U.S. Department of Labor

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

BRB Nos. 21-0418 BLA
and 21-0418 BLA-A

KENNETH E. LOVELL	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY LLC F/K/A PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 01/24/2023
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Denying Benefits of Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill PSC), Greenville, Kentucky, for Claimant.[1]

H. Brett Stonecipher (Reminger Co., L.P.A.), Lexington, Kentucky, 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 GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and Employer and its Carrier (Employer) cross-appeal, Administrative Law Judge (ALJ) Jerry R. DeMaio's Decision and Order Denying Benefits (2019-BLA-05283) rendered on a claim filed on April 5, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 12.5 years of coal mine employment. Because Claimant had less than fifteen years of coal mine employment, he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established legal pneumoconiosis, and a totally disabling respiratory or pulmonary impairment, but failed to establish his total disability is due to legal pneumoconiosis. 20 C.F.R. §§718.202, 718.204(b), (c). The ALJ therefore denied benefits, and did not address whether Employer is the responsible operator liable for the payment of benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish disability causation. Employer responds in support of the denial of benefits. The Director, Office of

[1] Subsequent to Claimant's filing of his brief, Messrs. Daniel Sherman and Ryan Driskill of Yonts, Sherman & Driskill PSC, entered an appearance as counsel for Claimant.

[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); 20 C.F.R. §718.305.

Workers' Compensation Programs (the Director), declined to file a substantive response to Claimant's appeal.

Additionally, Employer cross-appeals arguing the ALJ violated its due process rights by not allowing it to submit a Post-Hearing Brief in excess of twenty-five pages, that Peabody Energy Corporation (Peabody Energy) is not the liable carrier for the payment of benefits if any are awarded, and the ALJ erred in finding Claimant established legal pneumoconiosis. The Director responds, urging rejection of Employer's liability arguments regarding Peabody Energy, but also contends that if the Benefits Review Board vacates the denial of benefits and remands this case, the ALJ must be instructed to address the responsible carrier issue.

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.[3] 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 did not challenge before the ALJ that the district director's determination that Heritage Coal Company (Heritage) is the correct responsible operator and was self-insured through Peabody Energy on the last day Heritage employed Claimant. 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 9-12. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for benefits in this claim should transfer to the Black Lung Disability Trust Fund (the Trust Fund).

Patriot Coal Corporation ("Patriot") was initially another Peabody Energy subsidiary. Director's Brief at 2. In 2007, after Claimant ceased his coal mine employment with Heritage, formerly known as Peabody Coal Company (Peabody Coal), Peabody Energy transferred a number of its other subsidiaries, including Heritage, 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. *Id*. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Peabody Coal/Heritage, Patriot later went bankrupt and can no longer

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as 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 5; Director's Exhibit 4; Director's Brief at 5 n.3.

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/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 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. Employer's Brief at 24-55 (unpaginated); Employer's Post-Hearing Brief at 16-36.

Employer argues Peabody Energy is liable for benefits because: (1) the district director is an inferior officer not properly appointed under the Appointments Clause;[4] (2) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (3) before transferring liability to Peabody Energy, the Department of Labor (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) the Director is equitably estopped from imposing liability on Peabody Energy; (6) 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act and the Administrative Procedure Act; (7) Black Lung Benefits Act Bulletin No. 16-01[5] is invalid because it was not promulgated in accord with the APA and violates the APA prohibition on retroactive rulemaking; (8) that its due process rights were violated because "discovery was cut off prematurely;" and (9) that its due process rights to a fair hearing were violated based on the regulatory scheme whereby the district director must determine the liability of a responsible operator and its carrier, while also administering the Trust Fund. Employer's Brief at 24-55 (unpaginated). It maintains that a separation agreement – a private contract between Peabody Energy and

[4] Employer first raised this issue in its Post-Hearing Brief to the ALJ on July 10, 2020. Employer's Post-Hearing Brief at 34; Director's Brief at 21. Notably, the Director timely raised Employer's failure to comply with the Department of Labor's (DOL's) mandatory issue exhaustion regulations on this issue in his response to Employer's cross-appeal. *Id.* Employer has therefore forfeited its Appointments Clause argument. *Fort Bend Cnty. V. Davis*, 139 S. Ct. 1843, 1846 (2019); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018); *Edd Potter Coal Co. v. Dir., OWCP* [*Salmons*], 39 F.4th 202, 212 (4th Cir. 2022).

[5] Bulletin No. 16-01 is a memorandum the Director of the Division of Coal Mine Workers' Compensation issued on November 12, 2015, to "provide guidance for district office staff in adjudicating claims" affected by Patriot's bankruptcy.

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 addressed these arguments in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (October 25, 2022), *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 and hold Peabody Energy is the liable carrier.

Due Process Challenge – Page Limit

Employer contends the ALJ violated its due process rights by imposing a twenty-five page limit on its Post-Hearing Brief. Employer's Brief at 24 (unpaginated). It asserts the page limit required all parties to abide by this limit, without considering Claimant had twenty-five pages to brief entitlement issues and the Director had twenty-five pages to brief liability issues, whereas Employer had only 12.5 pages to brief entitlement issues and only 12.5 pages to address the liability issues. *Id.*

In his Briefing Order dated December 18, 2019, the ALJ stated: "[Post-Hearing Briefs] shall not exceed 25 pages," and "Non-conforming briefs will not be accepted. . . ." December 18, 2019 Briefing Order at 2. On March 23, 2020, roughly two weeks before the briefs were initially due on April 6, 2020, Employer filed a motion to exceed the page limit. March 23, 2020 Employer's Motion at 1. There is no indication in the record that Employer's motion was granted or denied. However, the ALJ implicitly considered all thirty-seven pages of Employer's Post-Hearing Brief, noting in his decision that Employer preserved "various constitutional issues for appeal." Decision and Order at 2 n.1, citing Employer's Post-Hearing Brief at 33-36. Because Employer does not explain how the ALJ's setting of a page limit under these circumstances affected the outcome of this case, we reject Employer's argument as any error is harmless. *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).

Entitlement to Benefits - 20 C.F.R. Part 718

Without the benefit of the statutory presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements

precludes an award of benefits.[6] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc); Decision and Order at 15.

Employer's Cross Appeal - Legal Pneumoconiosis[7]

To establish legal pneumoconiosis, Claimant must prove he has a chronic lung disease or an impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). The United States Court of Appeals for the Sixth Circuit has held that a miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The ALJ considered five medical opinions. Decision and Order at 7-9. Drs. Chavda, Baker, and Sood diagnosed legal pneumoconiosis while Drs. Selby and Tuteur did not. Director's Exhibit 18; Claimant's Exhibits 2, 8; Employer's Exhibits 6, 7, 10. After summarizing the medical opinions collectively, the ALJ summarily stated he found Claimant established legal pneumoconiosis based on the opinions of Drs. Chavda, Baker and Sood. Decision and Order at 10. He then analyzed and explained why he found the opinions of Drs. Tuteur and Selby not adequately reasoned. *Id*.

The ALJ's summary conclusion that Claimant established legal pneumoconiosis fails to provide any analysis or explanation as to whether the opinions of Drs. Baker and Sood are reasoned and documented, and therefore sufficient to satisfy Claimant's burden to establish that coal mine dust exposure significantly caused or substantially aggravated

[6] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant had 12.5 years of coal mine employment, a forty-pack year smoking history, and is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 3-6, 9-11; Employer's Brief at 12-13, 16 (unpaginated); Claimant's Brief at 8, 9; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[7] Because we vacate, infra, the ALJ's denial of benefits pursuant to 20 C.F.R.§718.204(c), we address Employer's arguments on cross-appeal regarding whether the ALJ erred in weighing the medical opinions on legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

his chronic obstructive pulmonary disease (COPD). *See* 20 C.F.R. §718.201(a)(2), (b); 718.202(a)(4); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) ("When the ALJ fails to make important and necessary factual findings, the proper course for the Board is to remand the case . . . rather than attempting to fill the gaps in the ALJ's opinion."). Further, Employer correctly asserts the ALJ erred in finding Dr. Chavda's opinion supportive of a finding of legal pneumoconiosis, as the doctor specifically stated that coal mine dust exposure was not a significant factor in his disabling respiratory impairment.[8] Employer's Brief at 17 (unpaginated).

Employer also accurately asserts the ALJ did not fully consider Dr. Tuteur's rationale in rejecting his opinion as "qualified."[9] Employer's Brief at 23 (unpaginated). According to the ALJ, Dr. Tuteur acknowledged the cause of Claimant's COPD was unknown, but still excluded coal mine exposure as a causative factor. This is not entirely accurate: Dr. Tuteur stated the "clinical picture of COPD, whether caused by the inhalation of tobacco smoke or coal mine dust is generally similar . . . in an individual person, one cannot use available clinical characteristics to differentiate between these two etiologies."

[8] Dr. Chavda performed the DOL's complete pulmonary evaluation of Claimant on May 9, 2017. Director's Exhibit 18. The ALJ appears to credit Dr. Chavda's opinion as supporting his finding of legal pneumoconiosis, but while Dr. Chavda indicated Claimant's coal mine dust exposure contributed to his respiratory impairment, he specifically opined it did not rise to the level of being a significant contributing cause or substantially aggravating factor of his chronic obstructive pulmonary disease. Thus, Dr. Chavda did not diagnosis legal pneumoconiosis as defined at 20 C.F.R. §718.201(a)(2), (b).

[9] The ALJ permissibly found Dr. Selby's rationale that Claimant had "minimal coal dust exposure" as a mechanic in surface coal mining reflected an inaccurate understanding of Claimant's coal mine employment and was "of no consequence to this case." Decision and Order at 9, 10; *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983). We also reject Employer's contention that the ALJ erred in finding Dr. Selby relied on a 60 pack year smoking history, which was more than the forty years the ALJ found. Decision and Order at 10. Consistent with the ALJ's finding, Dr. Selby noted Claimant "smoked from 1966-2006"; however, he also stated in his March 2019 report that Claimant was still smoking cigarettes and had never quit "based on the fact that his breath smelled like 'freshly smoked cigarettes.'" Decision and Order at 10, quoting Employer's Exhibit 6 at 3, 5, 10; Employer's Brief at 23-24 (unpaginated). We therefore affirm the ALJ's rejection of Dr. Selby's opinion that Claimant does not have legal pneumoconiosis. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1994); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988) (the effect of an inaccurate smoking history on the credibility of a medical opinion is a determination for the administrative law judge to make).

Employer's Exhibit 7 at 4. He therefore relied on statistics and relative risk theories to conclude that Claimant's COPD was due solely to smoking. Dr. Tuteur stated he could not rule out coal mine dust exposure as a potential contributing factor but opined within a reasonable degree of medical certainty that it was not. Employer's Exhibit 10 at 48. Because the ALJ failed to fully address Dr. Tuteur's specific rationale for excluding a diagnosis of legal pneumoconiosis and determine what weight to assign it, we are unable to affirm his credibility finding. *See Rowe*, 710 F.2d 251, 255; *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

Because the ALJ's weighing of the evidence is not adequately explained as the Administrative Procedure Act (APA) requires,[10] we vacate his determination that Claimant established legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Claimant's Appeal - Disability Causation

A miner is totally disabled due to pneumoconiosis if it is "a substantially contributing cause of his totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a "substantially contributing cause" if it has a "material adverse effect" on the miner's respiratory or pulmonary condition or "[m]aterially worsens" a totally disabling respiratory or pulmonary impairment caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1); *Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003).

Drs. Baker and Sood opined that Claimant is totally disabled due to legal pneumoconiosis.[11] Claimant's Exhibits 2 at 3, 8 at 12. The ALJ found Dr. Baker's opinion that Claimant's disabling COPD was significantly related to both coal mine dust exposure and smoking lacked credibility and was "qualified," because the doctor acknowledged that "when one has both exposures to tobacco smoke and coal dust, the effects may be either synergistic or additive." Decision and Order at 12, quoting Claimant's Exhibit 2 at 3.

[10] The Administrative Procedure Act (APA) provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[11] The opinions of Drs. Tuteur and Selby that Claimant's respiratory disability is not due to legal pneumoconiosis are based on their conclusions that Claimant does not have legal pneumoconiosis.

Similarly, the ALJ rejected Dr. Sood's opinion because the doctor indicated he could not apportion between smoking and coal mine dust exposure as the cause of Claimant's disabling COPD, but still concluded Claimant's coal mine dust exposure significantly contributed to it. Decision and Order at 12; Employer's Exhibit 8 at 10, 14. The ALJ concluded:

> The weight of the medical evidence pushes against the notion that [Claimant's] pneumoconioisis is a "substantially contributing cause" to his total disability. While both [Drs.] Baker and Sood opined that his pneumoconiosis was a substantial cause of his total disability, they both qualify their opinions due to his extended smoking history of at least [forty] pack years. These two qualified opinions, along with Dr. Tuteur's opinion of no causation, means the evidence does not meet the burden required. Therefore, the Court finds that [Claimant] has failed to establish that his legal pneumoconiosis is a substantially contributing cause to his total pulmonary disability as required by the regulations. Because Claimant cannot establish a requisite element of his claim, [Claimant] is not entitled to benefits under the Act. [footnote omitted].

Decision and Order at 12.

Claimant contends the ALJ erred in finding the opinions of Drs. Baker and Sood "qualified" because they indicated the effects of smoking or coal mine dust exposure are additive or that it was impossible to distinguish between the effects of smoking and coal mine dust exposure, while still concluding Claimant is totally disabled due to legal pneumoconiosis. *Id.* We agree.

Contrary to the ALJ's analysis, the DOL in the preamble to the revised 2001 regulations recognized scientific evidence that the risks of smoking and coal mine dust exposure are additive. 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000). Further, a physician need not apportion a specific percentage of Claimant's lung disease to smoking versus coal mine dust exposure to establish the existence of legal pneumoconiosis or disability causation. Claimant may establish legal pneumoconiosis and disability causation, in the absence of contrary probative evidence, if the ALJ finds that Drs. Baker and Sood provided credible reasoned diagnoses, with respect to legal pneumoconiosis, of a chronic respiratory or pulmonary impairment that is "significantly related to, or substantially aggravated by dust exposure in coal mine employment" and, with respect to disability causation, that pneumoconiosis is a "substantially contributing cause" of the miner's respiratory or pulmonary impairment. 20 C.F.R. §718.201(b); *see* 20 C.F.R. §718.204(c); *see also Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 820 F.3d 833, 847 (6th Cir. 2016); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000) (because coal dust need not be

the sole cause of the miner's respiratory or pulmonary impairment, legal pneumoconiosis can be proven based on a physician's opinion that coal dust and smoking were both causal factors and that it was impossible to allocate between them). If legal pneumoconiosis is found established and constitutes the totally disabling impairment, the causation requirement is satisfied (physician's opinion that a miner has a totally disabling pulmonary impairment supports disability causation if that impairment is found to constitute legal pneumoconiosis); *Cumberland River Coal Co., v. Banks*, 690 F.3d 477, 489-90 (6th Cir. 2012) (substantially contributing cause standard met where a physician concludes the miner's smoking and coal mine dust exposure both contributed to his disabling lung disease); *see also Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 1-256 (2019) (inquiry regarding disability causation is satisfied when the disabling impairment constitutes the miner's legal pneumoconiosis).

Because the ALJ's credibility findings with respect to Drs. Baker and Sood are contrary to law, we vacate them. Thus, we vacate the ALJ's finding that Claimant did not establish that pneumoconiosis is a substantially contributing cause of his total disability. 20 C.F.R. §718.204(c).

Remand Instructions

The ALJ must reconsider whether Claimant established the existence of legal pneumoconiosis by establishing he has a chronic respiratory impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §718.201(a)(2), (b). He must also reconsider whether Claimant established that his legal pneumoconiosis is a substantially contributing cause of his total disability at 20 C.F.R. §718.204(c). *Hawkinberry*, 25 BLR at 1-255-57.

If Claimant does not establish his entitlement to benefits, the ALJ may reinstate the denial of benefits. 20 C.F.R. Part 718; *see Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-1. In determining the weight to accord the medical opinions, the ALJ must address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Rowe*, 710 F.2d at 255. Further, the ALJ must explain the bases for all of his findings on remand in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits, and we remand this case for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge