U.S. Department of Labor

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

BRB No. 20-0577 BLA

DONALD C. COOK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 12/16/2022
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

G. Todd Houck, Mullens, West Virginia, for Claimant.

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

Ann Marie Scarpino (Elena S. Goldstein, Deputy 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 ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits (2016-BLA-05632) rendered on a claim filed on December 3, 2013, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 17.05 years of coal mine employment and a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] Further, she found Employer did not rebut the presumption of legal pneumoconiosis nor total disability due to legal pneumoconiosis and therefore awarded benefits.

On appeal, Employer contends 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] Further, it argues the ALJ erred in finding it liable for benefits. On the merits, Employer argues the ALJ improperly invoked the Section 411(c)(4) presumption based on an erroneous finding that Claimant established 17.05 years of coal mine employment. It further contends the ALJ erred in finding it did not rebut the presumption. 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

[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.

reject Employer's constitutional challenges and to affirm the ALJ's finding Employer is responsible for payment of benefits.[3]

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, 362 (1965).

Due Process Challenge

Employer generally asserts the regulatory scheme whereby the district director must determine the liability of a responsible operator and its carrier, while also administering the Black Lung Disability Trust Fund (Trust Fund), creates a conflict of interest that violates its due process right to a fair hearing. Employer's Brief at 49-54 (unpaginated). For the reasons set forth in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 18-19 (Oct. 25, 2022) (en banc), we reject Employer's argument.

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Peabody Coal Company (Peabody Coal) is the correct responsible operator and was self-insured by Peabody Energy on the last day Peabody Coal employed Claimant; thus, we affirm these findings. 20 C.F.R. §§725.494(e), 725.495, 726.203(a); *see Skrack*, 6 BLR at 711; Decision and Order at 41, Employer's Brief at 17 (unpaginated). 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 (Trust Fund).

Patriot was initially a Peabody Energy subsidiary. Employer's Exhibit 1 at 6. In 2007, after Claimant ceased his coal mine employment with Peabody Coal, Peabody Energy transferred a number of its other subsidiaries, including Peabody Coal, to Patriot. *Id*. at 2-56. That same year, Patriot became an independent company. *Id*. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. Employer's Exhibit 2. Although Patriot's self-insurance authorization made it

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2).

[4] 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 16.

retroactively liable for the claims of miners who worked for Peabody Coal, 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 who were last employed by Peabody Coal when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 41; Director's Brief at 2.

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. Employer's Brief at 17-62 (unpaginated). It argues the ALJ erred in finding Peabody Energy liable for benefits because: (1) the district director is an inferior officer not properly appointed under the Appointments Clause;[5] (2) the ALJ erroneously excluded its liability evidence; (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 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) DOL's issuance of, and adherence to, the Black Lung Benefits Act (BLBA) Bulletin No. 16-01[6] reflects a change in policy wherein DOL began to retroactively impose new liability on self-insured mine operators and bypass traditional rulemaking; 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. *Id.* 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.[7] *Id.*

The Board has previously addressed arguments (1), and (3) through (8), and rejected them in *Bailey*, BRB No. 20-0094 BLA, slip op. at 3-19; *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). Thus, for the

[5] Employer first contested the district director's appointment at the June 5, 2019 hearing before the ALJ. Hearing Transcript at 7.

[6] The BLBA Bulletin No. 16-01 is a memorandum the Director of the Division of Coal Mine Workers' Compensation issued on November 12, 2015 to "provide guidance for district office staff in adjudicating claims" affected by Patriot's bankruptcy.

[7] Employer states it intends the preserve the issue of whether discovery was cut off prematurely, but it does not ask the Board to address the issue. Employer's Brief at 49 (unpaginated).

reasons set forth in *Bailey*, *Howard* and *Graham*, we reject Employer's arguments. We also reject Employer's argument (2) with respect to the exclusion of evidence as inadequately briefed.[8] 20 C.F.R. §802.211(b); *see Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 109 (1983).

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

Invocation of the Section 411(c)(4) Presumption: Length of Coal Mine Employment

Claimant bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986); *Hunt*, 7 BLR at 1-710-711.

The ALJ considered Claimant's employment history form, hearing testimony, and Social Security Administration (SSA) earnings records. Decision and Order at 13-14. Claimant's employment history form states he worked underground for ARMCO Steel Company (ARMCO) and Peabody Coal from April 1977 to November 1994. Director's Exhibit 4. Claimant testified he worked for ARMCO and then Peabody Coal after Peabody Coal bought ARMCO and that all of his employment was underground; he estimated that he worked seventeen and one-half years in coal mines. Hearing Transcript at 16-17. His SSA earnings records provide that he worked for ARMCO from 1978 to 1984, Peabody Coal (now known as Heritage Coal Company) from 1984 until 1994, and Pine Ridge Coal Company in 1995. Director's Exhibit 6.

After setting forth the two-step inquiry for determining a year of coal mine employment and discussing Claimant's testimony and the evidence from the SSA records, the ALJ found Claimant demonstrated "periods of coal mine employment from 1978 to 1994" but did not testify whether his employment was uninterrupted or whether he had any layoffs. 20 C.F.R. §725.101(a)(32); 65 Fed. Reg. 79,920, 79,959 (Dec. 20, 2000); *see Clark*, 22 BLR at 1-280. The ALJ then compared Claimant's yearly earnings reflected in his SSA records to the yearly earnings for miners who worked 125 days set forth in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine Procedure Manual* to

[8] Although Employer asserts, "[t]he ALJ excluded evidence with respect to [the liability] issue which we believe was error, leading to failure to properly consider the issues," it does not explain what evidence was excluded or how it affected the ALJ's disposition of the responsible carrier issue. Employer's Brief at 2 (unpaginated).

"determine whether Claimant's wages demonstrate full or partial calendar years of coal mine employment." Decision and Order at 14 (citing 20 C.F.R. §725.101(a)(32)(iii)).[9] Where Claimant's earnings exceeded the annual average for 125 working days, the ALJ credited Claimant with a full calendar year of employment. Where the earnings fell short, she credited him with a fractional year "based on the ratio of the actual days worked to 125 [days]." *Id*. Based on this method, the ALJ concluded Claimant established 17.05 years of qualifying coal mine employment.[10] *Id.*

Employer concedes Claimant was employed by Peabody from 1985 to 1994 but argues he was not continuously exposed to coal mine dust during that period.[11] Employer's Brief at 9 (unpaginated). Specifically, it contends the ALJ erred in crediting Claimant with full years of coal mine employment in 1986, 1988, 1989, and 1993 because his wages were lower in those years than in 1992,[12] thereby demonstrating that he did not have "fifteen years (15) or [sic] true exposure to coal dust."[13] *Id.* Employer also generally expresses its disagreement with the Sixth Circuit's decision in *Shepherd, v. Incoal,* 915 F.3d 392 (6th Cir. 2019), invites the Board to reassess the rationale in *Shepherd*, and notes the ALJ was not required to apply the method she used; however, it does not identify any specific error by the ALJ in this regard. 20 C.F.R. §802.211(b); *see Sarf,* 10 BLR at 1-120-21; *Fish,* 6 BLR at 109.

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[9] The regulation at 20 C.F.R. §725.101(a)(32)(iii) provides that, if the beginning and ending dates of a miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the ALJ may determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics.

[10] Employer conceded all of Claimant's coal mine employment was underground and is therefore qualifying. Hearing Transcript at 38.

[11] Employer concedes Claimant was continuously employed by Armco from 1978 to 1984. Employer's Brief at 9 (unpaginated).

[12] The ALJ calculated that Claimant's 1992 wages reflect 303.46 working days, while his 1986, 1988, 1989, and 1993 wages reflect 260.78, 272.82, 264.82, and 128.3 working days respectively. Decision and Order at 14.

[13] Because Employer does not explain what it means by "true exposure to coal dust," or how it relates to its assertion that Claimant has less than fifteen years of coal dust exposure, we will not address this assertion. 20 C.F.R. §802.211(b); *see Sarf,* 10 BLR at 1-120-21; *Fish,* 6 BLR at 109.

Moreover, Employer does not specifically dispute that Claimant had a continuous employer-employee relationship with it and Armco for at least fifteen calendar years from 1978 to 1994. *See Skrack*, 6 BLR 1-710, 1-711. Under the regulation, it is therefore presumed, in the absence of evidence to the contrary, that Claimant worked at least 125 days in each of those years. 20 C.F.R. §718.101(a)(32)(ii).[14] Further, the ALJ reasonably compared Claimant's annual wages to the wages for a miner who worked 125 days in each of the years from 1978 to 1994 to conclude he established at least 125 working days for each year in this period. Decision and Order at 14-15; *see* 20 C.F.R.§725.101(a)(32)(iii); *Muncy*, 25 BLR at 1-27. Therefore, we affirm that Claimant established at least fifteen years of qualifying coal mine employment. 20 C.F.R.§725.101(a)(32)(ii), (iii); *see Muncy*, 25 BLR 1-21, 1-27; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993). Thus, we affirm his finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis[15] or "no part of [his] respiratory or pulmonary total disability is 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 rebutted the presumption of clinical pneumoconiosis but failed to rebut the presumption of legal pneumoconiosis and disability causation. *Id.*

[14] The regulation at 20 C.F.R. §725.101(a)(32)(ii) provides that, "[i]f the evidence establishes that the miner's employment lasted for a calendar year or partial periods totaling a 365-day period amounting to one year, it must be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment." *See* 20 C.F.R. §725.101(a)(32)(ii).

[15] 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). This 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).

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." 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).

Employer relies on the opinions of Drs. Zaldivar and Rosenberg that Claimant does not have legal pneumoconiosis. Director's Exhibit 22; Employer's Exhibit 14. The ALJ found their opinions not well-reasoned and thus insufficient to satisfy Employer's burden of proof. Decision and Order at 35-36. Employer argues the ALJ did not give permissible reasons for discrediting their opinions. We disagree.

Dr. Zaldivar examined Claimant on November 24, 2014. Director's Exhibit 22. Based on his examination and objective test results, he diagnosed a disabling restriction with mild diffusion impairment and no obstruction or gas exchange abnormality. *Id.* at 2-3. He excluded a diagnosis of legal pneumoconiosis because Claimant's "chest radiograph does not reveal any intrinsic pulmonary abnormalities" and his "blood gases are normal, which is incompatible with an advanced pulmonary fibrosis resulting in a restriction." *Id.* at 3. Dr. Zaldivar testified "[t]he blood gases are the final arbiters of whether lungs work well or not, and they are working fine." Employer's Exhibit 15 at 14-15. He further explained when coal dust exposure results in restriction it results in "space-occupying lesions [fibrosis]" that "must be visible [on x-ray]." *Id.* at 15. Dr. Zaldivar offered other possibilities as to the etiology of Claimant's pulmonary impairment including undiagnosed "musculoskeletal weakness," obesity, and Claimant possessing "unusually small lungs." Employer's Exhibit 13 at 3-4. Contrary to Employer's contention, the ALJ permissibly found Dr. Zaldivar's opinion not well-reasoned because despite stating "possible" alternatives to Claimant's impairment and generally stating Claimant's lungs were working "well" given his arterial blood gas study results, he failed to explain "why his alternative possibilities cannot co-exist with legal pneumoconiosis, how he came to the conclusion that these possibilities may even exist in Claimant, or why the arterial blood gas testing ruled out legal pneumoconiosis."[16] Decision and Order at 35. The ALJ also correctly observed that Dr. Zalidvar "did not discuss whether the uniformly qualifying

[16] Dr. Zaldivar's characterization of Claimant's blood gas studies is not explained given that he interpreted the 2014 and 2018 blood gas studies that he administered as "normal," but indicated Dr. Rasmussen's 2014 study showed an oxygen consumption that was "26% of the predicted [normal values]," *see* Director's Exhibit 22 at 2, and that Dr. Ranavaya's 2019 blood gas study showed "moderate hypoxemia at rest." Claimant's Exhibit 1 at 4.

pulmonary function tests provided any information regarding legal pneumoconiosis." *Id*.; *see Compton*, 211 F.3d at 211; *Grizzle*, 994 F.2d at 1096.

Dr. Rosenberg conducted a records review and diagnosed Claimant with a disabling restriction, no obstruction, and normal gas exchange in association with exercise. Employer's Exhibit 14 at 4-5. He opined Claimant does not suffer from legal pneumoconiosis, but rather from an "'extrinsic' restriction, unrelated to parenchymal lung disease." *Id.* at 4. He explained, "restriction in relationship to coal mine dust exposure would only be present if advanced changes of parenchymal lung disease are present" and "[i]f he had restriction in relationship to parenchymal lung disease, his gas exchange would have been markedly abnormal in association with exercise" yet Dr. Zaldivar's 2014 and 2018 exercise blood gas tests demonstrated "preserved oxygenation." *Id.* at 4-5. Dr. Rosenberg attributed Claimant's extrinsic restriction to obesity, "bodily habitus," and a possible undiagnosed diaphragm abnormality.[17] Employer's Exhibit 16 at 14. The ALJ permissibly found Dr. Rosenberg's opinion that coal mine dust exposure did not contribute to Claimant's restriction unpersuasive since he focused on the absence of parenchymal lung disease while the definition of legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment."[18] *See* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); 65 Fed. Reg. at 79,941; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012); Decision and Order at 35.

Employer's arguments amount to a request to reweigh the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Therefore, we affirm the ALJ's conclusion that Employer failed to disprove the existence of legal pneumoconiosis. Decision and Order at 35-36.

Disability Causation

The ALJ next addressed whether Employer established no part of Claimant's 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)(ii); Decision and Order at 37. The ALJ permissibly discredited the opinions of Drs. Zaldivar and Rosenberg on the cause of

[17] Dr. Rosenberg clarified that Claimant's obesity was "probably not" sufficient in and of itself to explain his entire restrictive impairment; "it has to be more the obesity combined with bodily habitus." Employer's Exhibit 16 at 14-15.

[18] The Act's implementing regulations recognize legal pneumoconiosis may take the form of an obstructive or restrictive condition, or both, and may be diagnosed notwithstanding a negative x-ray. 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); *see* 65 Fed. Reg. at 79,941; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012).

Claimant's pulmonary disability because they did not diagnose legal pneumoconiosis contrary to the ALJ's finding that Employer failed to disprove the disease.[19] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 37. We therefore affirm the ALJ's conclusion that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 37.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[19] Drs. Zaldivar and Rosenberg did not address whether legal pneumoconiosis caused Claimant's total respiratory disability independent of their conclusions that he did not have the disease. Director's Exhibit 22; Employer's Exhibits 13-16.