U.S. Department of Labor

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

BRB No. 23-0198 BLA

ROBERT D. HUMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ALLIED COALS CORPORATION	)	
	)	
and	)	
	)	
ARROWOOD INDEMNITY f/k/a FIRE & CASUALTY COMPANY OF CONNECTICUT	)	DATE ISSUED: 03/25/2024
	)	
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 and Denying Employer's Request for Modification 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.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for Employer.

Sarah M. Hurley (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: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Lauren C. Boucher's Decision and Order Awarding Benefits and Denying Employer's Request for Modification (Decision and Order on Modification) (2021-BLA-05172) rendered on a claim filed on April 11, 2019,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

In a Proposed Decision and Order – Award of Benefits dated June 3, 2020, the district director found Allied Coals Corporation (Employer) is the proper responsible operator liable for the payment of benefits. Director's Exhibit 57 at 2-3. On June 15, 2020, Employer timely requested modification of that award, submitting new evidence and alleging a mistake in a determination of fact. Director's Exhibits 63, 64. In a Proposed Decision and Order – Denying Request for Modification dated October 15, 2020, the district director found Employer failed to establish a change in conditions or a mistake in a determination of fact. Director's Exhibit 69 at 1. Following Employer's request for a hearing, the case was transferred to the Office of Administrative Law Judges and assigned to ALJ Boucher (the ALJ). Director's Exhibits 75, 78.

In her February 21, 2023 Decision and Order on Modification, the ALJ found Employer is the responsible operator. She also found Claimant established 6.29 years of coal mine employment and thus could not invoke 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). *See* 20 C.F.R. §718.305. Considering entitlement under 20 C.F.R. Part 718, she found Claimant established the existence of legal pneumoconiosis and a totally disabling respiratory or

[1] Claimant filed a prior claim on January 18, 2018, and withdrew it. Director's Exhibits 1; 78 at 6. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[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); *see* 20 C.F.R. §718.305.

pulmonary impairment due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b), (c). Thus, she awarded benefits.

On appeal, Employer argues the ALJ erred in finding it is the responsible operator. On the merits of entitlement, it argues the ALJ erred in finding Claimant established the existence of legal pneumoconiosis. Claimant responds in support of the award of benefits. Although the Director, Office of Workers' Compensation Programs (the Director), urges the Benefits Review Board to reject Employer's specific successor operator argument, he nevertheless agrees with Employer that the Board should vacate the ALJ's responsible operator finding and remand the case for further consideration of the issue.[3]

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 Operator

The responsible operator is the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year.[5] 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a),

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability. 20 C.F.R. §718.204(b)(2); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky and Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 7 at 1-4; Hearing Tr. at 30-31.

[5] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

(b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or that another "potentially liable operator" that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

On June 18, 2019, the district director issued a Notice of Claim identifying Employer as the potentially liable operator, which it controverted on June 24, 2019. Director's Exhibits 34 at 1-3; 39 at 1-3; 40 at 1-3. Employer filed a Motion to Dismiss on December 30, 2019, alleging it should be dismissed as a potentially liable operator and Key Mining/Kline Coal should be named the responsible operator under the theory of successor operator liability. Director's Exhibit 30 at 1-6. On October 31, 2019, June 3, 2020, October 8, 2020,[6] and October 15, 2020, the district director determined Employer is the responsible operator.[7] Director's Exhibits 31; 42 at 1-4; 57 at 2, 11; 69 at 4. By letter dated October 21, 2020, Employer asserted it is not the responsible operator and requested a hearing. Director's Exhibit 75.

At the hearing before the ALJ, Employer argued Key Mining, Inc. and Kline Coal Company, Inc., which Employer referred to as one entity, "Key Mining/Kline Coal," should have been named the responsible operator because it employed Claimant more recently for one year. Decision and Order at 6-8; Employer's Post-Hearing Brief at 2-4. Although Claimant did not work for Key Mining/Kline Coal for one year in isolation, Employer argued it is a successor operator to Employer under the regulations because Employer's parent company, West Mining, "exited the coal mine business in 1991 upon

[6] On October 8, 2020, the district director noted he was responding to Employer's request for dismissal. Director's Exhibit 31.

[7] The district director acknowledged Employer is not the operator that most recently employed Claimant, but she designated it as the responsible operator because no subsequent operators employed him for a period of at least one year. Director's Exhibits 57 at 2, 11; 69 at 4. She noted Kline Coal Company, Inc. last employed Claimant as a coal miner in 1992 for less than 125 working days; Key Mining, Inc. employed him as a coal miner in 1991 for less than 125 working days; and Allied Coal Corporation (Employer) employed him as a coal miner "from 1989" to "approximately May 10, 1991" for 125 working days. *Id.*

transferring its entire mining operation to Key Mining/Kline Coal."[8] Id. at 2-3. Thus Employer asserted the time Claimant spent working for Employer and Key Mining/Kline Coal should be aggregated to establish one year of employment with Key Mining/Kline Coal.[9] *Id*.

In considering Employer's arguments, the ALJ concluded that "the regulation governing the liability of successor operators" at 20 C.F.R. §725.492(d) "only comes into play" if "the prior operator does not meet the conditions of [a potentially liable operator pursuant to 20 C.F.R. §]725.494." Decision and Order at 8. Because she found Employer meets the conditions of a potentially liable operator, she concluded "successor liability is not at issue." *Id*. In addition, she found Employer did not establish that it possesses insufficient assets to secure the payment of benefits or that another potentially liable operator more recently employed Claimant for at least one year. *Id*. The ALJ thus concluded Employer is the properly designated responsible operator. *Id*.

Employer does not contend that it does not meet the criteria of a potentially liable operator; thus, we affirm that finding. 20 C.F.R. §725.494(a)-(e); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6-7. Nor does Employer allege it is financially incapable of assuming liability for benefits. We therefore also affirm that finding. *Id*. On appeal, Employer contends Key Mining/Kline Coal is a

[8] In its brief to the Board, Employer explains that West Mining transferred all of its mining operations, including Employer, to Key Mining, which later began operating as Kline Coal. Employer's Brief at 16.

[9] If a successor relationship is established between two coal mine employers, a miner's tenure with a prior and successor operator may be aggregated to establish one year of employment. *See* 20 C.F.R. §§725.101(a)(32), 725.103, 725.494(c). A "successor operator" is "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such prior operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a). Successor operator liability is also created when an operator ceases to exist due to reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3). If the successor operator is financially incapable of assuming liability for benefits, liability falls to its predecessor if the predecessor meets the definition of a potentially liable operator – namely, that it employed the miner for at least one year and is financially capable of paying benefits. 20 C.F.R. §§725.492(d), 725.494(c), (e), 725.495(a)(3).

successor operator that more recently employed Claimant for at least one year and is liable for benefits in this claim.

The Director disagrees with Employer's argument that a successor relationship exists among Employer, Key Mining, and Kline Coal. He contends Employer is liable for the payment of benefits because it is the last operator "capable of assuming liability for the claim" to employ Claimant for "one-year duration." The Director asserts, however, that the Board should remand this claim for the ALJ to reconsider whether Employer is the responsible operator because she erred in applying 20 C.F.R. §725.492(d) to find "successor liability is not at issue." Director's Brief at 2-4. Specifically, he asserts that, contrary to the ALJ's finding, Section 725.492(d) does not impose liability on a prior operator simply where "the prior operator meets the criteria of a potentially liable operator at [Section] 725.494," but rather provides that "a prior operator retains liability in the situation where the successor operator did not employ the miner." *Id*. at 2. Because the ALJ did not resolve the successor operator issue by weighing the relevant facts in the case, he believes remand is necessary. *Id*. at 2-4.

Based on the Director's concession, and because the ALJ failed to render necessary factual findings as to whether Key Mining/Kline Coal is a successor operator, we vacate her determination that Employer is the responsible operator. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). On remand, the ALJ must address Employer's argument that Kline Coal is a successor operator to Employer and thus Claimant's tenure with Kline Coal, Key Mining, and Employer may be aggregated to establish one year of employment with Key Mining/Kline Coal as a successor operator. *See* 20 C.F.R. §§725.492, 725.493; Employer's Brief at 13-20. If the ALJ finds that a subsequent operator should have been named the responsible operator, she must dismiss Employer and transfer liability to the Black Lung Disability Trust Fund. *See England v. Island Creek Coal Co.*, 17 BLR 1-141, 1-145 (1993); *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354, 1-357 (1984). However, if she finds that a subsequent operator should not have been named the responsible operator, she may reinstate her finding that Employer is liable for the payment of benefits as the responsible operator.

Modification

When an employer seeks modification to terminate an award of benefits, it bears the burden to establish a change in conditions or a mistake of fact with regard to at least one element of entitlement. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 724-25 (4th Cir. 1993); *D.S.* [*Stiltner*] *v. Ramey Coal Co*., 24 BLR 1-33, 1-38 (2008); 20 C.F.R. §725.310(a). In assessing whether there was a mistake in a determination of fact, the ALJ is obligated to perform an independent

assessment of the newly submitted evidence, in conjunction with the previously submitted evidence. *See Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). The ALJ has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999); *see Worrell*, 27 F.3d at 230; *Jessee*, 5 F.3d at 725. Thus, the ALJ is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

Entitlement Under 20 C.F.R. Part 718

To be entitled to benefits, Claimant must establish disease (pneumoconiosis);[10] 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. Statutory presumptions may assist a claimant in establishing these elements when certain conditions are met, but failure to establish any element precludes an award of benefits. *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).

To establish legal pneumoconiosis,[11] Claimant must prove he has a "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(a)(2), (b). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that a claimant can satisfy this burden "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the*

[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 Claimant did not establish the existence of clinical pneumoconiosis. 20 C.F.R. §718.202(a); Decision and Order at 18.

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 the medical opinions of Drs. Green, Nader, Habre, Tuteur, and McSharry. Decision and Order at 19-21. Drs. Green and Nader opined Claimant has legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) related to coal mine dust exposure. Director's Exhibits 11, 18; Employer's Exhibit 1. Similarly, Dr. Habre opined Claimant has legal pneumoconiosis in the form of chronic bronchitis related to coal mine dust exposure. Claimant's Exhibit 8. In contrast, Drs. Tuteur and McSharry opined Claimant does not have legal pneumoconiosis but has reactive airway disease syndrome (RADS) related to "raw" diesel fuel exposure and unrelated to coal mine dust exposure. Director's Exhibit 22; Employer's Exhibit 14.

The ALJ found Dr. Green's opinion well-reasoned and documented. Decision and Order at 20. She found Drs. Nader's and Habre's opinions unpersuasive because they "did not recognize Claimant's history of asthma." *Id.* Further, she found Drs. Tuteur's and McSharry's opinions not well-reasoned and thus unpersuasive. *Id.* She concluded the medical opinion evidence establishes legal pneumoconiosis based on Dr. Green's opinion. *Id.* at 21.

We reject Employer's argument that the ALJ erred in crediting Dr. Green's opinion because he did not consider Claimant's exposure to diesel fuel fumes. Employer's Brief at 5-13. Dr. Green examined Claimant on May 15, 2019, and noted his medical, occupational, and smoking histories, as well as his symptoms of a productive cough, wheezing, and shortness of breath. Director's Exhibit 11. He diagnosed severe COPD with an asthmatic component based on Claimant's pulmonary function studies and hypoxemia based on his arterial blood gas studies. *Id.* at 3-4. He opined Claimant's coal mine employment history "cannot be excluded as an additional independent significant contributing factor" of his COPD. *Id.* at 4. In his supplemental report, Dr. Green reiterated his opinion that Claimant has "very severe" COPD related to coal mine dust exposure. Director's Exhibit 18 at 2. Further, he opined Claimant's asthma "in no way excludes" the diagnosis of COPD. *Id.*

The ALJ found that "a fair reading of Dr. Green's opinion" is that Claimant's coal mine dust exposure is "a significantly contributing causal factor" of his COPD. Decision and Order at 19 n.14; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir.

2002); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).[12] She also found his understanding of Claimant's history, which included asthma and respiratory symptoms, "sufficiently complete." Decision and Order at 21; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185.

Employer's general argument that the ALJ erred in finding Dr. Green's opinion reasoned and documented because he was unaware of Claimant's specific exposure to diesel fuel, amounts to a request to reweigh the evidence, which we are not empowered to do. *See Anderson*, 12 BLR at 1-113; Employer's Brief at 5-13. Thus, we affirm the ALJ's finding that Dr. Green's opinion is well-reasoned and documented. Decision and Order at 20.

We also reject Employer's argument that the ALJ erred in rejecting the opinions of Drs. Tuteur and McSharry. Employer's Brief at 10-13.

Drs. Tuteur and McSharry opined Claimant has "irritant induced asthma" or RADS. Director's Exhibit 22 at 2, 5; Employer's Exhibit 14 at 5. They opined his pulmonary impairment is due to the inhalation of diesel fuel for six weeks while working at a surface coal mine and unrelated to coal mine dust exposure. Director's Exhibit 22 at 5; Employer's Exhibit 14 at 5. The ALJ permissibly found their opinions unpersuasive because they did not adequately explain why Claimant's six-week exposure to diesel fuel is more likely to have caused or contributed to his chronic pulmonary impairment than his six plus years of coal mine dust exposure. *See Napier*, 301 F.3d at 713; *Crisp*, 866 F.2d at 185; Decision and Order at 20-21. She also permissibly found they did not adequately explain why Claimant's coal mine dust exposure did not contribute to his respiratory condition or aggravate any existing asthma. *See Napier*, 301 F.3d at 713; *Crisp*, 866 F.2d at 185; Decision and Order at 21.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a)(4).

As the ALJ's finding that Claimant established total disability due to pneumoconiosis is unchallenged, we affirm it. 20 C.F.R. §718.204(c); *see Skrack*, 6 BLR at 1-711; Decision and Order at 22.

Based on the foregoing, we affirm the ALJ's finding that Claimant established entitlement to benefits but vacate her finding that Employer is the properly named responsible operator.

[12] This finding is unchallenged by Employer.

Accordingly, the ALJ's Decision and Order Awarding Benefits and Denying Employer's Request for Modification is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge