U.S. Department of Labor

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

BRB No. 20-0108 BLA

CHARLES L. DICKENS (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PINE RIDGE COAL COMPANY	)	DATE ISSUED: 03/31/2021
	)	
and	)	
	)	
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 Lauren C. Boucher, 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 and Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for Employer and its Carrier.

William M. Bush (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Lauren C. Boucher's Decision and Order Awarding Benefits (2018-BLA-05820) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves the Miner's claim filed on August 17, 2016.[1]

The administrative law judge found Pine Ridge Coal Company (Pine Ridge) and its parent company, Peabody Energy Corporation (Peabody), to be the responsible operator and carrier. Based on the parties' stipulation, she credited the Miner with twenty-five years of coal mine employment, including at least fifteen years underground, and found he was totally disabled by a respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She thus found Claimant invoked the presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues liability for the payment of benefits should transfer to the Black Lung Disability Trust Fund because the administrative law judge erred in finding Peabody is the responsible carrier. Employer also contends she erred in finding the Section 411(c)(4) presumption unrebutted.[3] Claimant responds in support of the award of

[1] On December 30, 2019, the Benefits Review Board was informed that the Miner died on December 28, 2019, and his widow, Judy Ann Dickens (Claimant), is pursuing the claim on her husband's behalf.

[2] Section 411(c)(4) provides a rebuttable presumption that the Miner was totally disabled if Claimant establishes he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established the Miner had at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, and therefore

benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response arguing that the Board need not address Employer's responsible carrier arguments because they rely on evidence the administrative law judge excluded from the record as untimely submitted and Employer has not challenged the administrative law judge's evidentiary rulings. Alternatively, the Director urges the Board to reject Employer's allegations of error as to the administrative law judge's finding that Peabody is the responsible carrier.

The Board's scope of review is defined by statute. We must affirm the administrative law judge'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 Associates, Inc.*, 380 U.S. 359, 362 (1965).

Responsible Insurance Carrier

The district director issued a Notice of Claim on August 30, 2016, identifying Pine Ridge as the potentially liable operator and Peabody as the self-insurer.[5] Director's Exhibit 27. This notice gave Employer thirty days to respond and ninety days to submit liability evidence. *Id*. Employer, via its third-party claims administrator, responded, denying liability and requesting the district director dismiss it, arguing Patriot Coal Corporation (Patriot) was the proper responsible carrier. Director's Exhibit 30.

Thereafter the district director issued a Schedule for the Submission of Additional Evidence (SSAE) on July 7, 2017, giving "any party that wishes to submit liability evidence or identify liability witnesses" until September 5, 2017, to submit evidence in support of their positions. Director's Exhibit 31. Moreover, the district director advised that, "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability . . . may be admitted into the record once a case is referred to the Office of Administrative Law Judges [(OALJ)]." *Id*., *citing* 20 C.F.R. §725.456(b)(1).

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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 20.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the Miner's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 21.

[5] Employer's assertion that the district director never issued a Notice of Claim designating Peabody as a potentially liable self-insurer therefore lacks merit. Employer's Brief at 32.

Employer requested an extension of time to submit evidence on August 24, 2017, and the district director granted it a six-month extension until March 10, 2018. Director's Exhibits 34, 35. The record does not reflect, nor does Employer allege, that it submitted any liability evidence prior to the extended deadline.

The district director issued a Proposed Decision and Order on April 10, 2018, designating Pine Ridge and Peabody as the responsible operator and carrier.[6] Director's Exhibit 36. On April 26, 2018, Employer requested a formal hearing before an administrative law judge and, for the first time, submitted documents related to its argument that Patriot is the liable carrier.[7] Director's Exhibit 37. On February 13, 2019, prior to the formal hearing scheduled for March 6, 2019, Employer filed a motion to dismiss Peabody as the liable carrier and to admit into the record deposition transcripts from former Division of Coal Mine Workers' Compensation employees David Benedict and Steven Breeskin. At the hearing, the administrative law judge postponed ruling on Employer's motion and instructed Employer and the Director to brief the relevant issues. Hearing Transcript at 10. After receipt of the briefs, the administrative law judge denied Employer's motions, finding its liability evidence inadmissible because it was not timely submitted before the district director and because Employer did not establish extraordinary circumstances warranting admission of the untimely evidence into the record.[8] Order Denying Employer's Motion to Admit at 8, *citing* 20 C.F.R. §§725.414(d), 725.456(b)(1).

[6] The Miner's Social Security Administration earnings record indicates he worked for Heritage Coal Company (Heritage) from 1984 through 1994, and then for Pine Ridge Coal Company (Pine Ridge) in 1995. Director's Exhibit 5. Peabody Coal Company, later known as Heritage, transferred it assets and liabilities to Pine Ridge, thereby making Pine Ridge a successor operator. 20 C.F.R. §725.492(a); Director's Exhibit 33 at 7.

[7] Employer requested the district director "reconsider and revise" the Proposed Decision and Order and "dismiss" Peabody Energy Corporation (Peabody), but if he did not do so, it requested the matter be forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 37.

[8] The administrative law judge excluded from the record Employer's Exhibits 5 and 6 (the deposition transcripts of Mr. Benedict and Mr. Breeskin), and Exhibit A to Director's Exhibit 37 (the liability evidence Employer submitted after the district director issued the Proposed Decision and Order). May 3, 2019 Order at 8.

On appeal, Employer[9] asserts the administrative law judge erred in finding Peabody liable for the payment of benefits as Employer's self-insurer. Employer's Brief at 17-33. The Director responds that Employer's arguments are unsupported by record evidence because it did not submit any liability evidence to the district director, the administrative law judge properly excluded its late-submitted evidence, and it has not challenged those rulings on appeal. Director's Brief at 6, 18-21. We agree with the Director's argument.

Because the district director must resolve identification of the responsible operator or carrier before a case is referred to the OALJ, the regulations require that, absent extraordinary circumstances, liability evidence must be timely submitted to the district director.[10] 20 C.F.R. §725.456(b)(1). Employer does not dispute it failed to timely submit liability evidence before the district director. Nor does it assert extraordinary circumstances exist to excuse its failure. Rather, Employer indicates only that the excluded evidence supports its assertion that Peabody is not liable for payment of benefits. Employer's Brief at 20-23. We therefore affirm as unchallenged the administrative law judge's determination that Employer's liability evidence is inadmissible because it was untimely submitted. 20 C.F.R. §725.456(b)(1); *Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983).

As the "designated responsible operator," Employer has the burden to prove either that it does not have sufficient assets to secure the payment of benefits or that another potentially liable operator more recently employed the Miner. 20 C.F.R. §725.495(c)(1), (2). To support a challenge to its liability, Employer, not the Director, is responsible for submitting any documentation relevant to its liability to the district director within specific timeframes. *See* 20 C.F.R. §§725.408(b)(1) (90 days from notification as a potentially liable operator), 725.410 (60 days from issuance of the SSAE), 725.456(b)(1) (documentary liability evidence "not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances"). Although

[9] In portions of its brief, Employer refers to Eastern Associated Coal as the entity that employed the Miner. Employer's Brief at 17-34. As Employer correctly identifies Pine Ridge in the caption and initial portion of its brief, we attribute these references to scrivener's errors.

[10] A "carrier is required to discharge the statutory and regulatory duties imposed on the employer, thus stepping into its shoes." *Tazco, Inc. v. Director, OWCP* [*Osborne*], 895 F.2d 949, 951 (4th Cir. 1990). The regulations therefore specifically include the insurance carrier as a party that must be given adequate notice of the claim and an opportunity to defend on the question of its direct liability to the claimant. 20 C.F.R. §§725.360(a)(4), 725.407(b); *see Osborne*, 895 F.2d at 952.

Employer suggests some of the documents it intended to rely on are a matter of "public record," it does not explain why that would relieve it of its obligation to identify and submit those documents when the matter was before the district director.[11] Employer's Brief at 17-18; *see* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 446-47 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

As Employer's arguments regarding Peabody's liability for payment of benefits depend on evidence the administrative law judge properly excluded, we need not address them. We therefore affirm the administrative law judge's denial of Peabody's motion to be dismissed from the case, and affirm her finding that Peabody is the liable carrier for this claim.[12] 20 C.F.R. §725.495.

[11] Employer does not contest Pine Ridge is the Miner's most recent coal mine employer, that it was self-insured through Peabody at the time of the Miner's employment, or that Peabody is financially capable of paying benefits. Director's Brief at 6-7. Employer instead alleges some of the "public" documents it failed to timely submit to the district director prove the Department of Labor (DOL) "shifted" liability for Employer's Black Lung claims to Patriot Coal and absolved Peabody of any further liability. Employer's Brief at 18-23.

[12] Employer also argues it should be relieved of liability under the doctrine of equitable estoppel. Employer's Brief at 23-27. To invoke equitable estoppel, Employer must show both that the DOL engaged in affirmative misconduct and that Employer reasonably relied on the DOL's action to its detriment. *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59-63 (1984); *Dawkins v. Witt*, 318 F.3d 606, 612 n.6 (4th Cir. 2003); *Lewis v. Washington*, 300 F.3d 829, 834 (7th Cir. 2002). Employer, however, identifies no admissible evidence establishing the DOL released Peabody from liability, or made a representation of such a release with respect to Peabody's liability. Thus the administrative law judge properly rejected this argument. Decision and Order at 42-43. Further, as the Director correctly asserts, even if Employer established the DOL made such a representation, it would not constitute "affirmative misconduct[,]" as Employer does not allege the DOL acted either intentionally or recklessly to mislead. Director's Brief at 13; *see U.S. v. Mich. Express, Inc.*, 374 F.3d 424, 427 (6th Cir. 2004) (Affirmative misconduct is "more than mere negligence. It is an act by the government that either intentionally or recklessly misleads."); *see also Keener v. Eastern Associated Coal Corp.*, 954 F.2d 209, 214 n.6 (4th Cir. 1992); *Teamsters & Employers Welfare Trust of Illinois v. Gorman Bros. Ready Mix*, 283 F.3d 877, 884 (7th

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish [the Miner] had neither legal nor clinical pneumoconiosis,[13] 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 administrative law judge found Employer failed to establish rebuttal by either method.[14]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner 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 Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

Employer relies on the opinions of Drs. Zaldivar and Tuteur. In his initial report, Dr. Zaldivar opined the Miner had an obstructive respiratory impairment and acknowledged it could be legal pneumoconiosis. Decision and Order at 33; Director's Exhibit 24. In a subsequent report, he reviewed the Miner's past medical records, which included a positive asthma test,[15] and stated "[the Miner] had asthma all along" and opined the entirety of the Miner's respiratory impairment was related to lung remodeling caused by asthma, a disease of the general population. Employer's Exhibit 17. Dr. Tuteur identified coal mine dust exposure, childhood pneumonia, and gastroesophageal reflux

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Cir. 2002). Because Employer failed to establish the necessary elements, we affirm the administrative law judge's rejection of Employer's equitable estoppel argument.

[13] "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).

[14] The administrative law judge found Employer disproved clinical pneumoconiosis. Decision and Order at 32.

[15] Dr. Porterfield administered a methacholine challenge test on September 27, 2005, which he interpreted as positive for asthma. Employer's Exhibits 14, 17.

disease (GERD) as potential risk factors for the Miner's obstructive respiratory impairment. Employer's Exhibits 4, 16 at 9. Noting the Miner suffered from persistent GERD even with treatment, he concluded that all of the Miner's respiratory impairment was related to GERD with no contribution from coal mine dust exposure. Employer's Exhibit 4, 16.

The administrative law judge found neither doctor's opinion sufficient to affirmatively establish the Miner's impairment is not also significantly related to or substantially aggravated by coal mine dust exposure. Decision and Order at 33-35.

Employer quotes the opinions of Drs. Zaldivar and Tuteur, and generally asserts they provided "reasoned and scholarly medical opinions refuting" that the Miner had legal pneumoconiosis. Employer's Brief at 7-12, 14-15. Employer alleges the administrative law judge "applied the wrong and an impossible standard of causation" by requiring it to "rule out" legal pneumoconiosis and further ignored that Drs. Zaldivar and Tuteur rationally relied on a "differential diagnosis" to conclude that the Miner's respiratory impairment was unrelated to coal mine dust exposure. Employer's Brief at 6. We disagree.

Although Employer points out instances in the administrative law judge's opinion when she used "rule out" language in assessing whether Employer rebutted the presumption of legal pneumoconiosis, she properly considered whether the opinions of Employer's experts, that coal dust exposure played no part in the Miner's pulmonary or respiratory impairment, were credible and established the Miner did not have a chronic lung disease or impairment significantly related to, or substantially aggravated by, coal mine dust exposure. Decision and Order at 32, *citing* 20 C.F.R. §718.201(a)(2), (b); *Minich*, 25 BLR at 1-155 n.8. She considered the underlying rationales the doctors provided for why they believed the Miner did not have legal pneumoconiosis but permissibly found their opinions unpersuasive. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 33-35. She noted "Dr. Zaldivar did not explain why the fact that [the Miner had] asthma compels the conclusion that his impairment is solely due to asthma . . . ." Decision and Order at 34. She similarly found that even if Dr. Tuteur is correct that the Miner's "CT scans and pulmonary function tests are typical of a GERD-induced impairment" and "his reasoning supports the conclusion that [the Miner's] condition is likely to have been caused or contributed to by GERD," it does not explain why coal mine dust did not substantially contribute to or aggravate the Miner's respiratory condition. *Id*.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions based on the explanations the experts give for their

diagnoses, and to assign those opinions appropriate weight. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Looney*, 678 F.3d at 314-15. Employer's general contention that the opinions of Drs. Zaldivar and Tuteur are reasoned is a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Employer failed to disprove legal pneumoconiosis.[16] 20 C.F.R. §718.305(d)(1)(i); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015).

Disability Causation

The administrative law judge next considered whether Employer established "no part of the [M]iner'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). She permissibly discredited the disability causation opinions of Drs. Zaldivar and Tuteur because neither diagnosed legal pneumoconiosis, contrary to her finding Employer failed to disprove the Miner had the disease.[17] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (such an opinion "may not be credited at all" absent "specific and persuasive reasons" for concluding the doctor's view on disability causation is independent of his erroneous opinion on pneumoconiosis); Decision and Order at 35-36. Further, Employer does not allege any error by the administrative law judge other than reiterating its argument that the Miner did not have legal pneumoconiosis, which we have rejected. *See* Employer's Brief at 16-17. We therefore affirm the administrative law judge's finding that Employer did not establish the Miner's disability was unrelated to legal pneumoconiosis, and affirm the award of benefits. 20 C.F.R. §718.305(d)(1)(ii).

[16] Because Employer has the burden of proof and we affirm the administrative law judge's discrediting of its medical experts, we need not address its argument that the administrative law judge erred in weighing the opinions of Drs. Habre, Raj, and Green that the Miner had legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Director's Exhibit 18; Claimant's Exhibits 2, 3; Employer's Brief at 12-14.

[17] Each physician rested his opinion that legal pneumoconiosis did not play a part in the Miner's disability on his determination that the Miner did not have legal pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge