Employer makes no specific challenge to the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2) and disability causation at 20 C.F.R. §718.204(c), we affirm the award of benefits.

Responsible Operator/Responsible Insurance Carrier

As noted, the Director alleges the ALJ did not make any finding as to whether Employer and its carrier were properly designated as liable for benefits despite Employer clearly raising liability as contested. January 10, 2020 Hearing Transcript at 7; August 27,

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(unpub.) (upholding an ALJ's discrediting of a medical opinion which contradicts Appendix C); Decision and Order at 7-10; Employer's Exhibits 14 at 8-11, 16-17, 20.

[7] Claimant's treatment records from Dr. Lin dated November 24, 2014, and January 7, 2015, merely identify her medical conditions as allergic rhinitis, high cholesterol, as well as the results of a well woman examination. Employer's Exhibit 2. Her treatment records from Dr. Chacko at the Catalina Chest Clinic dated October 1, 2019, and November 6, 2019, assert she "seems to have" black lung, but the doctor professes he "is not really qualified to diagnose black lung disease." Employer's Exhibit 15 at 3, 7.

[8] Because we affirm the ALJ's finding that Claimant established legal pneumoconiosis, we decline to address Employer's arguments regarding whether the ALJ erred in failing to consider all the relevant x-ray evidence in finding Claimant established clinical pneumoconiosis. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278; Decision and Order at 5 n.7; Employer's Brief at 7-9; Employer's Exhibit 1.

2019 Employer's Notice of Continued Contest of Responsible Operator/Liability. Contrary to the Director's assertion, the ALJ specifically noted Employer identified the timeliness of the claim and carrier liability as contested issues but, aside from liability exhibits previously excluded from the record as untimely submitted, "Employer introduced no evidence on either point, and filed no brief after the hearing discussing these, or any other, legal issues." Decision and Order at 2 n.2. He thus ruled against Employer "on both those issues."[9] *Id*. As the ALJ addressed and rejected Employer's challenge to its responsible carrier designation, we disagree with the Director's suggestion that the case should be remanded for a more specific finding that Heritage and Peabody Energy are the responsible operator and carrier.

Moreover, the Director's suggestion for remand was made prior to the issuance of published Board case law that is determinative of the liability issue. Director's Brief at 2, 20-23. Thus, why follow, even if the Director were correct that the ALJ failed to make a liability finding, remand would be unnecessary under the circumstances of this case.[10]

The responsible operator is the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(a)(1). To be a "potentially liable operator," a coal mine operator must have employed the miner for a cumulative period of not less than one year and be financially capable of assuming liability for the payment of benefits. 20 C.F.R. §725.494(c), (e).[11] Once the Director properly identifies a potentially liable operator, it may be relieved of liability only if it proves either that it is financially incapable of paying benefits, or that another financially capable operator more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

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[9] While the ALJ specifically stated he found "in [Claimant's] favor" on these issues, the clear import of his finding was a rejection of Employer's arguments. Notably, Employer does not allege on appeal that the ALJ failed to render a finding on liability.

[10] There is no reason to remand the case when the outcome is preordained. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 269 (4th Cir. 2002); *Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 524 (4th Cir. 1995); *Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995).

[11] The regulation at 20 C.F.R §725.494 further requires that the miner's disability or death must have arisen at least in part out of coal mine employment with the operator; the operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973; and the miner's employment included at least one working day after December 31, 1969. 20 C.F.R §725.494(a)-(e).

On appeal, Employer 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 subsidiary of Peabody Energy. Director's Brief at 2. In 2007, after Claimant ceased her coal mine employment with Heritage, Peabody Energy transferred a number of its other subsidiaries, including Heritage, to Patriot. Director's Exhibit 23 at 15-69. 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*. at 72-74. 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 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[12]; (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 Peabody Energy; (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 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.[13] Employer's Brief at 13-55. Employer further maintains that a separation

[12] Employer first challenged the district director's authority after the claim had been transferred to the Office of Administrative Law Judges - at the hearing before the ALJ. January 10, 2020 Hearing Transcript at 8.

[13] 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 46-47. Generally, Employer 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

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. *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 assertion that the ALJ erred in excluding liability evidence submitted as Employer's Exhibits 4-7, the depositions of David Benedict and Steven Breeskin, two former Department of Labor (DOL) Division of Coal Mine Workers' Compensation officials. Employer's Brief at 11-13. In *Bailey*, the same documentary evidence and 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 that Patriot financed under Peabody Energy's self-insurance program.[14] *Bailey*, BLR , BRB No. 20-0094 BLA at 15 n. 17. Given that the Board has previously held this evidence does not support Employer's argument, error, if any, in excluding this evidence in this case is harmless.[15] *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278.

C.F.R. §802.211(b); *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).

[14] 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.

[15] The ALJ excluded Employer's Exhibits 4 through 7 because he found Employer did not submit them to the district director and they were not relevant to the issues in this case. September 25, 2019 Order Denying Employer's Motion to Admit Depositions of David Benedict and Steven Breeskin; *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.

Thus, for the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's assertions on appeal and hold that Employer is the responsible operator and is liable for this claim.[16]

[16] Employer states it wants to "preserve" its argument that its due process rights were violated because the ALJ "cut off" discovery "prematurely." Employer's Brief at 44-46. Employer neither asks the Board to address this issue nor sets forth any argument that 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).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge