U.S. Department of Labor

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

BRB No. 20-0576 BLA

THOMAS B. CAMPBELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY, LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 12/06/2022
	)	
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.

Alexandria M. Panarelli (Bruce Law Firm), Madisonville, Kentucky, for Claimant.

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

Kathleen H. Kim (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.

BOGGS, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Noran J. Camp's Decision and Order Awarding Benefits (2019-BLA-05035) rendered on a claim filed September 28, 2016, pursuant to the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Heritage Coal Company (Heritage), self-insured through its parent company Peabody Energy Corporation (Peabody Energy), is the responsible operator liable for the payment of benefits. He accepted the parties' stipulation that Claimant has twenty-five years of underground coal mine employment and found he established a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). He thus found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4)(2018). He further found Employer failed to 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.[2] It

[1] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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. §921(c)(4) (2018); *see* 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.

further argues the duties performed by the district director create an inherent conflict of interest that violates its due process. It also argues the ALJ erred in finding Peabody Energy to be the responsible carrier and in failing to address its argument to the contrary. On the merits, it contends the ALJ erred in finding Claimant established total disability.[3]

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Benefits Review Board to reject Employer's constitutional and due process arguments. However, the Director asserts remand is necessary because the ALJ erred in excluding certain liability evidence and in failing to address Employer's challenges to the designation of Peabody Energy as the responsible insurer.

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).

Responsible Operator

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. *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 20. 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 28. In 2007, after Claimant ceased his coal mine employment with Heritage, Peabody Energy transferred a number of its other subsidiaries, including Peabody Coal, 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

[3] We affirm, as unchallenged on appeal, that Claimant established twenty-five years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 20.

[4] 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); Director's Exhibit 3.

who worked for Heritage, 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 Heritage when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 20.

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 ALJ erroneously excluded its liability evidence; (2) 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; (3) the DOL released Peabody Energy from liability; (4) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (5) the Director is equitably estopped from imposing liability on Peabody Energy; (6) its due process rights were violated because discovery was cut off prematurely; (7) the regulatory scheme, whereby the district director must determine the liability of a responsible operator and its carrier when the DOL also administers the Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing; (8) the DOL issued BLB Bulletin No. 16-01 without following the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. §7521; and (9) the district director is an inferior officer not properly appointed under the Appointments Clause.[5] Employer's Brief at 14-67 (unpaginated). 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. *Id*. at 38 (unpaginated).

The Board has previously considered and rejected arguments (2) through (9) 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, and any error by the ALJ in failing to address these arguments is thus harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984). Further, as set forth below, we reject Employer's argument that the ALJ erred in excluding its documentary liability evidence and hold that any error by the ALJ in excluding Employer's liability depositions was harmless.

[5] Employer first raised its Appointments Clause argument in its September 10, 2020 Joint Pre-Hearing Report. ALJ Exhibit 5. The ALJ did not address the issue but noted it was "preserved for appellate purposes." Decision and Order at 5.

Exclusion of Liability Evidence

To support its assertion that Patriot is the liable carrier, Employer sought to submit to the ALJ the deposition transcripts of Steven Breeskin and David Benedict, two former DOL Division of Coal Mine Workers' Compensation employees, as well as attached exhibits. Employer's March 19, 2019 Schedule of Evidence and Notice of Service. The ALJ declined to admit the deposition transcripts on the basis that they are not relevant because they were developed for another case, and because they were required to be submitted to the district director under 20 C.F.R. §725.456(b)(1) and were thus untimely. Decision and Order at 3, 20.

Employer argues, and the Director agrees, that remand is required because the ALJ erred rejecting the deposition transcripts.[6] We disagree.

The deposition transcripts of Messrs. Breeskin and Benedict were admitted to the record in *Bailey*, and the Board held they do not support Employer's argument that Peabody Energy cannot be held liable for the payment of benefits. *Bailey*, BRB No. 20-0094 BLA, slip op. at 15 n. 17. Because the depositions do not support Employer's contentions, any error in excluding the deposition transcripts in the present case was harmless. *Larioni*, 6 BLR at 1-278. We therefore decline to remand the case and affirm the ALJ's findings that Heritage and Peabody Energy are the responsible operator and carrier, respectively, for this claim.

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work or comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A 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. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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 Claimant established total disability based on the pulmonary

[6] We affirm, as unchallenged on appeal, the ALJ's exclusion of the exhibits attached to the deposition transcripts. *See Skrack*, 6 BLR at 1-711; Decision and Order at 20.

function studies, medical opinion evidence, and the weight of the evidence as a whole.[7] Decision and Order at 22-23.

Pulmonary Function Studies

The ALJ considered four pulmonary function studies dated November 11, 2016, October 5, 2017, March 29, 2019, and April 18, 2019. Decision and Order at 9-10, 22. The November 11, 2016 and March 29, 2019 studies produced qualifying[8] results both before and after the administration of bronchodilators. Director's Exhibit 13; Claimant's Exhibit 2. The October 5, 2017 and April 18, 2019 studies produced qualifying results before the administration of bronchodilators but non-qualifying results after. Employer's Exhibits 3, 18. The ALJ observed Dr. Tuteur opined the November 11, 2016 and April 18, 2019 studies are invalid. Decision and Order at 22; Employer's Exhibits 18 at 2; 22 at 23-24. However, noting Dr. Tuteur conceded the October 5, 2017 and March 29, 2019 studies are valid, the ALJ found the weight of the pulmonary function study evidence supports a finding of total disability. Decision and Order at 22; Employer's Exhibit 22 at 27.

Employer contends that, notwithstanding that Dr. Tuteur opined the April 18, 2019 pulmonary function study is invalid, the ALJ erred by not giving greater weight to the non-qualifying April 18, 2019 post-bronchodilator results. Employer's Brief at 11 (unpaginated). We disagree.

As the ALJ noted, pre-bronchodilator studies may be credited over post-bronchodilator studies, and all pulmonary function studies in the present case produced qualifying pre-bronchodilator values. *See* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (The DOL has cautioned against reliance on post-bronchodilator results in determining total disability, stating "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [though] it may aid in determining the presence or absence of pneumoconiosis."); Decision and Order at 9, 22; Director's Exhibit 13; Claimant's Exhibit 2; Employer's Exhibits 3, 18. Moreover, the two most recent studies were conducted less than one month apart, making an appeal solely to the recency of the

[7] The ALJ found the arterial blood gas studies do not establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 22. He also found no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R §718.204(b)(2)(iii); Decision and Order at 22.

[8] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

later study questionable. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993), *citing Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993).

Employer further argues the ALJ erred in finding the October 5, 2017 and March 29, 2019 pulmonary function studies support a finding of total disability. Employer's Brief at 11 (unpaginated). Specifically, Employer asserts that, though qualifying, the October 5, 2017 study showed some improvement since the November 11, 2016 study inconsistent with the progressive nature of pneumoconiosis, and the March 29, 2019 study results are lower than the other testing such that it is an outlier and should thus be considered less credible. *Id.*

To the extent Employer infers the October 5, 2017 and March 29, 2019 studies are invalid, we reject its arguments. Pulmonary function studies are presumed valid in the absence of evidence to the contrary, and the party challenging the validity of a study must affirmatively establish the results are suspect or unreliable. 20 C.F.R. §718.103(c); *see* Appendix B to 20 C.F.R. Part 718; *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984). Employer has cited to no such evidence. Further, it is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). Employer's arguments on appeal amount to a request to reweigh the evidence, which the Board may not do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Thus, we affirm the ALJ's finding that the pulmonary function study evidence supports a finding of total disability.

Medical Opinion Evidence

The ALJ next considered the medical opinions of Drs. Chavda and Baker that Claimant is totally disabled, and those of Drs. Tuteur, and Selby that he is not. Decision and Order at 11-16, 22-23; Director's Exhibit 13; Claimant's Exhibit 2; Employer's Exhibits 3, 18, 22. Crediting Drs. Chavda's and Baker's opinions over the opinions of Drs. Tuteur and Selby, the ALJ found the weight of the medical opinion evidence supports a finding of total disability. Decision and Order at 22-23.

Employer contends the ALJ erred in discrediting Dr. Tuteur's opinion that, although the non-qualifying April 18, 2019 pulmonary function study is invalid, it demonstrates

Claimant likely has the capacity to perform above disability standards.[9] Employer's Brief at 11-13 (unpaginated) (quoting Employer's Exhibit 22 at 22-23, 29-30). We disagree.

We initially note that, in opining the April 18, 2019 pulmonary function study suggests Claimant can perform above disability standards, Dr. Tuteur consistently referred to the post-bronchodilator testing. Employer's Exhibit 22 at 22-23, 29-30. However, the ALJ correctly observed that post-bronchodilator results do not provide an adequate assessment of a miner's disability. Decision and Order at 9 (quoting 45 Fed. Reg. at 13,682). The ALJ further permissibly discredited Dr. Tuteur's opinion because, aside from speculating that the qualifying March 29, 2019 pulmonary function study results may have reflected an acute condition that resolved, he failed to explain why the October 5, 2017 and March 29, 2019 studies do not establish total disability. *See Banks*, 690 F.3d at 489 (it is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507 (6th Cir. 1997) (physician's opinion must be based on more than "mere speculation"); *Crisp*, 866 F.2d at 185.

Employer raises no other argument with respect to the medical opinion evidence except to assert the ALJ's findings are based on an erroneous conclusion that the pulmonary function study evidence establishes total disability, an argument we have already rejected. We therefore affirm the ALJ's finding that the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv). We further affirm his overall conclusion that Claimant established total disability based on the evidence as a whole and thereby invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b), 718.305; Decision and Order at 34. Moreover, because Employer does not challenge the ALJ's finding that it failed to rebut the presumption, we affirm it. *Skrack*, 6 BLR at 1-711; Decision and Order at 26-28.

[9] Employer does not contest the ALJ's finding that Dr. Selby's opinion is speculative and not well-reasoned; thus, we affirm it. *Skrack*, 6 BLR at 1-711; Decision and Order at 22.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring:

I agree with the majority to affirm the ALJ's award of benefits. I write separately to more fully address Employer's assertion the ALJ erred in not crediting the most recent non-qualifying pulmonary function study. Whether or not the two studies are essentially contemporaneous is immaterial: the ALJ could not have credited the more recent study because of its recency since it shows an improvement in Claimant's condition, which is inconsistent with the regulatory recognition that pneumoconiosis can be a latent and progressive disease.

The United States Court of Appeals for the Sixth Circuit has held it irrational to credit evidence solely because of recency where the miner's condition has improved. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993), *citing Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *see also Thorn v. Itmann Coal Co*., 3 F.3d 713, 719 (4th Cir. 1993). In explaining the rationale behind the "later evidence rule," the court reasoned that a "later test or exam" is a "more reliable indicator of a miner's condition than an earlier one" where "a miner's condition has worsened" given the progressive nature of pneumoconiosis. *Woodward*, 991 F.2d at 319-20. Since the results of the tests do not conflict in such circumstances, "[a]ll other considerations aside, the later evidence is more likely to show the miner's condition." *Id.* But if "the tests or exams"

show the miner's condition has improved, the reasoning "simply cannot apply": one must be incorrect -- "and it is just as likely that the later evidence is faulty as the earlier." *Id*.

An ALJ must therefore resolve conflicting tests when the miner's condition improves "without reference to their chronological relationship." *Id*.

Because the more recent non-qualifying pre-bronchodilator study does not show a worsening of Claimant's condition, I would specifically reject Employer's contention that it could be entitled to controlling weight based on its recency.

JONATHAN ROLFE
Administrative Appeals Judge