U.S. Department of Labor

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

BRB No. 21-0643 BLA

JERRY D. SMITH (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 5/26/2023
	)	
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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

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

H. Brett Stonecipher (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

Jeffrey S. Goldberg (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) Steven D. Bell's[1] Decision and Order Awarding Benefits (2019-BLA-05015) rendered on a subsequent claim filed on September 26, 2017,[2] 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) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier. He accepted the parties' stipulation that the Miner[3] had thirty years of coal mine employment, with more

[1] This case was originally assigned to ALJ Larry A. Temin, who presided at the hearing. Notice of Hearing and Pre-Hearing Order; Decision and Order at 3. ALJ Temin subsequently retired and the case was reassigned to ALJ Bell (the ALJ). Order Regarding Reassignment; Decision and Order at 3.

[2] The record from the Miner's prior claim, filed on March 16, 1994, was destroyed. Director's Exhibits 1, 38. ALJ Temin admitted the district director's proposed decision and order from the claim as a part of Director's Exhibit 1; however, it does not appear in the record before us. Hearing Transcript at 8-9; Decision and Order at 3. Per the ALJ's summarization of the document, the district director denied the prior claim for failure to establish any element of entitlement. Decision and Order at 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); *see 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 Miner did not establish any element of entitlement in his prior claim, Claimant had to submit evidence establishing at least one element to obtain review of the merits of the current claim. *See White*, 23 BLR at 1-3; Decision and Order at 3.

[3] The Miner died on February 23, 2023, while this case was pending before the Benefits Review Board. Notice of Party-in-Interest for the Claimant. His widow, Carol Smith (Claimant), is pursuing the claim on his behalf. *Id.*

than fifteen years underground. In addition, he found Claimant established a totally disabling respiratory or pulmonary impairment and therefore invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[4] and therefore established a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309. Finally, he determined Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Peabody Energy is the liable carrier. On the merits, Employer argues the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption.[5] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject Employer's liability arguments.

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.[6] 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 it was self-insured by Peabody Energy on the last day Heritage employed the Miner; thus, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 710, 1-711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 30, 35; Employer's Brief at 13. Rather, it alleges Patriot Coal Corporation

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that the miner's total disability was due to pneumoconiosis if he had 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.

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established more than fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 710, 1-711 (1983); Decision and Order at 17.

[6] The Board will apply the law of the United States Court of Appeals for the Seventh Circuit because the Miner performed his last coal mine employment in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 18; Claimant's Exhibit 8.

(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).

Patriot was initially another Peabody Energy subsidiary. Director's Exhibit 34. In 2007, after the Miner 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, 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 32-35.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated the self-insured carrier in this claim and thus the Trust Fund, not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 13-50. It argues the ALJ erred in finding Peabody Energy liable for benefits because: (1) ALJ Temin, who presided over the hearing in this claim prior to its transfer to ALJ Bell, erred in excluding documentary liability evidence;[7] (2) the

[7] Employer moved to admit the deposition testimony of Department of Labor employees David Benedict and Steven Breeskin as liability witnesses before ALJ Temin. Employer's Motion to Admit Depositions. The Director opposed the motion, arguing the testimony is not relevant and the exhibits attached to the transcripts were inadmissible. Director's Objections. ALJ Temin allowed the deposition transcripts but excluded the attached exhibits. Feb. 13, 2020 Order. He found the evidence was either already in the record or was inadmissible as it was not submitted before the district director. Feb. 13, 2020 Order; 20 C.F.R. §725.414(d). He further found no extraordinary circumstances for Employer's failure to timely submit the evidence, noting Employer was in possession of the documents prior to the filing of this claim. Feb. 13, 2020 Order; 20 C.F.R. §725.456(b)(1).

Employer acknowledges it failed to submit the exhibits before the district director, but contends extraordinary circumstances exist. Employer's Brief at 14. It, however, fails to address ALJ Temin's specific findings and we find no abuse of discretion in excluding the exhibits on this basis. *Dempsey v. Sewell Coal Corp*., 23 BLR 1-47, 1-63 (2004) (en banc). Moreover, even assuming error, it would be harmless, as the same evidence was admitted and considered by the Board in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022) (en banc), and the Board held it did not

district director is an inferior officer not properly appointed under the Appointments Clause;[8] (3) before transferring liability to Peabody Energy, the Department of Labor (DOL) must establish it exhausted any available funds from the security bond 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 Director is equitably estopped from imposing liability on Peabody Energy; (7) the ALJ's reliance on 20 C.F.R. §§725.495(a)(2)(i) and 725.493(b)(2) is misplaced; (8) the regulatory scheme, whereby the district director must determine the liability of a responsible operator and its carrier when the DOL also administers the Trust Fund, creates a conflict of interest that violates its due process; (9) 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act and the Administrative Procedure Act (APA); (10) the DOL's issuance of Black Lung Benefits Act (BLBA) Bulletin No. 16-01[9] reflects a change in policy where the DOL began to retroactively impose new liability on self-insured mine operators that bypasses traditional rulemaking in violation of the APA; and (11) the DOL violated its due process rights by not maintaining adequate records with respect to Patriot's bond and failing to monitor Patriot's financial health.[10] *Id.* 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. *Id.*at 38.

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.*,

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support the employer's arguments which are, in substance, similar to those raised by Employer in this case. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[8] Employer first raised this argument while this case was before the Office of Administrative Law Judges. Hearing Transcript at 17-18; Employer's Post-Hearing Brief at 53-54.

[9] BLBA Bulletin No. 16-01 is a memorandum the Director of the Division of Coal Mine Workers' Compensation issued on November 12, 2015, to "provide guidance for district office staff in adjudicating claims" affected by Patriot's bankruptcy.

[10] 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 47. Employer neither asks the Board to address this issue nor sets forth any argument that would permit our review. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986).

25 BLR 1-301, 1-312-18 (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 Heritage 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. 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 – Total Disability

To invoke the Section 411(c)(4) presumption, Claimant must establish that the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if he had a pulmonary or respiratory impairment which, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based upon qualifying[11] pulmonary function or 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 all relevant supporting evidence against all relevant 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.*, 9 BLR 1-236 (1987) (en banc). The ALJ found Claimant established total disability based on the pulmonary function studies, medical opinion evidence, and weighing of the evidence as a whole.[12] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 21.

[11] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[12] The ALJ found the arterial blood gas studies do not establish total disability and that 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 19-20. He further found Claimant did not establish complicated pneumoconiosis by a preponderance of the evidence and thus could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304; Decision and Order at 19.

Medical Opinion Evidence

The ALJ considered the medical opinions of Drs. Cohen, Sood, Tuteur, and Selby. Decision and Order at 11-18, 20-21; Director's Exhibit 16; Claimant's Exhibit 4; Employer's Exhibits 8-11. Dr. Cohen found the Miner was totally disabled due to a "very severe" obstructive defect, moderate diffusion impairment, and moderate resting hypoxemia. Director's Exhibit 16 at 5-6. Dr. Sood also noted "very severe" obstruction and opined the Miner was totally disabled from his usual coal mining employment, and the physical demands of most jobs, finding him "severely impaired." Claimant's Exhibit 4. Dr. Tuteur found severe obstruction and a mild impairment in gas exchange at rest and opined the Miner was "totally and permanently" disabled from returning to his coal mining work. Employer's Exhibits 8, 10. Dr. Selby acknowledged the presence of severe obstruction, moderate diffusion impairment, and mild resting hypoxemia; however, he declined to opine that the Miner had a "permanent" totally disabling impairment. Employer's Exhibits 9, 11.

Employer argues the ALJ erred in finding the medical opinion evidence supports a finding of total disability.[13] Employer's Brief at 9-13. Specifically, it contends the ALJ erred in discrediting Dr. Selby's opinion that the Miner did not have a permanent totally disabling pulmonary impairment.[14] *Id.* We disagree.

Dr. Selby acknowledged a severe obstructive impairment in the Miner's pulmonary function; however, he stated that the improvement after administration of bronchodilators on pulmonary function testing indicates the Miner had a "significantly responsive disease" in the form of asthma that was inadequately treated. Employer's Exhibit 11 at 14-15. The doctor concluded that unless the disease was more aggressively treated with anti-

[13] The ALJ considered six pulmonary function studies obtained March 29, 2006, September 5, 2008, October 23, 2017, June 26, 2018, August 24, 2018, and April 24, 2019. Decision and Order at 8; Director's Exhibit 16; Claimant's Exhibit 7; Employer's Exhibits 8, 9. He found all the studies produced qualifying results both before and after the administration of bronchodilators; thus, the pulmonary function study evidence establishes total disability. Decision and Order at 20. As Employer does not contest the ALJ's determination, we affirm it. *Skrack*, 6 BLR at 1-711.

[14] We affirm, as unchallenged, the ALJ's findings that the opinions of Drs. Cohen, Sood, and Tuteur, who each found the Miner was totally disabled, were well-reasoned and well-documented and worthy of "substantial weight." *See Skrack*, 6 BLR at 1-711; Decision and Order at 20-21; Director's Exhibit 16; Claimant's Exhibit 4; Employer's Exhibits 8, 10.

inflammatory medicine, "you can make no statement with any veracity about total and permanent disability." *Id.* at 15.

Contrary to Employer's arguments, the ALJ permissibly found Dr. Selby's opinion unreasoned because it was reliant on whether the Miner would remain totally disabled after treatment.[15] Decision and Order at 21. In making disability determinations, the question is whether a miner is able to perform his job, not whether he can perform his job after taking medication. *See* 20 C.F.R. §718.204(b)(1); 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (DOL has cautioned against relying on post-bronchodilator pulmonary function testing 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"); Decision and Order at 21.

Moreover, the ALJ did not "ignore" that Claimant has the burden of proof to establish total disability. Employer's Brief at 12-13. The ALJ placed the burden of proof on Claimant and permissibly found that the medical findings of total disability made by Drs. Cohen, Sood, and Tuteur were well-reasoned and well-documented and outweigh Dr. Selby's opinion that he could not opine "with any veracity about total and permanent disability" until the Miner received treatment for his impairment. Decision and Order at 20-21. Because it is supported by substantial evidence, we affirm the ALJ's determination that the medical opinion evidence establishes total disability. *Amax Coal Co. v. Beasley*, 957 F.2d 324, 327 (7th Cir. 1992); 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 21.

As Employer has raised no other arguments regarding the ALJ's weighing of the evidence, we further affirm his finding that the evidence as a whole establishes total disability. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 21. Consequently, we affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b); Decision and Order at 22. Finally, because Employer does not challenge the ALJ's finding that it failed to rebut the presumption, we affirm it. *See* 20 C.F.R. §718.305(d); *Skrack*, 6 BLR at 1-711; Decision and Order at 26-29.

[15] While Employer also argues the ALJ erred in finding Dr. Selby's opinion speculative and inconsistent with the results of the pulmonary function studies, these arguments are reliant on the assumption that disability should be determined after the Miner was optimally treated. Employer's Brief at 12-13.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge