U.S. Department of Labor

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

BRB No. 22-0101 BLA

JACKIE E. EFAW	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL COMPANY	)	
	)	
	)	
and	)	DATE ISSUED: 03/13/2023
	)	
PEABODY ENERGY CORPORATION, c/o UNDERWRITERS SAFETY & CLAIMS	)	
	)	
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 Administrative Law Judge Drew A. Swank, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for Claimant.

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2020-BLA-05667) rendered on a claim filed on October 11, 2018, 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. He also determined Claimant established twenty-seven years of qualifying coal mine employment and a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). He further concluded Employer did not rebut the presumption and awarded benefits.

On appeal, Employer asserts the ALJ did not find Peabody Energy Corporation (Peabody Energy) is the responsible carrier, so it should be dismissed and liability for the payment of benefits should transfer to the Black Lung Disability Trust Fund (Trust Fund). Alternatively, it argues the ALJ erred in failing to determine who the responsible carrier is. On the merits, it argues the ALJ erred in finding total disability established and that it failed to rebut the Section 411(c)(4) presumption.[2] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

The Benefits Review 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).

[1] 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); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-seven years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[3] 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

Responsible Insurer

Employer does not challenge Eastern's designation as the responsible operator or its status as self-insured by Peabody Energy on the last day Eastern employed the claimant; thus we affirm these findings.[4] *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 5. Rather, it alleges 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).[5] Employer's Brief at 10-11.

Patriot was initially another Peabody Energy subsidiary. Director's Exhibit 40. In 2007, five years after Claimant ceased his coal mine employment with Eastern, Peabody Energy transferred a number of its other subsidiaries, including Eastern, to Patriot. *Id.*; Director's Exhibits 10 at 7; 27. That same year, Patriot was spun off as an independent company. Director's Exhibits 27, 40. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. Director's Exhibits 27 at 31; 40 at 338. 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 Exhibits 38, 39. 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.

Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 6; 10 at 7.

[4] Employer initially argues there is no evidence of record that Peabody Energy Corporation (Peabody Energy) self-insured Eastern Associated Coal Company (Eastern). Employer's Brief at 10-11. However, the Notice of Claim specifically identifies Peabody Energy as Eastern's self-insurer, Director's Exhibit 32, and Employer's prior arguments have acknowledged that Peabody Energy was the self-insurer of Eastern at the time of Claimant's last date of employment with Eastern. *See, e.g.* Director's Exhibit 54 (arguing to the district director that documentation that the Department of Labor (DOL) provided "confirm[s] . . . that Peabody Energy as a predecessor self-insurer was released").

[5] Employer argues that because the ALJ did not order Peabody Energy to pay benefits, it should be dismissed from the claim. Employer's Brief at 10. We reject this argument as the ALJ simply failed to address who the responsible carrier is, and did not dismiss Peabody Energy.

Employer argues that the ALJ erred in not addressing several arguments that Peabody Energy should not be held liable for payment of any benefits.[6] Employer's Brief at 10-11.

While the ALJ failed to address Employer's argument that Peabody Energy is not the responsible carrier, the Board has previously considered and rejected all of the arguments Employer raised to the ALJ 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*., 25 BLR 1-289, 1-295-99 (2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we are not persuaded by these arguments. Thus, any error by the ALJ in failing to address these arguments and the responsible carrier issue 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). Therefore, we affirm the ALJ's finding that Eastern, self-insured by Peabody Energy, is the responsible operator liable for this claim if benefits are awarded.

Invocation of the Section 411(c)(4) Presumption — Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh the relevant evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp*., 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195, 1-198 (1986), *aff'd on recon*.,

[6] Employer argues Peabody Energy is not liable for benefits because: (1) the Director failed to present evidence that Peabody Energy self-insured Eastern; (2) Black Lung Benefits Act Bulletin Nos. 12-07 and 14-02 place liability on the Black Lung Disability Trust Fund (Trust Fund); (3) before transferring liability to Peabody Energy, the DOL must establish it exhausted any available funds from the security bond Patriot Coal Corporation (Patriot) gave to secure its self-insurance status; (4) the DOL released Peabody Energy from liability; (5) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (6) the DOL failed to require adequate surety from Patriot; and (7) the Director is equitably estopped from imposing liability on Peabody Energy. Employer's Post-Hearing Brief at 25-39. It maintains that a separation agreement—a private contract between Peabody Energy and Patriot—released Peabody Energy from liability and that the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. *Id*. at 33.

9 BLR 1-236 (1987) (en banc). The ALJ found the pulmonary function study evidence and medical opinion evidence established total disability.[7] Decision and Order at 20-25.

The ALJ considered two pulmonary function studies conducted on December 17, 2018 and on August 6, 2019. Decision and Order at 19; Director's Exhibits 10, 12, 20. Both studies produced qualifying values[8] before the administration of bronchodilators and non-qualifying values post-bronchodilator. Decision and Order at 19; Director's Exhibits 10, 12, 20. Because both studies were qualifying before the administration of bronchodilators, the ALJ found the pulmonary function study evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 20.

Employer asserts the ALJ erred in failing to consider Dr. Tuteur's opinion that the studies are not indicative of total disability as they were non-qualifying after the administration of bronchodilators. Employer's Brief at 8-9. We disagree.

As discussed below, the ALJ considered Dr. Tuteur's opinion that Claimant was not totally disabled at 20 C.F.R. §718.204(b)(2)(iv), but permissibly found it unpersuasive given the qualifying pre-bronchodilator studies. *See* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (The Department of Labor has cautioned against reliance on post-bronchodilator results in determining total disability, stating "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis."); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order at 25. As Employer raises no other challenges to the ALJ's weighing of the evidence, we affirm the ALJ's determination that the pulmonary function study evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 20.

The ALJ also considered the medical opinions of Drs. Celko, Go, Sood, Basheda and Tuteur. Decision and Order at 22-25. Dr. Celko opined Claimant is totally disabled based upon his moderate obstructive pulmonary impairment as indicated on his pulmonary function study and the mild reduction in his diffusion capacity. Director's Exhibits 10, 14. Dr. Go opined Claimant is totally disabled based on his moderately severe obstructive impairment indicated on pulmonary function studies and a class 4 diffusion impairment.

[7] The ALJ found the arterial blood gas studies did not support total disability, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 21.

[8] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

Claimant's Exhibits 3, 3a. Dr. Sood also opined Claimant is totally disabled based upon his qualifying pulmonary function studies and his class 4 diffusion impairment which demonstrates Claimant is "moderately impaired with progressively lower levels of lung function correlated with diminishing ability to meet the physical demands" of his usual coal mine employment. Claimant's Exhibit 5, 5a. Dr. Basheda opined Claimant is totally disabled based upon his "uncontrolled and under-treated" obstructive impairment with a moderately reduced diffusion capacity, but also explained that he believed Claimant's condition would improve with proper medication. Director's Exhibit 20; Employer's Exhibit 4 at 38. On the other hand, Dr. Tuteur opined that Claimant is not totally disabled as his pulmonary function studies were non-qualifying after the administration of bronchodilators, indicating only a mild impairment. Employer's Exhibits 1; 5 at 34.

The ALJ found Drs. Celko, Go, Sood, and Basheda's opinions that Claimant has a totally disabling respiratory impairment, well-reasoned and documented as they took into consideration Claimant's usual coal mine employment[9] and were consistent with the objective testing. Decision and Order at 25. Conversely, he found Dr. Tuteur's opinion not adequately explained and not supported by the weight of the pulmonary function study evidence. *Id*. Consequently, he found the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 25.

Employer argues the ALJ erred in failing to consider Dr. Tuteur's explanation that Claimant is not totally disabled because his post-bronchodilator values were non-qualifying. Employer's Brief at 8-9. We disagree.

The ALJ accurately noted that Dr. Tuteur opined that Claimant has a "moderate obstructive impairment that dramatically and substantially improves following administration of aerosolized bronchodilator to normal." Decision and Order at 24, *citing* Employer's Exhibit 5 at 14. However, he permissibly found Dr. Tuteur's opinion that Claimant is not totally disabled when treated with medications unpersuasive considering the qualifying pre-bronchodilator studies. *See* 45 Fed. Reg. 13,682; *Hicks*, 138 F.3d at 528; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). As Employer raises no other challenges to the ALJ's weighing of the medical opinion evidence, we affirm his crediting of the opinions of Drs. Celko, Go, Sood, and Basheda and his finding that the medical opinion evidence establishes total disability. *Skrack*, 6 BLR at 1-711; Decision and Order at 25.

[9] The ALJ found Claimant's usual coal mine employment was working as a section mason. Decision and Order at 22.

As Employer raises no other challenges to the weighing of the medical evidence, we also affirm the ALJ's conclusion that the evidence as a whole establishes total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 25. We therefore affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1); Decision and Order at 31.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he had neither legal nor clinical pneumoconiosis,[10] 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.[11]

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[12] 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, 1-159 (2015).

[10] "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).

[11] The ALJ found Employer rebutted the presumption of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 16.

[12] The ALJ incorrectly set forth the applicable standard when stating "the evidence is insufficient to establish that the miner's respiratory impairment was entirely unrelated to coal mine dust exposure." Decision and Order at 17; Employer's Brief at 7. The correct standard is whether Employer established that Claimant's pulmonary or respiratory impairment is not "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).

The ALJ considered the opinions of Drs. Basheda and Tuteur.[13] Decision and Order at 16-17. Dr. Basheda opined Claimant does not have legal pneumoconiosis, but instead has tobacco-induced chronic obstructive pulmonary disease (COPD) with an asthmatic component. Director's Exhibit 20 at 11; Employer's Exhibit 4 at 7, 9, 24, 37. Dr. Tuteur opined that Claimant does not have legal pneumoconiosis but suffers from COPD due to cigarette smoking, "an allergic phenomenon," vocal cord polyps, and exposure to epoxy material. Employer's Exhibits 1; 5 at 34-35.

The ALJ accorded no weight to the opinions of Drs. Basheda and Tuteur because their determination that "Claimant has COPD but that it does not equate to legal coal workers' pneumoconiosis is contrary to the [preamble to the 2001 revised regulations] and therefore not well-reasoned." Decision and Order at 17. Thus, the ALJ concluded Employer failed to rebut the presumption that Claimant has legal pneumoconiosis.[14] Decision and Order at 17.

Employer asserts the ALJ erred in his consideration of the opinions of Drs. Basheda and Tuteur. Employer's Brief at 4-7. We agree.

[13] The ALJ also considered the opinions of Drs. Celko, Go, and Sood, and rationally found they do not support Employer's position, as each of the physicians diagnosed legal pneumoconiosis. Decision and Order at 17.

[14] We reject Employer's argument that remand is required because the ALJ applied an incorrect standard, specifically evaluating whether Claimant has legal pneumoconiosis by applying a presumption which he had not yet found had been invoked. Employer's Brief at 4. At the outset, the ALJ determined Claimant was entitled to the benefit of the rebuttable presumption as he had more than fifteen years of qualifying underground coal mine employment and a totally disabling respiratory impairment. Decision and Order at 7-8. Thus, Claimant established invocation of the rebuttable presumption that he is totally disabled "due to pneumoconiosis" under Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. While Employer accurately notes the ALJ analyzed the existence of pneumoconiosis before fully evaluating total disability, the ALJ indicated Claimant's totally disabling respiratory impairment would be discussed in a following section of his decision. Therefore, any error by the ALJ in approaching the issues "backward" is harmless as a reorganized analysis of the issues would not make any difference. *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).

The ALJ's only rationale for discrediting the opinions of Drs. Basheda and Tuteur is that their opinions that Claimant's COPD does not constitute legal pneumoconiosis is contrary to the preamble that "links" coal mine dust exposure to COPD, including chronic bronchitis and emphysema. Decision and Order at 16-17. However, the preamble only states that "exposure to coal mine dust *may* cause chronic obstructive pulmonary disease." 65 Fed. Reg. 79,920, 79,923 (Dec. 20, 2000) (emphasis added); *see also Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-73 (4th Cir. 2017). The ALJ therefore appears to conclude, erroneously, that the cause of a coal miner's COPD is necessarily attributable to coal mine dust inhalation pursuant to the preamble and therefore Claimant's COPD constitutes legal pneumoconiosis. *Id.*; Employer's Brief at 6-7. Contrary to the ALJ's finding, whether a particular miner's COPD is due to coal mine dust exposure must be determined on a case-by-case basis. *See* 65 Fed. Reg. at 79,938; *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 861 (D.C. Cir. 2002); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012). Because the ALJ did not adequately address the specific rationales for the opinions of Drs. Basheda and Tuteur on legal pneumoconiosis and explain the weight he accorded them, his findings do not satisfy the requirements of the Administrative Procedure Act (APA).[15] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

We therefore vacate the ALJ's determination that Employer did not disprove legal pneumoconiosis.[16] 20 C.F.R. §718.305(d)(1)(i)(A). As the ALJ's finding regarding rebuttal of disability causation are dependent on his findings regarding legal

[15] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), requires the ALJ to set forth his "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A).

[16] Employer also argues the ALJ erred by not assessing Claimant's smoking history, which therefore made it impossible to properly assess the validity and reliability of the opinions of Employer's experts that Claimant's impairment was due to smoking. Employer's Brief at 5, n.11. We agree. Claimant's smoking history in conjunction with his coal mine dust exposure may be a consideration in weighing the opinions of Drs. Tuteur and Basheda. While the ALJ found Claimant has a long history of smoking, he did not specifically consider discrepancies in the record regarding the length of Claimant's smoking history. Decision and Order at 5, *citing* Hearing Transcript at 24-25. On remand he must do so.

pneumoconiosis,[17] we must also vacate these findings. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 30.

On remand, the ALJ must reconsider the opinions of Drs. Basheda and Tuteur that Claimant does not have legal pneumoconiosis and determine whether they are sufficient to meet Employer's burden to disprove the disease. 20 C.F.R. §718.305(d)(1)(i). In evaluating the medical opinions on remand, the ALJ should address the physicians' explanations for their diagnoses, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441. He must set forth his findings in detail, including the underlying rationale for his decision as the APA requires. *See Wojtowicz*, 12 BLR at 1-165.

If the ALJ finds legal pneumoconiosis disproven, then Employer has 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] respiratory or pulmonary 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. If the presumption is found rebutted, benefits must be denied.

[17] The ALJ discredited the opinions of Drs. Basheda and Tuteur regarding disability causation because they failed to diagnose legal pneumoconiosis. Decision and Order at 29-30.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded 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

MELISSA LIN JONES
Administrative Appeals Judge