U.S. Department of Labor

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

BRB No. 21-0355 BLA

LEONARD CLARK (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 01/31/2023
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 Lystra A. Harris, 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.

Jeffrey S. Goldberg (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, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Awarding Benefits (2018-BLA-05794) rendered on a claim filed on April 4, 2017,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Eastern Associated Coal Company (Eastern) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier. She accepted the parties' stipulation of at least eighteen years of qualifying coal mine employment and determined Claimant suffered from a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). The ALJ therefore found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. She further determined Employer did not rebut the presumption and awarded benefits.

On appeal, Employer asserts Peabody Energy is not the responsible carrier. On the merits, Employer argues the ALJ erred in finding the Section 411(c)(4) presumption was unrebutted.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds urging the Benefits Review

[1] Claimant died on April 12, 2019. Director's Exhibit 2; Claimant's Exhibits 5-6; Hearing Transcript at 5-6.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled 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); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the ALJ's determinations that Claimant established at least eighteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment and thus invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 25.

Board to affirm the ALJ's determination that Eastern 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.[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).

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Eastern is the correct responsible operator and it was self-insured by Peabody Energy on the last day Eastern employed Claimant; thus we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 6-8. Rather it alleges that 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).

Patriot was initially another Peabody Energy subsidiary. In 2007, after Claimant ceased his coal mine employment with Eastern, Peabody Energy transferred a number of its other subsidiaries, including Eastern, to Patriot. Director's Response at 2, 10. That same year, Patriot was spun off as an independent company. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. Director's Response at 10; Employer's Brief at 20, 25-30; Decision and Order at 6. Although Patriot's self-insurance authorization made it retroactively liable for claims of miners who worked for Eastern, Patriot later went bankrupt and can no longer provide for those benefits. Director's Response at 2; Employer's Brief at 25, 28; Decision and Order at 6. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed by Eastern when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 8-13.

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 payment of benefits following Patriot's bankruptcy: (1) The Director failed to present any evidence that Peabody Energy self-insured Eastern; (2) the Department of Labor (DOL) released Peabody Energy from liability; (3) 20 C.F.R.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

§725.495(a)(4) precludes Peabody Energy's liability; (4) the Director is equitably estopped from imposing liability on the company; (5) 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; and (6) because Patriot cannot pay benefits, Black Lung Benefits Act Bulletin Nos. 12-07 and 14-02 place liability on the Trust Fund. Employer's Brief at 20-32. 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.[5]

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 that Eastern and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.

Exclusion of Liability Evidence

Employer asserts the ALJ erred in excluding its liability evidence, Employer's Exhibits 6-10,[6] submitted to the ALJ in support of its arguments that Patriot is the responsible carrier. Employer's Brief at 20-23. Employer neither submitted liability

[5] Employer also alleges the ALJ erred in failing to require the Director to name the Black Lung Disability Trust Fund (the Trust Fund) as a party to this claim, and that the district director failed to take an action on its request to dismiss Peabody Energy. Employer's Brief at 22-23. The Director represents the Trust Fund's interests and is a party to all claims under the Act. 30 U.S.C. §932(k); *see also Boggs v. Falcon Coal Co.*, 17 BLR 1-62, 1-65-66 (1992); *Truitt v. N. Am. Coal Corp.*, 2 BLR 1-199, 1-202 (1979); Director's Brief at 10 n.3. Further, while Employer requested dismissal of Peabody Energy as the responsible carrier in response to the Notice of Claim, in response to the Proposed Decision and Order it requested that the district director forward the claim for a hearing before the Office of Administrative Law Judges (OALJ). Director's Exhibits 23, 46. The district director forwarded the claim to the OALJ as requested. Director's Exhibit 49.

[6] Employer's Exhibit 6 is Mr. David Benedict's deposition, Employer's Exhibit 7 is Mr. Breeskin's deposition, Employer's Exhibit 8 is an in camera portion of Mr. Benedict's deposition, Employer's Exhibit 9 is an in camera portion of Mr. Breeskin's deposition, and Employer's Exhibit 10 consists of "various" DOL documents.

evidence nor identified any liability witnesses before the district director and further provides no argument that there were extraordinary circumstances for failing to do so. *See* Director's Exhibits 23-24, 29-30, 46; Employer's Brief. Accordingly, we affirm the ALJ's exclusion of Employer's Exhibits 6-10.[7] *See Skrack*, 6 BLR at 1-711;20 C.F.R. §§725.456(b)(1), 725.457(c)(1); Decision and Order at 9, n.8; Hearing Transcript at 19-23.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish Claimant had neither legal nor clinical pneumoconiosis,[8] or that "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.[9] Decision and Order at 36.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish that Claimant did 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 Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 555 (4th Cir. 2013); *Minich v. Keystone Coal Mining Co*., 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the medical opinions of Drs. Zaldivar and Rosenberg to disprove the existence of legal pneumoconiosis. Dr. Zaldivar diagnosed Claimant with moderate airway obstruction due to undertreated asthma with remodeling, and oxygenation abnormality due to fluid from severe congestive heart failure, unrelated to his previous coal

[7] Regardless, these same documents were admitted and considered in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022) (en banc) with the same material facts, and the Board held they made no difference in outcome.

[8] "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 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).

[9] The ALJ found Employer disproved the existence of clinical pneumoconiosis. Decision and Order at 28-29; *see* 20 C.F.R. §718.305(d)(1)(i)(B).

mine employment. Employer's Exhibits 3 at 2-5; 14 at 7-13, 17-22, 25-26. Dr. Rosenberg found moderate to severe airflow obstruction due to cigarette smoking and asthma, and severe cardiac disease resulting in fluid in the lungs, unrelated to coal mine dust exposure. Employer's Exhibits 4 at 2-4; 13 at 7-9, 14-15. The ALJ found neither opinion sufficiently reasoned to rebut the presence of legal pneumoconiosis. Decision and Order at 31-32.

Employer contends the ALJ applied an improper standard of proof by requiring Drs. Zaldivar and Rosenberg to prove coal dust exposure "could not have caused" Claimant's impairment, thus requiring a "mere possibility of contribution." Employer's Brief at 2-13. Employer also asserts the ALJ erred in discrediting Drs. Zaldivar's and Rosenberg's opinions and mischaracterized their opinions. *Id.* at 3-7, 11-13. We disagree.

Initially, the ALJ did not shift the burden of proof to Employer; rather, she examined the reasoning of each physician to determine if his conclusions were adequately explained. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); Decision and Order at 29-33. She set forth the correct standard for rebuttal of legal pneumoconiosis, explaining Employer must establish by a preponderance of the evidence that Claimant did not have a lung disease "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 26 (citing 20 C.F.R. §718.201(a)-(b)). She further correctly indicated that it was the Employer's burden to affirmatively disprove the existence of pneumoconiosis. Decision and Order at 26. She therefore discredited Dr. Zaldivar not for the failure to meet a wrong standard, but for Dr. Zaldivar's failure to adequately explain his own conclusion that Claimant's impairment was completely unrelated to his coal mine dust exposure, *Id.* at 32, finding Dr. Zaldivar did not adequately explain his belief that Claimant's "coal mine dust exposure history could not have contributed to Claimant's obstructive disabling pulmonary impairment in addition to other factors like his age and heart and lung condition."

Further, the ALJ permissibly found Dr. Zaldivar's opinion undermined as contrary to the regulations given his reliance on negative radiographic evidence to find legal pneumoconiosis absent. 20 C.F.R. §718.202(a)(4), (b); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000) (recognizing that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of x-ray evidence of clinical pneumoconiosis); Employer's Exhibit 14 at 29-30 (indicating where the "CT scans and chest x-rays are negative. . . . the expectation is there be [sic] minimal amount of dust, if any, within the lungs that could cause any damage"); *see also* Employer's Exhibit 3 at 4. Employer does not challenge this credibility determination or otherwise explain how the ALJ mischaracterized Dr.

Zaldivar's opinion in this regard;[10] thus, we affirm it. *Skrack*, 6 BLR at 1-711; Decision and Order at 32-33.

Employer also argues the ALJ erred in finding Dr. Rosenberg's opinion undermined. Employer's Brief at 11-13. We disagree.

Dr. Rosenberg opined it is unlikely that a miner who has no impairment when he leaves coal mine employment will suddenly develop a coal dust related impairment years "far removed" from his last exposure. Employer's Exhibit 4 at 3-4. Thus, the ALJ permissibly found his opinion inconsistent with the DOL's recognition that pneumoconiosis can be a "latent and progressive disease, which may first become detectable only after cessation of coal mine dust exposure." 20 C.F.R. §718.201(c)(1); *see* 65 Fed. Reg. at 79,971 ("[I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period."); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014); Decision and Order at 31-32.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000). Employer's arguments on appeal are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm, as supported by substantial evidence, the ALJ's determinations regarding the opinions of Drs. Zaldivar and Rosenberg and that Employer failed to rebut the presumption of legal pneumoconiosis.[11] 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 33. Employer's failure to disprove legal pneumoconiosis precludes

[10] Employer argues the "sole reason" the ALJ discounted Dr. Zaldivar's opinion was that he did not explain why Claimant's coal mine dust exposure "could not have contributed" to his obstruction in addition to other factors, which it argues was an incorrect standard. Employer's Brief at 10. We rejected this argument above as inconsistent with the ALJ's findings that Dr. Zaldivar did not explain *his own conclusion* that Claimant's impairment was completely unrelated to his coal mine dust exposure, not that she held him to any particular standard.

[11] Because Drs. Forehand's and Habre's opinions do not support Employer's rebuttal burden, we need not address Employer's arguments concerning the ALJ's weighing of their opinions. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 33; Employer's Brief at 10-19.

a rebuttal finding that Claimant did not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

Next, the ALJ 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 35-36. The ALJ permissibly discounted the opinions of Drs. Zaldivar and Rosenberg because they did not diagnose pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 36. Moreover, Employer raises no specific challenge to this determination. Employer's Brief at 3-20; *see Skrack*, 6 BLR at 1-711. Thus, we affirm the ALJ's finding that Employer failed to establish that no part of Claimant's respiratory or pulmonary total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). We further affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption.

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

SO ORDERED.

JUDITH S. BOGGS,
Chief Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge