U.S. Department of Labor

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

BRB No. 20-0455 BLA

LOREN H. STUMP, deceased	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 12/28/2022
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

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

Ann Marie Scarpino (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: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2019-BLA-05883) rendered on a claim filed on August 4, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Eastern Associated Coal (Eastern), self-insured through its parent company Peabody Energy Corporation (Peabody Energy), is the responsible operator liable for the payment of benefits. He found the Miner had nineteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, he found Claimant[1] invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4). Further, he found Employer did not rebut the presumption and awarded benefits.

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

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[1] Inez Stump is the widow of the Miner, who died on February 8, 2022. She is pursuing her husband's claim on his behalf.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had 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); *see* 20 C.F.R. §718.305.

[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 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 Peabody Energy liable for the payment of benefits. Alternatively, it contends the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption.[4]

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's Appointments Clause and conflict of interest arguments. The Director also argues Employer's assertions regarding Peabody Energy's liability are without merit but contends the ALJ erred in failing to address Employer's arguments in the first instance or explain how the evidence established Employer's liability.

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, 362 (1965).

Responsible Operator and Insurance Carrier

Employer does not challenge the ALJ's findings that Eastern is the correct responsible operator and was self-insured by Peabody Energy on the last day it employed the Miner; thus we affirm these findings.[6] *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 4.

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established at least fifteen years of underground coal mine employment, total disability, and invocation of 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 Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 5, 7, 8, 10.

[6] Employer states it seeks to "preserve" its "ability to challenge" Black Lung Benefits Act Bulletin No. 16-01 as an invalid rule. Employer's Brief at 47-48. Generally, Employer argues Bulletin No. 16-01 contradicts liability rules under the Act, was issued without notice and comment, and violates the Administrative Procedure Act (APA). *Id.* Its one sentence summary of its arguments does not set forth sufficient detail to permit the Board to consider the merits of these issues. *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).

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 Exhibit 31 at 3-58. In 2007, after the Miner ceased his coal mine employment with Eastern, Peabody Energy transferred a number of its other subsidiaries, including Eastern, to Patriot. Director's Exhibits 7, 8, 31 at 3-58. That same year, Patriot was spun off as an independent company. Director's Exhibit 31 at 3-58. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. Director's Exhibit 31 at 59-60. 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. Employer's Brief at 27; Employer's Post-Hearing Brief at 25. 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 by failing to address several of its arguments that Peabody Energy should not be held liable in this case.[7] Employer's Brief at 17-55. The Board, however, 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,

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[7] Employer argues Peabody Energy Corporation (Peabody Energy) is not liable for benefits because: (1) the district director is an inferior officer not properly appointed under the Appointments Clause, an argument it raised for the first time before the ALJ in its post-hearing brief; (2) the regulatory scheme, where the district director must determine the liability of a responsible operator and its carrier when at the same time the Department of Labor (DOL) administers the Black Lung Disability 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 Coal Corporation (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 the company; (7) the ALJ's reliance on 20 C.F.R. §§725.495(a)(2)(i) and 725.493(b)(2) is misplaced; and (8) 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. Employer's Brief at 17-55. 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.

2022), and *Graham v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022).[8] Given that binding precedent, any error by the ALJ in failing to address these specific arguments in the first instance is harmless as a matter of law.[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, 1-1278 (1984). Thus we affirm the ALJ's determination that Eastern and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[10] or "no

[8] Employer argues the time limitation for its submission of liability evidence at 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act (Longshore Act) and the APA because it divests the ALJ of authority under the Longshore Act, 33 U.S.C. §919(d), and the APA, 5 U.S.C. §556(d), to receive evidence and adjudicate issues de novo. Employer's Brief at 48-49. We reject this argument. As the Director correctly argues, 30 U.S.C. §932(a) incorporated the provisions of the Longshore Act and the APA into the Black Lung Benefits Act "except as otherwise provided . . . by regulations of the Secretary." 30 U.S.C. §932(a). Thus, even if we were to accept Employer's interpretation of the regulation, the Secretary of Labor has the "authority to adopt regulations that differ from the APA and the Longshore Act." Director's Brief at 17-18, *citing Nat'l Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001), *rev'd in part on other grounds*, *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 869 (D.C. Cir. 2002).

[9] Employer also 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 42. Employer neither asks the Board to address this issue nor sets forth any argument that would permit our review. *See Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

[10] "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).

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 did not establish rebuttal by either method.[11]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did 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); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered Drs. Fino's and Rosenberg's opinions that the Miner did not have legal pneumoconiosis. Decision and Order at 15-16. Dr. Fino diagnosed disabling emphysema related to cigarette smoking. Director's Exhibit 22; Employer's Exhibit 4 at 6. Dr. Rosenberg diagnosed disabling chronic obstructive pulmonary disease (COPD), emphysema, and chronic bronchitis related to cigarette smoking. Employer's Exhibit 5 at 3, 9, 10-11, 15-16. The ALJ found their opinions not well-reasoned and thus insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 15-16.

We reject Employer's argument that the ALJ erred in discrediting Drs. Fino's and Rosenberg's opinions.[12] Employer's Brief at 10-15. The ALJ found their opinions that the Miner did not have legal pneumoconiosis "not well-reasoned" because "their reliance on epidemiological studies as to why smoking is more harmful than coal mine dust exposure, smoke particle size, or relating to coal mine dust-burdens as depicted in X-rays . . . *tell us nothing about what happened in this particular case*." Decision and Order at 15-16 (emphasis in original). He thus permissibly discredited their opinions because they are based on generalities and not the specifics of the Miner's case. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 312-13 (4th Cir. 2012) (substantial evidence supported ALJ's discrediting of medical opinion where doctor relied "heavily on general statistics rather than particularized facts about" the miner); *Island Creek Coal Co. v. Young*, 947 F.3d 399, 408-08 (6th Cir. 2020); *Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1345-46 (10th Cir. 2014); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723,

[11] The ALJ found Employer disproved the existence of clinical pneumoconiosis but not the existence of legal pneumoconiosis. Decision and Order at 14, 16.

[12] The ALJ also considered Dr. Allen's opinion that the Miner had legal pneumoconiosis. Decision and Order at 15. He found her opinion well-reasoned and well-documented. *Id.* Employer does not challenge the ALJ's weighing of Dr. Allen's opinion; thus, we affirm it. *See Skrack*, 6 BLR at 1-711.

726 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 15-16; Director's Exhibit 22; Employer's Exhibits 4, 5.

Further, the ALJ noted Dr. Rosenberg opined the Miner did not have legal pneumoconiosis because he "sought no treatment for breathing problems at the time that he ended his coal mining job," "his pulmonary complaints are of recent onset," and "obstruction due to coal mining . . . would [occur] . . . 'in the first few years after beginning to work in the coal mines.'" Decision and Order at 16. He thus permissibly discredited Dr. Rosenberg's opinion because the regulations provide that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."[13] 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (medical opinion not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); Decision and Order at 16; Employer's Exhibit 5.

Thus we affirm the ALJ's finding that Employer did not disprove the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 16. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 16.

Disability Causation

To disprove disability causation, Employer must establish "no part of the [M]iner's disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201."[14] 20 C.F.R.

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[13] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Fino and Rosenberg, we need not address Employer's additional arguments regarding the weight he assigned their opinions. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 7-15.

[14] We reject Employer's argument that the ALJ erred in failing to apply the legal standard for total disability causation enunciated in *Island Creek Coal Co. v. Young*, 947 F.3d 399, 408-08 (6th Cir. 2020). Employer's Brief at 15-17. In *Young*, the United States Court of Appeals for the Sixth Circuit held an employer can "disprove the existence of legal pneumoconiosis by showing that [a miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Young*, 947 F.3d at 405. "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 legal standard

§718.305(d)(1)(ii); *see Minich*, 25 BLR at 1-154-56. The ALJ found the disability causation opinions of Drs. Fino and Rosenberg insufficient to satisfy Employer's burden because they are not well-reasoned. Decision and Order at 26-27. We affirm that finding, as the ALJ correctly recognized that neither Dr. Fino nor Dr. Rosenberg diagnosed legal pneumoconiosis, contrary to his finding that Employer failed to disprove the existence of the disease. Decision and Order at 25-26; *Epling*, 783 F.3d at 504-05 (medical opinion that erroneously fails to diagnose pneumoconiosis "may not be credited at all" on causation absent "specific and persuasive reasons" demonstrating the physician's view of causation is independent from his diagnosis of no pneumoconiosis); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995). Employer has not identified any reasons why Drs. Fino's and Rosenberg's disability causation opinions were made independent of their belief that the Miner did not have legal pneumoconiosis. We thus affirm the ALJ's finding that their opinions do not rebut disability causation. 20 C.F.R. §718.305(d)(1)(ii).

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and Employer did not rebut the presumption, Claimant is entitled to benefits.

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enunciated in *Young* is relevant to an employer's burden to rebut the presumed fact of legal pneumoconiosis, not to its burden to rebut the presumed fact of total disability due to legal pneumoconiosis. *See Young*, 947 F.3d at 405; Employer's Brief at 15-17. Further, this case arises within the jurisdiction of the Fourth Circuit, and not the Sixth Circuit.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge