U.S. Department of Labor

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

BRB No. 20-0474 BLA

CHARLES L. JARRELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COALCOMPANY	)	
	)	
and	)	DATE ISSUED: 12/12/2022
	)	
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 in a Subsequent Claim of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for Employer and its Carrier.

Jeffrey S. Goldberg (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: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Awarding Benefits in a Subsequent Claim (2018-BLA-06141) rendered on a claim filed on March 3, 2017,[1] 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. On the merits, she found Claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant established a change in an applicable condition of entitlement,[2] 20 C.F.R. §725.309(c), and invoked the presumption that his total disability is due to pneumoconiosis at Section 41l(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] The ALJ further found Employer did not rebut the presumption, and thus awarded benefits.

On appeal, Employer argues the ALJ erred in finding Peabody Energy is the liable carrier. It also contends the ALJ erred in finding Claimant invoked the Section 411(c)(4)

[1] Claimant filed his initial claim for benefits on December 10, 2010, which the district director denied for failure to establish any element of entitlement. Decision and Order at 2; Director's Exhibit 1.

[2] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she 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(d); *see 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 failed to establish any element of entitlement in his prior claim, he had to submit new evidence establishing at least one element to obtain a review of his subsequent claim on the merits. *Id.*; *see White*, 23 BLR at 1-3; Director's Exhibit 1.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has 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. §92l(c)(4) (2018); 20 C.F.R. §718.305(b).

presumption and Employer did not rebut it.[4] Claimant responds, urging affirmance of Peabody Energy's designation as the responsible carrier and the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging rejection of Employer's challenge to the ALJ's responsible carrier determination.

The Benefits 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 Insurance Carrier

Employer does not challenge the ALJ's findings that Eastern is the correct responsible operator and it was self-insured by Peabody Energy on the last day Eastern employed Claimant; thus we affirm these findings. 20 C.F.R. §§725.494(e), 725.495, 726.203(a); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); Decision and Order at 39; Employer's Brief at 15-26. 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.

Patriot was initially another Peabody Energy subsidiary. Director's Exhibit 45; Employer's Exhibit 7. In 2007, after Claimant ceased his coal mine employment with Eastern, Peabody Energy transferred a number of its other subsidiaries, including Eastern, to Patriot. Director's Exhibits 5, 45; Employer's Exhibit 7. That same year, Patriot was spun off as an independent company. Director's Exhibit 45; Employer's Exhibit 7. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. Director's Exhibit 45; Employer's Exhibit 7. 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 45; Employer's Exhibit 7. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant has at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 21.

[5] 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); Hearing Transcript at 20.

last employed by Eastern when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 40-41.

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. Employer's Brief at 15-26. It argues the ALJ erred in finding Peabody Energy liable for benefits because: (1) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (2) before transferring liability to Peabody Energy, the Department of Labor (DOL) must establish it exhausted any available funds from the security bond Patriot gave to secure its self-insurance status; (3) the DOL released Peabody Energy from liability; (4) the Director is equitably estopped from imposing liability on the company; and (5) because Patriot cannot pay benefits, Black Lung Benefits Act Bulletin Nos. 12-07 and 14-02 place liability on the Trust Fund. Employer 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. Employer's Brief at 19-22.

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. 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.

Invocation of the Section 411(c)(4) Presumption – Total Disability

To 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), Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work.[6] *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R.

[6] The ALJ determined Claimant last worked in coal mine employment as an electrician which had heavy exertional requirements. Decision and Order at 5; Hearing Transcript at 14-16; Director's Exhibit 5.

§718.204(b)(2)(i)-(iv). The ALJ must consider all relevant evidence and weigh the evidence supporting total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ found the preponderance of pulmonary function studies qualifying; the preponderance of blood gas studies non-qualifying; the record contains no evidence of cor pulmonale with right-sided congestive heart failure; and the medical opinions unanimously diagnose Claimant as totally disabled.[7] Decision and Order at 7-20. Weighing the evidence as a whole, the ALJ found Claimant established total disability by a preponderance of evidence. *Id.* at 20; *see Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984) (non-qualifying blood gas studies do not undermine qualifying pulmonary function studies, and vice versa, because the studies measure different types of impairments).

Blood Gas Studies

Employer asserts the ALJ erred in failing to exclude a February 9, 2018 arterial blood gas study pertaining to a different miner from the Director's exhibits in this case.[8] *See* Decision and Order at 10 n.9; Employer's Brief at 4. Specifically, Employer argues it was prejudiced by the inclusion of this evidence in the record as it "result[ed] in an award of benefits." Employer's Brief at 4. We disagree.

As Claimant correctly notes, the ALJ did not consider the February 9, 2018 arterial blood gas study and specifically found "the preponderant arterial blood gas study evidence fails to support a finding of total disability under [20 C.F.R.] §718.204(b)(2)(ii)."[9] Decision and Order at 10-11; Claimant's Brief at 6. Therefore, as the February 9, 2018 arterial blood gas study had no bearing on the ALJ's disposition of this case, we reject Employer's assertion that the inclusion of it in the Director's exhibits violated Employer's right to due process. *See Consolidation Coal Co. v. Borda*, 171 F.3d 175, 183 (4th Cir.

[7] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] Claimant's counsel filed an arterial blood gas study concerning a different miner. Director's Exhibit 17. The district director considered this study in his Proposed Decision and Order. Director's Exhibit 39.

[9] The ALJ considered Claimant's blood gas studies dated June 21, 2017; February 21, 2018; October 15, 2018; December 17, 2018; and April 17, 2019. Decision and Order at 10; Director's Exhibits 14, 19; Claimant's Exhibits 2, 3; Employer's Exhibit 1.

1999) (it is not the mere fact of procedural error that violates due process, but rather the deprivation of the opportunity to mount a meaningful defense that results from it).

We similarly reject Employer's challenge to the ALJ's determination to discount the results of Claimant's April 17, 2019 non-qualifying resting blood gas study. Employer does not challenge the ALJ's finding that the pulmonary function study evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(i). *See Skrack*, 6 BLR at 711. As non-qualifying blood gas evidence does not contradict qualifying pulmonary function evidence, *Sheranko*, 6 BLR at 1-798, the record contains no evidence of cor pulmonale with right-sided heart failure, and the medical opinions are unanimous in diagnosing total respiratory disability, any error the ALJ may have made weighing the blood gas studies was immaterial to her disposition of Claimant's total respiratory disability. 20 C.F.R. §718.204(b)(2) (in the absence of contrary probative evidence, evidence which meets the standards of paragraph (b)(2)(i) of this section shall establish a miner's total disability); *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). As Employer does not otherwise challenge the ALJ's findings at 20 C.F.R. §718.204(b)(2), we affirm the ALJ's findings that Claimant established total respiratory disability, established a change in applicable condition of entitlement at 20 C.F.R. §725.309, and invoked the Section 411(c)(4) presumption. Decision and Order at 20-21.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[10] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined

[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 that is 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).

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.[11]

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." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer argues the ALJ erred in discrediting the opinions of Drs. Zaldivar and McSharry that Claimant's respiratory impairment is related solely to asthma and bronchiectasis. Employer's Brief at 5-15. Employer contends the ALJ applied a legally improper standard by requiring its experts to "rule out" coal dust exposure as even a "possible" contributing cause of Claimant's lung disease, and that he mischaracterized their opinions. *Id.* at 5-7, 14-15. We disagree.

Contrary to Employer's assertion, the ALJ did not require its experts to establish coal dust exposure could not have possibly contributed to Claimant's lung disease or impairment. Rather, the ALJ correctly stated that to rebut the presumption of pneumoconiosis, Employer must "affirmatively disprove the *existence* of" a lung disease "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 22, 30 (emphasis added); *see* 20 C.F.R. §§718.201(b), 718305(d)1)(i). Moreover, she discredited the opinions of Drs. Zaldivar and McSharry because she found they did not adequately explain why it was more likely than not that coal dust did not aggravate Claimant's impairment even if it was caused by asthma and bronchiectasis, and not because they failed to meet a heightened legal standard. *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018); Decision and Order at 31-32. We see no error in her credibility findings.

Dr. Zaldivar examined Claimant on February 21, 2018, and conducted a medical records review. Director's Exhibit 19. He diagnosed Claimant with a disabling restrictive-obstructive impairment, which he attributed to lifelong asthma due to genetics and resulting airways remodeling. *Id.*; Employer's Exhibit 12 at 46. Further, he testified that coal mine dust could cause asthma if an individual is exposed to a high enough concentration but he did not know whether Claimant was exposed to such a concentration. Employer's Exhibit 12 at 43-46. The ALJ found Dr. Zaldivar's opinion not well reasoned because he did not

[11] The ALJ found Employer established Claimant does not have clinical pneumoconiosis but failed to disprove legal pneumoconiosis. Decision and Order at 30, 32.

adequately address whether Claimant had both legal pneumoconiosis and non-coal dust-related asthma. Decision and Order at 31. Specifically, the ALJ explained that "[w]hile it may be true Claimant has suffered from asthma from childhood, or, at the very least, that Claimant's asthma was not caused by his exposure to coal mine dust, Dr. Zaldivar has not adequately explained why Claimant's [at least fifteen] years of exposure to coal mine dust could not have contributed to Claimant's pulmonary impairment." *Id.*

Employer suggests Dr. Zaldivar's opinion sufficiently explained why Claimant's history of coal dust exposure did not aggravate or contribute to his asthma, as the physician explained there was no indication that Claimant had occupational asthma and his condition is consistent with what is seen in lifelong asthmatics regardless of their occupation. Employer's Brief at 10. However, the weighing of the evidence is the purview of the ALJ. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999). In light of the presumption that Claimant's lung disease and impairment constitute legal pneumoconiosis, the ALJ acted within her discretion in finding Dr. Zaldivar did not adequately address the matter. We therefore affirm her finding. *See Looney*, 678 F.3d at 310; *Mays*, 176 F.3d at 756; Decision and Order at 31.

Dr. McSharry conducted a records review and issued a medical report dated June 14, 2019. Employer's Exhibit 2. He diagnosed Claimant with a disabling respiratory impairment "primarily on the basis of severe airflow obstruction." *Id.* at 5. Further, he attributed Claimant's impairment to lifelong asthma and bronchiectasis unrelated to coal dust exposure. *Id.* at 4-6. He explained these diagnoses account for the abnormalities demonstrated on Claimant's pulmonary function tests. *Id.* at 6. Specifically, he explained that "[t]here is no affirmative evidence to suggest that any portion of the obstructive lung disease is a result of coal dust exposure," so he opined "I think it is extremely unlikely that legal coal workers' pneumoconiosis is present in this claimant." *Id.* at 4, 6. The ALJ found Dr. McSharry's opinion not well-reasoned because he did not explain how he eliminated Claimant's occupational history of coal mine dust exposure as aggravating or contributing to his asthma or bronchiectasis. Decision and Order at 32.

We reject Employer's contention that Dr. McSharry adequately explained his opinion in stating coal dust exposure does not cause bronchiectasis and pointing to an absence of "affirmative evidence" that coal dust caused any portion of Claimant's lung disease. Employer's Brief at 11-14. The ALJ permissibly found Dr. McSharry's opinion not credible given the presumption that Claimant has legal pneumoconiosis and the physician's failure to explain how he eliminated Claimant's history of coal dust exposure as an additive cause of his lung condition. *See Looney*, 678 F.3d at 310; *Mays*, 176 F.3d at 756; Decision and Order at 32. Therefore, we affirm the ALJ's rejection of Employer's experts' opinions and affirm her conclusion that Employer failed to disprove the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 32.

Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 32-33. The ALJ permissibly discounted the opinions of Drs. Zaldivar and McSharry regarding the cause of Claimant's pulmonary disability because they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the existence of the disease.[12] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 33. We therefore affirm the ALJ's finding that Employer failed to establish no part of Claimant's pulmonary disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the ALJ's Decision and Order Awarding Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[12] Drs. Zaldivar and McSharry did not address whether pneumoconiosis caused Claimant's total respiratory disability independent of their conclusions that he did not have the disease.