U.S. Department of Labor

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

BRB No. 22-0004 BLA

GARY A. SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 6/23/2023
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for Employer and its Carrier.

Steven Winkelman (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, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2018-BLA-06162) rendered on a subsequent claim filed on October 6, 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; credited Claimant with thirty-five years of coal mine employment, including at least fifteen years in underground mines; and found he has a totally disabling respiratory impairment. 20 C.F.R. §§718.204(b)(2). Thus, the ALJ determined 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.

[1] Claimant's prior claim, filed on September 13, 2011, was dismissed on July 11, 2013, because he failed to attend the hearing without good cause for his absence. *See* 20 C.F.R. §725.465(a)(1); Director's Exhibits 1; 29. An order of dismissal has the same effect as a decision and order disposing of the claim on its merits. 20 C.F.R. §725.466(a).

[2] 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 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 "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)(1); *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 the prior claim was dismissed, Claimant had to submit evidence establishing any

On appeal, Employer contends the ALJ erred in finding Peabody Energy Corporation (Peabody Energy) is the liable carrier and in excluding certain liability evidence. On the merits, it argues the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (Director), responds, arguing the ALJ properly excluded the liability evidence at-issue but agrees with Employer that the ALJ failed to adequately address Employer's liability arguments. The Director therefore requests that the Benefits Review Board vacate the ALJ's finding that Employer is liable for benefits and remand this case for the ALJ to readdress the liability 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.[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 Eastern is the correct responsible operator and was self-insured through 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, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 8; Employer's Brief at 15-20. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible insurance carrier and thus liability for the claim should transfer to the Black Lung Disability Trust Fund (Trust Fund). Employer's Brief at 15-16.

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element of entitlement to obtain review of the merits of the current claim. *See White*, 23 BLR at 1-3; Director's Exhibits 1, 29.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least fifteen years of underground coal mine employment and a totally disabling impairment, thereby invoking the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4); 20 C.F.R. §725.309(c); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4; 7.

Patriot was initially another Peabody Energy subsidiary. Director's Exhibit 25. In 2007, after Claimant ceased his coal mine employment with Eastern, Peabody Energy sold a number of its subsidiaries, including Eastern, to Patriot. *Id.*; Employer's Exhibit 9. That same year, Patriot was spun off as an independent company. Director's Exhibit 25; Employer's Exhibit 9. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to July 1, 1973. Director's Exhibit 25; Employer's Exhibit 9. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Eastern, Patriot later went bankrupt and can no longer provide for those benefits. Director's Exhibit 25; Employer's Exhibit 9. However, neither Patriot's self-insurance authorization nor any other arrangement 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.

Employer argues the ALJ erred by failing to address several arguments that Peabody Energy was improperly designated as the self-insured carrier and thus the Trust Fund, not Peabody Energy, is responsible for the payment of benefits following Patriot's Bankruptcy: (1) the ALJ erroneously found Peabody Energy had not raised the liability issue before the district director; (2) the Director failed to present evidence that Peabody Energy self-insured Eastern; and (3) the ALJ erred in excluding documentary liability evidence. Employer's Brief at 15-19.

The Board has previously considered and rejected the same and similar arguments under the same dispositive material facts 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.*, 25 0 BLR 1-301, 1-307-08 (2022); and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-295-99 (2022). *Bailey*, *Howard*, and *Graham* control this case and establish—as a matter of law—that Eastern and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim. Consequently, for the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments. Any error by the ALJ in failing to address these arguments is thus 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, 1-278 (1984). 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.

Merits of Entitlement: Rebuttal of the Section 411(c)(4) Presumption

The ALJ determined Claimant was employed in an underground mine for more than 15 years and is totally disabled; he therefore found Claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. Decision and Order at 6, 17. As a consequence the burden shifted to Employer to establish he has neither legal nor

clinical pneumoconiosis,[6] 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.[7] Decision and Order at 23, 25.

To disprove legal pneumoconiosis, Employer must establish 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 Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015).

Employer relies on the medical opinion of Dr. Tuteur to rebut legal pneumoconiosis. Employer's Exhibits 4; 12. Dr. Tuteur diagnosed Claimant with Chronic Obstructive Pulmonary Disease (COPD) caused by the inhalation of tobacco smoke and unrelated to coal mine dust exposure. Employer's Exhibits 4 at 5, 11; 12 at 10, 23-27, 32-33. The ALJ found Dr. Tuteur's opinion not well-reasoned or documented and therefore found Employer failed to rebut the existence of legal pneumoconiosis. Decision and Order at 23.

Employer first argues the ALJ erred in finding Claimant has a smoking history of at least thirty-three pack years and potentially more than sixty pack years, asserting this finding is equivocal and understates Claimant's actual smoking history. Employer's Brief at 4-5 (quoting Decision and Order at 9). We disagree. The ALJ acknowledged Dr. Tuteur's opinion that Claimant is a lifelong smoker and continued to smoke, Decision and Order at 15 (citing Employer's Exhibit 12 at 8-9), and did not discredit his opinion for relying on an inflated smoking history. Moreover, Employer has not otherwise explained how definitively finding a specific length of Claimant's smoking history and that Claimant continues to smoke would otherwise affect the result in this case. Thus, Employer fails to

[6] "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).

[7] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 23.

explain why the ALJ's alleged error warrants remand. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278.

We also reject Employer's contention that the ALJ applied an improper standard of proof to rebut legal pneumoconiosis by requiring Dr. Tuteur to "rule out" coal dust exposure as a contributing factor of Claimant's chronic lung disease or impairment. Employer's Brief at 2-3, 13-15. The ALJ correctly stated that, to rebut the presumption of legal pneumoconiosis, Employer must prove Claimant does not "have a lung disease 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment' by a preponderance of the evidence." Decision and Order at 18 (quoting 20 C.F.R. § 718.201(b)). Moreover, the ALJ did not discredit Dr. Tuteur's opinion because he failed to satisfy an erroneous heightened legal standard. Rather, he found Dr. Tuteur's opinion not well-reasoned or documented and therefore entitled to little weight. Decision and Order at 23.

We agree, however, that the ALJ erred in evaluating Dr. Tuteur's opinion by mischaracterizing the physician's statements regarding whether Claimant has legal pneumoconiosis.[8] Employer's Brief at 8-11.

As Employer asserts, although Dr. Tuteur stated "it will be assumed that [Claimant] has the COPD phenotype," he did not assume Claimant has legal pneumoconiosis as the ALJ characterized his opinion, nor did he fail to provide a specific opinion as to whether Claimant has legal pneumoconiosis.[9] Employer's Exhibit 4 at 5; Decision and Order at 22-23. Rather, as the ALJ accurately observed elsewhere in his opinion, Dr. Tuteur testified

[8] Because Dr. Jaworski's opinion does not aid Employer in rebuttal, we decline to address Employer's arguments regarding the ALJ's weighing of the doctor's opinion. *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); Decision and Order at 22-23; Employer's Brief at 5-8.

[9] Dr. Tuteur opined that "[i]t appears that this impairment may be due to airflow obstruction and with hyperinflation seen on radiograph and at least potential historical data suggesting chronic bronchitis, it will be assumed that he has the COPD phenotype. This phenotype may be cause[d] by either the inhalation of coal mine dust or the chronic inhalation of tobacco smoke, both of which are present here." Employer's Exhibit 4 at 5. Thus, while he identified coal dust exposure as a potential cause, he ultimately concluded Claimant's "impairing and disabling [COPD], manifested both by chronic bronchitis and emphysema . . . was due to the chronic inhalation of tobacco smoke, not coal mine dust." Employer's Exhibit 12 at 22.

Claimant's COPD is caused by his lifetime history of smoking cigarettes and is unrelated to his history of coal mine dust exposure. Decision and Order at 22 (citing Employer's Exhibit 12 at 23);[10] *see also* Employer's Exhibits 4 at 5, 11; 12 at 23-27, 32-33 (specifically opining Claimant's respiratory and pulmonary impairments are caused by cigarette smoke inhalation and unrelated to coal mine dust exposure).

Because he mischaracterized Dr. Tuteur's opinion and did not provide valid reasons for discrediting it, the ALJ erred in considering and weighing Dr. Tuteur's opinion and the evidence relevant to rebuttal of legal pneumoconiosis. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a);[11] *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

We therefore vacate the ALJ's determination that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A). As the ALJ's findings regarding rebuttal of disability causation may have been affected by his findings regarding legal pneumoconiosis, we must also vacate these findings. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 25.

Remand Instructions

On remand, the ALJ must reconsider the opinion of Dr. Tuteur that Claimant does not have legal pneumoconiosis and determine whether it is sufficient to meet Employer's burden to disprove the disease. 20 C.F.R. §718.305(d)(1)(i)(A). In weighing the relevant medical opinion evidence on remand, the ALJ must fully explain the reasons for his credibility determinations in light of the physician's explanations for his medical findings, the documentation underlying his medical judgments, and the sophistication of, and bases

[10] While the ALJ did discuss Dr. Tuteur's specific rationale for excluding a diagnosis of legal pneumoconiosis (i.e., why the physician attributed Claimant's COPD to smoking, not coal mine dust exposure), he did so, errantly, in the context of whether Employer established that "no part" of Claimant's total disability is due to legal pneumoconiosis and only after misstating that Dr. Tuteur "assumed" Claimant has legal pneumoconiosis. Decision and Order at 25.

[11] 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).

for his diagnoses. *See Hicks*, 138 F.3d at 531-33; *Akers*, 131 F.3d at 439-40; *Wojtowicz*, 12 BLR at 1-165.

If the ALJ finds legal pneumoconiosis disproven, then Employer will have rebutted the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(d)(1)(i). If legal pneumoconiosis is not disproven, the ALJ must reconsider whether Employer can establish that "no part of [Claimant's] total disability was caused by" his legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). If the ALJ finds the Section 411(c)(4) presumption unrebutted, he may reinstate his award of benefits.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge