U.S. Department of Labor

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

BRB No. 21-0429 BLA

BARRY F. HUNTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY	)	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 Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels and M. Alexander Russell (Vowels Law PLC), Henderson, Kentucky, for Claimant.

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

Olgamaris Fernandez (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) Jerry R. DeMaio's Decision and Order – Awarding Benefits (2019-BLA-05596) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on March 21, 2017.[1]

The ALJ found Peabody Coal Company LLC (Peabody Coal), self-insured through Peabody Energy, is the responsible operator liable for the payment of benefits. He found Claimant established thirty-four years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, he found Claimant 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) (2018), and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §§718.204(b)(2), 725.309(c). He further found Employer did not rebut the presumption and thus 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

[1] This is Claimant's second claim for benefits. The ALJ noted Claimant filed "his first claim for benefits on October 11, 2002" and the district director denied it on January 12, 2004, because "he did not establish any element of entitlement." Decision and Order at 2, 8; Director's Exhibit 1.

[2] 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. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] 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 he finds that "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(c); *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 did not establish any element of entitlement in his prior claim, he had to submit new evidence establishing at least one element of entitlement to obtain review of the merits of his current claim. *Id;* Decision and Order at 8.

manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] It also asserts the duties the district director performs create an inherent conflict of interest that violates its due process rights. In addition, Employer contends the ALJ erred in finding Peabody Energy liable for the payment of benefits. Employer further asserts the ALJ erred in admitting Dr. Chavda's supplemental medical report under the DOL's pilot program because it exceeds the evidentiary limitations. Finally, on the merits of entitlement, it argues the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption.[5]

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, and affirm the ALJ's determination that Employer is liable for benefits. He also urges the Board to reject Employer's argument concerning the DOL's pilot program.

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.[6] 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).

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[4] 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.

[5] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established thirty-four years of qualifying coal mine employment, total disability, a change in an applicable condition of entitlement, and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 8-17.

[6] 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 4.

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Peabody Coal is the correct responsible operator and was self-insured by Peabody Energy on the last day it employed Claimant; thus we affirm these findings.[7] 20 C.F.R. §§725.494(e), 725.495, 726.203(a); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5-6. 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). Employer's Brief at 11-57.

Patriot was initially another Peabody Energy subsidiary. Director's Exhibit 39. In 2007, after Claimant ceased his coal mine employment with Peabody Coal, Peabody Energy transferred a number of its 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. Director's Exhibit 66. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Peabody Coal, 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 Peabody Coal when Peabody Energy owned and provided self-insurance to that company.

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:[8] (1) the district director is an inferior officer not

[7] Employer also states it wants to "preserve" its "ability to challenge" Black Lung Benefits Act (BLBA) Bulletin No. 16-01 as an invalid rule. Employer's Brief at 54. 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*. Employer's 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).

[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, 5 U.S.C. §556(d), because it divests the ALJ of authority under those Acts to receive evidence and adjudicate issues de novo. Employer's Brief at 56-57. 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

properly appointed under the Appointments Clause;[9] (2) the regulatory scheme, whereby the district director must determine the liability of a responsible operator and its carrier when at the same time the DOL administers the 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 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 Peabody Energy; and (7) 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.[10] Employer's Brief at 11-57. Moreover, 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.

The Board has previously considered and rejected these arguments in *Bailey v. Eastern Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 4-29 (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. Eastern 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 Peabody Coal and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.

Evidentiary Issue

ALJs are afforded significant discretion in rendering evidentiary orders. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc). Such orders may be overturned

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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 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 raised this argument for the first time in its brief before the Board. Employer's Brief at 11-17.

[10] 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 52-54. It 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).

only if the party challenging them demonstrates the ALJ's action represented an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). Employer argues the ALJ erred in admitting Dr. Chavda's supplemental medical report, obtained as part of the DOL's pilot program,[11] contending the development of supplemental reports exceeds the DOL's evidentiary limitations. Employer's Brief at 7. We need not resolve this issue.

The sole argument Employer raises regarding the merits of entitlement is whether it rebutted the Section 411(c)(4) presumption. Employer's Brief at 7-10. Even if we were to agree with Employer that Dr. Chavda's supplemental medical report should not have been admitted into evidence, the ALJ's consideration of the doctor's opinion was immaterial to his findings on rebuttal of the Section 411(c)(4) presumption.[12] *See* Director's Exhibit 23. Thus, it has not shown why the alleged error would require remand. *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); Director's Response Brief at 25-26. We therefore decline to address Employer's assertion of evidentiary error.

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,[13] or "no part of

[11] The Department of Labor (DOL) established the Pilot Program under the Act to provide for the supplementation of a miner's complete pulmonary examination in claims where the miner had fifteen or more years of coal mine employment, the DOL-sponsored pulmonary evaluation indicated the miner is entitled to benefits, and the employer submitted evidence contrary to a claims examiner's initial proposed finding of entitlement. *See* BLBA Bulletin 14-05 (Feb. 24, 2014); Director's Response Brief at 25-26. The program became standard procedure in 2019. *See* BLBA Bulletin No. 20-01 (Oct. 24, 2019); Director's Response Brief at 25.

[12] The ALJ did not consider Dr. Chavda's opinion that Claimant has clinical and legal pneumoconiosis in assessing the sufficiency of Employer's experts' opinions at rebuttal of the Section 411(c)(4) presumption. Decision and Order at 19-21; Director's Exhibit 23.

[13] "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). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial

[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 failed to establish rebuttal by either method. Decision and Order at 17-22.

Clinical Pneumoconiosis

We affirm as unchallenged the ALJ's finding that Employer failed to disprove clinical pneumoconiosis. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 19-21. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[14] Thus we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

To rebut disability causation, Employer must establish "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201."[15] 20 C.F.R. §718.305(d)(1)(ii); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015). The ALJ discredited the disability causation opinions of Drs. Tuteur and Selby because they do not diagnose clinical pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove Claimant has the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island*

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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).

[14] Because the ALJ's finding that Employer did not disprove clinical pneumoconiosis precludes a finding that Claimant does not have pneumoconiosis, we need not address Employer's argument that the ALJ erred in finding it failed to rebut the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 7-10.

[15] 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 10-11. The legal standard 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 pneumoconiosis. *See Young*, 947 F.3d at 405. The ALJ correctly stated "the party opposing entitlement must rule out pneumoconiosis as a cause of the miner's disability" under the "play no part" standard. Decision and Order at 21; *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013) (an employer's burden on rebuttal of disability causation is to rule out coal mine employment as a cause of disability or show that pneumoconiosis played no part in causing disability).

Creek Ky. Mining v. Ramage, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 21-22. Because Employer does not contest this finding, we affirm it. *See Skrack*, 6 BLR at 1-711. Thus, we affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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

DANIEL T. GRESH
Administrative Appeals Judge