**U.S. Department of Labor**

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

BRB No. 20-0376 BLA

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| WILLIAM R. FOGLE | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| HERITAGE COAL COMPANY | ) | |
| | ) | |
| and | ) | |
| | ) | |
| PEABODY ENERGY CORPORATION | ) | DATE ISSUED: 01/20/2023 |
| | ) | |
| 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 Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for Claimant.

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

William M. Bush (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, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jonathan C. Calianos's Decision and Order Awarding Benefits (2017-BLA-05971) rendered on a subsequent claim filed on July 8, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ initially found Heritage Coal Company (Heritage) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier. He found Claimant has thirty-three years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, the ALJ determined Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[2] and demonstrated a change in an applicable condition of entitlement.[3] 20 C.F.R. §§718.305, 725.309. He further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it liable for the payment of benefits. On the merits, Employer argues the ALJ erred in finding the Section 411(c)(4) presumption unrebutted. Claimant filed a response brief, urging the Benefits Review

[1] Claimant filed an initial claim on July 16, 2003, which the district director denied on March 9, 2004, because Claimant failed to establish any element of entitlement. Director's Exhibit 1 at 3, 4.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes 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.

[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). Because Claimant's prior claim was denied for failure to establish any element of entitlement, Claimant had to submit new evidence establishing any element to obtain review of his current claim on the merits. 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3; Director's Exhibit 1 at 3, 4.

Board to affirm the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), also filed a response brief, urging the Board to reject Employer's liability arguments, but declined to address the merits of entitlement.[4]

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.[6] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); *see* 20 C.F.R. §§725.494(e), 725.495, 726.203(a); September 26, 2019 Order Denying Motion to Dismiss Peabody Energy Corporation as Responsible Operator; August 22, 2019 Hearing Transcript at 10-20. 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).

[4] We affirm, as unchallenged on appeal, the ALJ's findings of thirty-three years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and thus that Claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[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); Decision and Order at 8; Director's Exhibits 1 at 65, 66; 7 at 1.

[6] Employer also states it intends to "preserve" its "ability to challenge" Black Lung Benefits Act (BLBA) Bulletin No. 16-01 as an invalid rule. Employer's Brief at 49-50. Employer generally argues Bulletin No. 16-01 contradicts liability rules under the Act, was issued without notice and comment, and violates the Administrative Procedure Act. Employer also argues the Department of Labor (DOL) acted arbitrarily and capriciously by not following its own self-insurance regulations. *Id.* Apart from one sentence summarizing its arguments, Employer has not set forth sufficient detail to permit the Board to consider the merits of these issues. *See* 20 C.F.R. §802.211(b); *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).

Patriot was initially another Peabody Energy subsidiary. Director's Brief at 2. In 2007, after Claimant ceased his coal mine employment with Heritage, Peabody Energy transferred a number of its other subsidiaries, including Heritage, to Patriot. Director's Exhibit 31. 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*. at 59-60. 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 Brief at 2. 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. *Id*.

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 district director is an inferior officer not properly appointed under the Appointments Clause[7]; (2) the DOL released Peabody Energy from liability; (3) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) the Director is equitably estopped from imposing liability on Peabody Energy; (5) the regulatory scheme whereby the district director determines the liability of a responsible operator and carrier, while also administering the Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing; (6) 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; (7) 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act and the Administrative Procedure Act; and (8) 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. Employer's Brief at 7-52. Employer further 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*.

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,

[7] In its Brief Addressing Liability to the ALJ submitted May 1, 2019, Employer first challenged the district director's authority, well after the claim had already been transferred to the Office of Administrative Law Judges. May 1, 2019 Employer's Brief Addressing Liability at 1, 2-8.

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 Heritage and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.[8]

**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,[9] or "no 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.

**Legal Pneumoconiosis**[10]

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated

[8] Employer states that it wants to "preserve" its argument that its due process rights were violated because the ALJ "cut off" discovery "prematurely." Employer's Brief at 47-48. Employer neither asks the Board to address this issue nor sets forth any argument that would permit our review. *See* 20 C.F.R. §802.211(b); *Cox*, 791 F.2d at 446-47; *Sarf*, 10 BLR at 1-120-21.

[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). 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).

[10] We affirm, as unchallenged, the ALJ's finding that Employer did not disprove clinical pneumoconiosis. *Skrack*, 6 BLR at 1-711. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. However, we address legal pneumoconiosis because the ALJ's findings on that issue have bearing on whether Employer disproved disability causation by establishing that no part of Claimant's total disability is due to either clinical or legal pneumoconiosis. *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8, 1-159 (2015).

by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). The United States Court of Appeals for the Sixth Circuit requires Employer establish the miner'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)).

The ALJ credited Dr. Sood's opinion that Claimant has legal pneumoconiosis over the contrary opinions of Employer's experts, Drs. Tuteur and Selby. Employer challenges only the ALJ's determination that Dr. Tuteur's opinion is inadequate to satisfy its burden of proof.

Initially, Employer asserts the ALJ applied an improper legal standard by requiring it to "rule out" coal mine dust exposure as a cause of Claimant's totally disabling respiratory or pulmonary impairment in order to disprove that Claimant has legal pneumoconiosis. Employer's Brief at 6. We disagree. Although the ALJ used the term "rule out" on occasion when discussing Dr. Tuteur's opinion, the ALJ's analysis did not rise to the level of applying an incorrect legal standard. The ALJ correctly stated "Employer must establish the absence of any respiratory or pulmonary impairment arising out of coal mine employment," including any chronic pulmonary disease or respiratory or pulmonary impairment "significantly related to or substantially aggravated by dust exposure in coal mine employment." Decision and Order at 41; *see* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). Moreover, as explained below, the ALJ permissibly found Dr. Tuteur's opinion lacked credibility because it was poorly reasoned and not because it failed to satisfy an incorrect heightened legal standard. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 47.

Dr. Tuteur diagnosed Claimant having chronic obstructive pulmonary disease (COPD) which was "more likely" caused by smoking, gastroesophageal reflux disease (GERD), chronic use of Lisinopril, and upper airway disease (chronic respiratory and/or ear infections as a child), and not coal mine dust exposure. Employer's Exhibits 7 at 4; 8 at 19-26. He excluded coal mine dust exposure as a causative factor for Claimant's COPD based on medical literature describing the relative risks of developing COPD for a non-smoking miner as one percent in comparison to twenty percent for a miner, such as Claimant, who has a smoking history. Employer's Exhibits 7 at 4; 8 at 19-26. Moreover, Dr. Tuteur opined that individuals with GERD were at a higher risk of developing COPD than persons exposed to coal mine dust. *Id.*

Contrary to Employer's contention, the ALJ permissibly found Dr. Tuteur's opinion unpersuasive to disprove that Claimant has legal pneumoconiosis as he relied on statistical

probabilities and not the specifics of Claimant's case. *See Young*, 947 F.3d at 408-09; *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985) (ALJ may permissibly discount a physician's reasoning because it is based on generalities and not the specifics of a claimant's case); Decision and Order at 46. The ALJ also permissibly found Dr. Tuteur's conclusion "speculative" that Claimant had recurrent respiratory infections as a child. Decision and Order at 46; *see Peabody Coal Co. v. Smith*, 127 F.3d 504, 507 (6th Cir. 1997) (physician's opinion must be based on more than "mere speculation"). And, he permissibly found Dr. Tuteur did not adequately explain why "Claimant's very significant history of coal mine dust exposure did not also play a role in his respiratory impairment, regardless of whether [his COPD] 'best fit' with GERD, or was 'most likely' caused by childhood respiratory infections." Decision and Order at 46; *see Rowe*, 710 F.2d at 255; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Thus, we see no error in the ALJ's overall conclusion that Dr. Tuteur did not offer a sufficiently reasoned opinion as to why coal mine dust exposure did not significantly contribute to, or substantially aggravate, Claimant's COPD. *See Groves*, 761 F.3d at 600.

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do.[11] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ acted within his discretion in weighing the evidence, we affirm his finding that Employer failed to disprove that Claimant has legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A).

**Disability Causation**

To disprove disability causation, Employer must establish "no part of the [m]iner's respiratory or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R. §718.305(d)(1)(ii). Contrary to Employer's contention, the ALJ permissibly found Dr. Tuteur's opinion on the cause of Claimant's disabling respiratory disease unpersuasive for the same reasons he discredited it on legal pneumoconiosis, which we have affirmed. Moreover, the ALJ permissibly found Dr. Tuteur's opinion on disability causation unpersuasive because he did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove that Claimant has the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 49; Employer's Brief at 5-6; Employer's

[11] Employer does not challenge the ALJ's rejection of Dr. Selby's opinion on legal pneumoconiosis as not well-reasoned; thus we affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order at 44.

Exhibits 7, 8. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption by establishing no part of Claimant's disabling respiratory impairment was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 47-50.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge