U.S. Department of Labor

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

BRB No. 22-0203 BLA

CHARLES F. SWAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY, LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 7/27/2023
	)	
Employer/Carrier- Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for Claimant.

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

David Casserly (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits (2018-BLA-06011) rendered on a subsequent claim[1] filed on October 6, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Heritage Coal Company, LLC (Heritage), self-insured through its parent company Peabody Energy Corporation (Peabody Energy), is the responsible operator liable for the payment of benefits. He found Claimant established at least eighteen years of surface coal mine employment in conditions substantially similar to those in an underground mine and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). He further found Employer did not rebut the presumption and awarded benefits.

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[1] This is Claimant's second claim for benefits. On September 30, 2002, the district director denied his first claim, filed on September 17, 2001, because he did not 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 Claimant 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); *see* 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). 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* 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3; Director's Exhibit 1 at 3-4.

On appeal, Employer contends the ALJ erred in finding it liable for the payment of benefits. It also contends its due process rights were violated by the ALJ's evidentiary rulings. Next, it asserts the Department of Labor's (DOL) regulations regarding surface coal mine employment conditions that are "substantially similar" to underground mines are contrary to the Act. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response urging the Benefits Review Board to reject Employer's arguments regarding the ALJ's evidentiary rulings and to affirm his finding that Peabody Energy is the responsible carrier.

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 (1965).

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Heritage is the correct responsible operator and was self-insured by Peabody Energy on the last day it employed Claimant; thus, we affirm these findings.[5] *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 7-8.

Patriot Coal Corporation (Patriot) was initially another Peabody Energy subsidiary. Director's Exhibit 30. In 2007, after Claimant ceased his coal mine employment with Heritage, 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,

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[4] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because Claimant performed his coal mine employment in Indiana. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 47; Director's Exhibits 5, 8.

[5] Employer also "preserve[s]" its "ability to challenge" Black Lung Benefits Act (BLBA) Bulletin No. 16-01 as an invalid rule. Employer's Brief at 39-40. 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 (APA). *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 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); 20 C.F.R. §802.211(b).

retroactive to 1973. *Id.* 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. *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 Heritage when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 8.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated the self-insured carrier in this claim and thus the Black Lung Disability Trust Fund (the Trust Fund), not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy.[6] Employer's Brief at 6-49. It argues the ALJ erred in finding Peabody Energy liable for benefits because: (1) the district director is an inferior officer not properly appointed under the Appointments Clause;[7] (2) the regulatory scheme, whereby the district director must determine the liability of a responsible operator and its carrier when at the same time the DOL also administers the Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing; (3) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) the DOL released Peabody Energy from liability; (5) the Director is equitably estopped from imposing liability on the company; and (6) the DOL violated its due process rights by not maintaining adequate records with respect to Patriot's bond and failing to comply with its duty to monitor

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[6] Employer also argues 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act and the APA. Employer's Brief at 42-43. That regulation specifies "[d]ocumentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances." 20 C.F.R. §725.456(b)(1). Employer has not identified any documentary evidence relevant to liability that the ALJ excluded. Further, although ALJ Kane rendered the decision at issue in the present appeal, Employer asserts "ALJ [John P. Sellers, III] and the Director's actions in this matter ultimately devest [sic] the ALJ of any control over the discovery and development of the record on the liability issue which is inconsistent with the Act." Employer's Brief at 42. Employer has failed to identify any action or finding by either ALJ Sellers or "the Director" pertinent to this case which implicates the issue raised in its argument. Thus, we decline to address this argument. *See Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

[7] Employer first raised this argument in a post-hearing brief to the ALJ. Employer's Brief on Liability at 5.

Patriot's financial health.[8] Employer's Brief at 6-49. Moreover, 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. Employer's Brief at 19-26.

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), *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.*, 25 BLR 1-289, 1-295-99 (2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments.[9] 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.

Invocation of the Section 411(c)(4) Presumption – Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines or surface coal mines in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4) (2018); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). The conditions in a surface mine are "substantially similar" to those underground if "the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

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[8] Employer also states it wants to "preserve" its argument that its due process rights were violated because the ALJ "cut off" discovery "prematurely." Employer's Brief at 37-39. Employer neither asks the Board to address this issue nor sets forth any argument that would permit our review. *See Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

[9] Employer additionally argues the ALJ erred in excluding the deposition testimony of two former Department of Labor employees, Steven Breeskin and David Benedict. Employer's Brief at 4-6; Employer's Exhibits 1-4. In *Bailey*, the same depositions were admitted into evidence, and the Board held they do not support Employer's argument that the DOL released Peabody Energy from liability when it authorized Patriot to self-insure and released a letter of credit that Patriot financed under Peabody Energy's self-insurance program. *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 15 n. 17 (Oct. 25, 2022). Given that the Board has previously held the depositions do not support Employer's argument, any error in excluding them here 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 (1984).

Employer argues 20 C.F.R. §718.305(b)(2)[10] is invalid because it "renders any distinction between aboveground and underground work sites meaningless" and is contrary to the Act. Employer's Brief at 3. We reject this argument. The United States Court of Appeals for the Seventh Circuit, in interpreting the originally enacted Section 411(c)(4), acknowledged "Congress, at the very least, was aware that underground mines are dusty and that exposure to coal dust causes pneumoconiosis" and held "in order to qualify for the presumption of § 411(c)(4), a surface miner must only establish that he was exposed to sufficient coal dust in his surface mine employment." *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988); *see also Zurich v. Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 300-03 (6th Cir. 2018); *Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1219-23 (10th Cir. 2018); *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1342 (10th Cir. 2014).

As Employer raises no further argument, we affirm the ALJ's finding that Claimant established at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b); *see* Decision and Order at 5, 15-16.

Due Process Challenge

Employer argues its due process rights were violated when ALJ Peter B. Silvain, Jr.[11] did not allow it to depose Dr. Tuteur post-hearing. We disagree.

To demonstrate a due process violation, Employer must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *see also Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999).

At the request of Employer, Dr. Tuteur conducted a medical examination of Claimant on November 16, 2017, which included a medical opinion, x-ray, arterial blood gas study, pulmonary function study, and blood work. Claimant's Exhibit 13; Employer's

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[10] Section 718.305(b)(2) states: "The conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

[11] ALJ Silvain conducted the hearing in this case on March 3, 2021. Hearing Transcript; Nov. 2, 2020 Notice of Hearing. Following ALJ Silvain's appointment as a United States Magistrate Judge, the case was reassigned to ALJ Kane. May 12, 2021 Order Regarding Reassignment.

Exhibit 7. Employer acknowledges it was in possession of and exchanged Dr. Tuteur's report and objective studies as early as 2018. *See* Employer's Brief at 6.

In November 2020, ALJ Silvain issued a pre-hearing Order specifically prohibiting any "post hearing development time." Nov. 2, 2020 Notice of Hearing at 2. ALJ Silvain conducted the hearing in this matter on March 3, 2021. Hearing Transcript; Nov. 2, 2020 Notice of Hearing. At the hearing, ALJ Silvain allowed Employer to submit Dr. Tuteur's objective testing results after the hearing. Hearing Transcript at 6; Employer's Exhibit 7. Given this allowance, ALJ Silvain also permitted Claimant to submit, as an affirmative medical report, Dr. Tuteur's report that accompanied his testing. Hearing Transcript at 6; Claimant's Exhibit 13. Pursuant to his November 2020 Notice of Hearing, ALJ Silvain denied Employer's request to depose Dr. Tuteur post-hearing.[12] Hearing Transcript at 6-7.

Employer argues the ALJ denied it procedural due process by not allowing it to depose Dr. Tuteur. Employer's Brief at 6 (citing *North American Coal Co. v. Miller*, 870 F.2d 948 (3d Cir. 1989); *Fowler v. Freeman United Coal Mining Co*., 7 BLR 1-495 (1984), *aff'd sub. nom*., *Freeman United Coal Mining Co. v. Director, OWCP*, No. 85-1013 (7th Cir. Jan. 24, 1986) (unpub.)).[13] We are not persuaded.

In *Miller*, the Third Circuit noted parties have a right of confrontation and cross-examination with respect to the medical reports of examining physicians offered as evidence. *Miller,* 12 BLR at 2-226 (citing *Richardson v. Perales*, 402 U.S. 389, 402-05 (1971)). The court stated "[t]his right is met when a party is provided *some* opportunity to cross-examine the reporting physician." *Id.* (emphasis in original). Further, the court noted "a similar opportunity must be provided when the ALJ relies heavily upon a medical report with no opportunity for cross-examination when such cross-examination is necessary to the full presentation of the case." *Id.* at 2-227.

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[12] The ALJ's admission of Dr. Tuteur's report and objective studies did not require him to keep the record open post-hearing pursuant to 20 C.F.R. §725.456(b)(4) because this evidence, developed in 2017, was exchanged between the parties in 2018, at least 20 days before the March 3, 2021 hearing.

[13] We note that in *Fowler*, when considering whether a medical report should be excluded from the record because the employer was not able to cross-examine the physician who wrote it, the Board specifically declined to address whether the inclusion of such evidence infringed on the employer's due process rights. *Fowler v. Freeman United Coal Mining Co*., 7 B.L.R. 1-495, 1-497 (1984).

Here, Employer has not met its burden to demonstrate a due process violation. Employer offers no evidence that it was deprived of a fair opportunity to mount a meaningful defense and nowhere explains how its inability to depose Dr. Tuteur prejudiced, or even affected, its defense of this case. *See Energy West Mining v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (The Due Process Clause "is concerned with procedural outrages, not procedural glitches"; to sustain its allegation of a procedural due process violation, an employer must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim.); *see also 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); *see* Employer's Brief at 6.

Employer has not argued, nor can it, that it was not provided an opportunity to confront or cross-examine Dr. Tuteur. *See* Employer's Brief at 6. Dr. Tuteur examined Claimant in 2017, and Employer had his report and was aware of his findings and opinions in 2018, nearly three years prior to the hearing. Claimant's Exhibit 13; Employer's Brief at 6. Thus, Employer had ample time and opportunity to depose Dr. Tuteur. Nor has Employer argued that the ALJ relied upon Dr. Tuteur's report or that his cross-examination was "necessary to the full presentation of the case." *See* Employer's Brief at 6. Although Employer has not met its burden, Claimant correctly notes the ALJ nevertheless found all of the valid pulmonary function study evidence supports finding Claimant is totally disabled[14] and all four physicians opined Claimant is totally disabled; thus, Employer cannot show the ALJ relied on Dr. Tuteur's report.[15] Claimant's Brief at 12; Decision and

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[14] The record contains eleven pulmonary function studies conducted on January 1, 2006, April 28, 2011, May 10, 2012, December 31, 2013, November 18, 2014, November 30, 2015, January 5, 2016, June 9, 2016, November 17, 2016, November 9, 2017, and November 16, 2017. Claimant's Exhibits 10 at 4, 11 at 5, 10, 17, 20, 24, 35, 36; Director's Exhibits 16 at 6, 22 at 10; Employer's Exhibit 7 at 5-6. The ALJ found the June 9, 2016 study is not in substantial compliance with the quality standards set forth at 20 C.F.R. §718.103 and Appendix B to 20 C.F.R. Part 718. Decision and Order at 12. He found the remaining ten studies were all qualifying both before and after the administration of bronchodilators. *Id.*

[15] As Dr. Tuteur diagnosed Claimant with legal pneumoconiosis and opined he is totally disabled due to pneumoconiosis, his opinion does not support Employer's burden on rebuttal. Claimant's Exhibit 13 at 3-4. Thus, the ALJ did not rely on his opinion when considering whether Employer rebutted the presumption of total disability due to pneumoconiosis. Decision and Order at 21-23.

Order at 12, 20. Thus, we reject Employer's argument. *See Holdman,* 202 F.3d at 883-84; *Borda*, 171 F.3d at 184.[16]

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

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[16] We affirm, as unchallenged, the ALJ's determinations that Claimant established a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and therefore a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c), as well as that Employer did not rebut the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).