U.S. Department of Labor

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

BRB No. 21-0469 BLA

WILLIAM H. WHITAKER	)	
	)	
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 Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

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: BUZZARD, ROLFE, and JONES, 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-05659) rendered on a subsequent claim filed on January 17, 2018,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Heritage Coal Company (Heritage) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier. He credited Claimant with twenty-eight years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). The ALJ therefore found Claimant established a change in an applicable condition of entitlement,[2] 20 C.F.R. §725.309(c), and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Peabody Energy is the liable carrier. On the merits, it argues the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[4] Claimant has not filed a response. The Director, Office of

[1] Claimant filed a prior claim on January 5, 2009, which was denied by the district director for failure to establish any element of entitlement. Director's Exhibit 1 at 4, 160.

[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 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); *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 did not establish any element of entitlement in his prior claim, he had to submit evidence establishing at least one element to obtain review of the merits of his current claim. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that the miner's total disability is 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); 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 710, 1-711 (1983); Decision and Order at 17.

Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to affirm the ALJ's determination that Heritage is the responsible operator and Peabody Energy is liable for the payment of benefits.

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 (1965).

Responsible Insurance Carrier

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 22-23. 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). Employer's Brief at 24 (unpaginated).

Patriot was initially a subsidiary of Peabody Energy. Director's Exhibit 49. In 2007, five years after Claimant ceased his coal mine employment with Heritage, Peabody Energy transferred a number of its other subsidiaries, including Heritage, to Patriot. Director's Exhibits 8, 49. That same year, Patriot was spun off as an independent company. Director's Exhibit 49. On March 4, 2011, Patriot was authorized to self-insure itself and its subsidiaries retroactive to 1973. Director's Exhibit 64. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Heritage, Patriot later went bankrupt and can no longer provide for those benefits. Director's Exhibits 35, 37. 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 25-26.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated 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: (1) the district director is an inferior officer not properly appointed under the

[5] 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 1 at 158.

Appointments Clause;[6] (2) allowing the district director to make an initial determination of the responsible carrier in instances involving potential Trust Fund liability violates its due process rights; (3) 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; (4) the DOL released Peabody Energy from liability; (5) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (6) the DOL failed to maintain adequate records with respect to Patriot's bond and failed to comply with its duty to monitor Patriot's financial health; (7) the Director is equitably estopped from imposing liability on Peabody Energy; and (8) its due process rights were violated because discovery was cut off prematurely. Employer's Brief at 10-56 (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 32 (unpaginated).

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 Heritage 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 Claimant has neither legal nor clinical pneumoconiosis,[7] or that "no

[6] Employer first raised this argument in its post-hearing brief to the ALJ. Employer's Post-Hearing Brief at 34-35.

[7] "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 failed to establish rebuttal by either method. Decision and Order at 21-22.

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). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, requires Employer to establish Claimant's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "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)).

Employer relies on the medical opinions of Drs. Selby and Tuteur to disprove legal pneumoconiosis. Employer's Brief at 8-9 (unpaginated). Dr. Selby diagnosed Claimant with an obstructive impairment due to asthma and unrelated to coal mine dust exposure. Director's Exhibit 26 at 17. Dr. Tuteur diagnosed Claimant with an obstructive impairment due to obesity, diabetes, hypertension, gastroesophageal reflux disease, atrial fibrillation, essential tremor, and obstructive sleep apnea and unrelated to coal mine dust exposure. Employer's Exhibit 9 at 16-26 (*referencing* Claimant's Exhibit 5 at 6). The ALJ found their opinions unpersuasive and thus do not satisfy Employer's burden of proof. Decision and Order at 19-20.

Employer argues the ALJ applied an incorrect legal standard because he required Drs. Selby and Tuteur to establish Claimant's coal dust exposure was not a contributing or aggravating factor to his respiratory impairment. Employer's Brief at 8-9 (unpaginated). We disagree.

As the ALJ correctly observed, because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to rebut the presumed existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order 18-21. He correctly noted that this requires Employer to prove Claimant's impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 15 (citing 20 C.F.R. §718.201(b)); *see Young*, 947 F.3d at 405; *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 667 (6th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013); 20 C.F.R. §718.201(a)(2).

The ALJ did not discredit Drs. Selby's and Tuteur's opinions based on an incorrect standard. He permissibly determined their opinions are insufficient to meet Employer's burden to disprove legal pneumoconiosis because neither physician adequately explained why Claimant's history of coal dust exposure did not contribute to or aggravate his disabling respiratory impairment. *See Huscoal, Inc. v. Director, OWCP* [*Clemons*], 48 F.4th 480, 489-90 (6th Cir. 2022); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 20. The ALJ further permissibly found Drs. Selby's and Tuteur's opinions unpersuasive because they did not adequately explain why Claimant's response to bronchodilators on pulmonary function testing[8] demonstrates his impairment is unrelated to coal mine dust exposure.[9] *See Clemons*, 48 F.4th at 493; *Barrett*, 478 F.3d at 356; *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 20.

Because the ALJ provided valid reasons for discrediting Drs. Selby's and Tuteur's opinions, the only opinions supportive of Employer's burden on rebuttal, we affirm his finding that Employer failed to establish that Claimant does not have legal pneumoconiosis.[10] *Ogle*, 737 F.3d at 1072-73; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order at 20. We therefore affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1); Decision and Order at 21. Moreover, as Employer raises no specific allegations of error regarding the ALJ's findings on disability causation, we affirm his determination that Employer failed to establish no part of Claimant's respiratory disability was due to legal

[8] The ALJ found that three of the four pulmonary function studies remained qualifying for total disability even after administration of bronchodilators. Decision and Order at 5, 13.

[9] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Shelby and Tuteur, we need not address Employer's additional arguments as to why the ALJ erred in weighing their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 19-20; Employer's Brief at 8-9 (unpaginated).

[10] Because we affirm the ALJ's finding that Employer failed to disprove legal pneumoconiosis, we need not address Employer's challenges to his finding it also failed to disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 19-20; Employer's Brief at 7-8 (unpaginated).

pneumoconiosis. 20 C.F.R. 718.305(d)(1)(ii); *Skrack*, 6 BLR at 1-711; Decision and Order at 21.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge