**U.S. Department of Labor**

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

BRB No. 19-0539 BLA

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| HARRY D. STOVER | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| EASTERN ASSOCIATED COAL COMPANY | ) | DATE ISSUED: 01/27/2021 |
| | ) | |
| and | ) | |
| | ) | |
| 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 of Lauren C. Boucher, 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.

Sarah M. Hurley (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), 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 Lauren C. Boucher's Decision and Order on Remand (2018-BLA-05792) rendered on a claim filed on June 22, 2016 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge initially found Employer, self-insured through its parent company Peabody Energy Corporation (Peabody), is the responsible operator/carrier. She credited Claimant with thirty years of underground coal mine employment, including fifteen years of qualifying coal mine employment as stipulated by Employer, and found he established a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). She thus found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues liability for the payment of benefits should transfer to the Black Lung Disability Trust Fund because the administrative law judge erred in finding Peabody is the responsible carrier. Employer also contends the administrative law judge erred in finding the Section 411(c)(4) presumption unrebutted.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response arguing that the Benefits Review Board need not address Employer's responsible carrier arguments because they rely on evidence the administrative law judge excluded from the record as untimely submitted and Employer has not challenged the administrative law judge's evidentiary rulings.

[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 impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 7, 11.

Alternatively, the Director urges the Board to reject Employer's allegations of error in the administrative law judge's finding that Peabody is the responsible carrier.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

**Responsible Carrier: Admissibility of Liability Evidence**

The district director issued a Notice of Claim identifying Employer as the potentially liable operator and Peabody as the self-insurer.[4] Director's Exhibit 34. The Notice gave Employer thirty days to respond and ninety days to submit any liability evidence. *Id*. Employer, via its third-party claims administrator, responded to the Notice of Claim, denying all aspects of its potential liability. Director's Exhibit 36. It asserted, among other things, that Patriot Coal should be liable rather than Peabody, but submitted no evidence in support of its position. *Id.*

On April 12, 2017, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) giving "any party that wishes to submit liability evidence or identify liability witnesses" until June 11, 2017, to submit evidence in support of their positions. Director's Exhibit 44. Moreover, the SSAE stated "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability, or testimony of a witness not identified at this stage of the proceedings, may be admitted into the record once a case is referred to the Office of Administrative Law Judges [(OALJ)]." *Id*., *citing* 20 C.F.R. §725.456(b)(1).

On June 5, 2017, Employer requested an extension of time to submit medical evidence, and the district director granted it an extension until November 19, 2017.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 17, 21.

[4] Employer's assertion that the district director never issued a Notice of Claim designating Peabody as a potentially liable self-insurer therefore lacks merit. Employer's Brief at 35.

Director's Exhibits 48, 49. Employer did not submit any liability evidence prior to the extended deadline.

Thereafter the district director issued a Proposed Decision and Order naming Employer as the responsible operator and awarding benefits. Director's Exhibit 50. On April 25, 2018, Employer requested a formal hearing before an administrative law judge and, for the first time, submitted documents related to its argument that Patriot Coal is the liable carrier. *See* Director's Exhibit 55. On February 21, 2019, prior to the formal hearing scheduled for March 6, 2019, Employer filed a motion to be dismissed as the responsible operator, asserting Peabody was not the liable carrier, and requesting that it be allowed to submit transcripts of depositions of Department of Labor (DOL) employees Steve Breeskin and David Benedict. At the hearing, the administrative law judge denied Employer's motion to be dismissed, but stated she would consider the admission of the deposition evidence post-hearing, and instructed the parties to brief the issue. Hearing Transcript at 12-13. The administrative law judge subsequently issued an Order setting a briefing schedule, and Employer and the Director filed briefs.

On May 3, 2019, the administrative law judge issued an Order denying Employer's motions, finding its liability evidence inadmissible because it was not submitted before the district director and Employer did not establish any extraordinary circumstances to admit the untimely evidence into the record. Order Denying Employer's Motions to Admit Depositions and to Dismiss Peabody at 8, *citing* 20 C.F.R. §§725.414(d), 725.456(b)(1). On June 14, 2019, the administrative law judge issued an Order Denying Employer's Motion to Reconsider, reiterating her previous determination regarding Employer's liability evidence.[5]

On appeal, Employer asserts the administrative law judge erred in finding Peabody liable for payment of benefits as Employer's self-insurer. Employer's Brief at 20-36. The Director responds that Employer did not meet its burden under 20 C.F.R. §725.495(c) to prove it is not the properly designated responsible operator because it failed to timely submit any liability evidence to the district director. *See* 20 C.F.R. §725.495(c); Director's Response at 10-11. We agree with the Director's argument.

Because the district director must designate the responsible operator or carrier before a case is referred to the OALJ, the regulations require that absent extraordinary

[5] Despite excluding all of Employer's liability evidence, the administrative law judge later addressed and rejected each of Employer's liability arguments. Decision and Order at 33-40.

circumstances, liability evidence must be timely submitted to the district director.[6] 20 C.F.R. §725.456(b)(1). Employer does not dispute it failed to timely submit liability evidence before the district director. Nor does it assert extraordinary circumstances exist to excuse its failure. Rather, Employer indicates only that the excluded evidence supports its assertion that Peabody is not liable for payment of benefits. Employer's Brief at 24-27. Failing to timely submit the evidence to the district director, however, precludes Employer from basing its liability arguments on it here. *Id*.; *see* 20 C.F.R. §725.456(b)(1).

As the "designated responsible operator," Employer has the burden to prove either that it does not have sufficient assets to secure the payment of benefits or that another potentially liable operator more recently employed the miner. 20 C.F.R. 725.495(c)(1), (2). To support a challenge to its liability, Employer, not the Director, is responsible for submitting any documentation relevant to its liability to the district director within specific timeframes. *See* 20 C.F.R. §§725.408(b)(1) (90 days from notification as a potentially liable operator), 725.410 (60 days from issuance of the SSAE), 725.456(b)(1) (documentary liability evidence "not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances"). Although Employer suggests some of the documents it intended to rely on are a matter of "public record," it does not explain why that fact relieved it of its obligation to identify and submit those documents when the matter was before the district director.[7] Employer's Brief at 21; *see* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 446-47

[6] A "carrier is required to discharge the statutory and regulatory duties imposed on the employer, thus stepping into its shoes." *Tazco, Inc. v. Director, OWCP* [*Osborne*], 895 F.2d 949, 951 (4th Cir. 1990). The insurance carrier thus is a party that must be given adequate notice of the claim and an opportunity to defend on the question of its direct liability to the claimant. 20 C.F.R. §§725.360(a)(4), 725.407(b); *see Osborne*, 895 F.2d at 952. The Board has consistently held that the rules and regulations regarding liability evidence apply to carriers as well as to operators. *See Olenick v. Olenick Bros. Coal Co.*, BRB No. 11-0833 BLA, slip op. at 4 (Sept. 19, 2012) (unpub.); *J.H.B.* [*Boyd*] *v. Peres Processing, Inc.*, BRB No. 08-0625 BLA, slip op. at 5 (June 30, 2009) (unpub.).

[7] As the Director notes, Employer does not contest it is Claimant's most recent coal mine employer, it was self-insured through Peabody at the time of Claimant's employment, and Peabody is financially capable of paying for benefits. Director's Brief at 2, 9, 11. Employer instead alleges some of the "public record" documents it failed to timely submit to the district director prove the DOL "shifted" liability for Employer's Black Lung claims to Patriot Coal and absolved Peabody of any further liability. Employer's Brief at 21-27.

(6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

Because Employer does not allege any error with regard to the administrative law judge's determination that its liability evidence was untimely submitted, 20 C.F.R. §725.456(b)(1), we affirm its exclusion. *Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983). And as all of Employer's arguments regarding Peabody's liability depend on that excluded evidence, we need not further address them. *See* Employer's Brief at 20-36. We therefore affirm the administrative law judge's denial of Peabody's motion to be dismissed from the case, and affirm her finding that Peabody is the liable carrier for this claim.[8] 20 C.F.R. §725.495.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden of proof shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[9] or "no

[8] Employer also argues that it should be relieved of liability under the doctrine of equitable estoppel. Employer's Brief at 27-31. To invoke equitable estoppel, Employer must show both that the Department of Labor (DOL) engaged in affirmative misconduct and that Employer reasonably relied on the DOL's action to its detriment. *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59-63 (1984); *Dawkins v. Witt*, 318 F.3d 606, 612 n.6 (4th Cir. 2003); *Lewis v. Washington*, 300 F.3d 829, 834 (7th Cir. 2002). Employer, however, identifies no admissible evidence establishing the DOL released Peabody Energy from liability, or made a representation of such a release with respect to Peabody's liability. Thus the administrative law judge properly rejected this argument. Decision and Order at 39. Further, as the Director correctly asserts, even if Employer established the DOL made such a representation, it would not constitute "affirmative misconduct[,]" as Employer does not allege the DOL acted either intentionally or recklessly to mislead. Director's Brief at 16-17; *see U.S. v. Mich. Express, Inc.*, 374 F.3d 424, 427 (6th Cir. 2004) (Affirmative misconduct is "more than mere negligence. It is an act by the government that either intentionally or recklessly misleads."); *see also Keener v. Eastern Associated Coal Corp.*, 954 F.2d 209, 214 n.6 (4th Cir. 1992); *Teamsters & Employers Welfare Trust of Illinois v. Gorman Bros. Ready Mix*, 283 F.3d 877, 884 (7th Cir. 2002). Because Employer failed to establish the necessary elements, we affirm the administrative law judge's rejection of Employer's equitable estoppel argument.

[9] "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

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 administrative law judge found Employer failed to rebut the presumption by either method.

**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 Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

Employer relies on the opinions of Drs. Zaldivar and Tuteur.[10] Dr. Zaldivar diagnosed Claimant with mild emphysema and asthma, and Dr. Tuteur diagnosed him with chronic obstructive pulmonary disease (COPD). Director's Exhibit 28 at 4; Employer's Exhibit 3 at 5. Both physicians opined Claimant's impairment was caused entirely by smoking and unrelated to coal mine dust exposure. *Id.* The administrative law judge discounted their opinions because she found they did not sufficiently explain why coal mine dust exposure did not contribute to Claimant's pulmonary impairment. Decision and Order at 28-30.

Employer argues the administrative law judge erred in discrediting the opinions of Drs. Zaldivar and Tuteur. Employer's Brief at 8-15, 18-19. We disagree.

In challenging the administrative law judge's findings, Employer quotes the opinions of Drs. Zaldivar and Tuteur at length, and asserts they provided "reasoned and scholarly medical opinions refuting [the administrative law judge's] conclusion" their opinions do not rebut the presumption of legal pneumoconiosis. Employer's Brief at 8-15. Employer's arguments are requests to reweigh the evidence which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Further, contrary to Employer's contentions, in light of the Department of Labor's recognition that the effects of smoking and coal dust exposure are additive, the administrative law judge

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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).

[10] The administrative law judge correctly found that Drs. Habre, Raj, and Green all diagnosed Claimant with legal pneumoconiosis, and their opinions therefore do not aid Employer on rebuttal. Decision and Order at 30. Thus, we need not address Employer's arguments regarding the weight she accorded to these opinions. Director's Exhibit 18; Claimant's Exhibits 2, 3; Employer's Brief at 15-18.

permissibly found Drs. Zaldivar and Tuteur failed to adequately explain why Claimant's thirty year history of coal mine dust exposure did not significantly contribute, along with his smoking, to his respiratory impairment.[11] *See* 20 C.F.R. §718.201(b); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989); Decision and Order at 28-30; Director's Exhibit 28; Employer's Exhibits 3, 8, 9. Because the administrative law judge permissibly discounted the opinions of Drs. Zaldivar and Tuteur, we affirm her determination that Employer did not disprove Claimant has legal pneumoconiosis. Decision and Order at 28-31. Employer's failure to disprove legal pneumoconiosis precludes a legal conclusion that Claimant does not have pneumoconiosis.[12] *See* 20 C.F.R. §718.305(d)(2)(i).

**Disability Causation**

Employer also contends the administrative law judge erred in finding it did not establish that "no part of [Claimant's] respiratory or pulmonary total disability was caused

[11] Dr. Zaldivar determined the pulmonary impairment he observed is due to smoking because Claimant's smoking history "in itself is sufficient to have caused . . . airway obstruction and emphysema." Director's Exhibit 28. At his deposition, Dr. Zaldivar acknowledged the asthma and emphysema he diagnosed could be due to other causes. Employer's Exhibit 8 at 26. He also stated that Claimant "worked in the coal mines for [forty] years and potentially he could have developed pneumoconiosis either legally or clinically." *Id*. at 36. He concluded, however, that Claimant's respiratory or pulmonary impairment was due solely to his significant smoking history. *Id*. at 37. Similarly, Dr. Tuteur provided that "[c]learly, [Claimant] was exposed to sufficient amounts of coal mine dust to produce a coal dust related primary pulmonary process in a susceptible host" but ultimately concluded the respiratory or pulmonary impairment he diagnosed was due solely to smoking based on a comparison of "the [twenty percent] risk of COPD among smokers who never mined to the [one percent] to [two percent] risk of nonsmoking miners." Employer's Exhibit 3. At his deposition, Dr. Tuteur reiterated his belief that Claimant does not have legal pneumoconiosis despite his "recognition that both the inhalation of coal mine dust and the chronic inhalation of tobacco smoke may produce [COPD]." Employer's Exhibit 9 at 25.

[12] We therefore need not address Employer's contentions that the administrative law judge erred in finding that it also failed to disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 5-8.

by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); Employer's Brief at 19-20. We disagree.

The administrative law judge permissibly discredited Drs. Zaldivar's and Tuteur's opinions on disability causation because they were premised on their beliefs that Claimant does not have legal pneumoconiosis, contrary to her finding Employer did not disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (such an opinion "may not be credited at all" absent "specific and persuasive reasons" for concluding the doctor's view on disability causation is independent of his erroneous opinion on pneumoconiosis); Decision and Order at 32; Director's Exhibit 28; Employer's Exhibit 3. We therefore affirm her finding that Employer did not establish Claimant's respiratory disability is unrelated to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 32.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge