U.S. Department of Labor

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

BRB No. 22-0005 BLA

JOHN HALE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KINNEY BRANCH MINING INCORPORATED,	)	DATE ISSUED: 5/26/2023
	)	
Employer-Petitioner	)	
	)	
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 Carrie Bland, Associate Chief Administrative Law Judge, United States Department of Labor.

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

David Casserly (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 ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Associate Chief Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Awarding Benefits (2018-BLA-05308) rendered on a subsequent claim filed on December 4, 2014,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 23.46 years of qualifying coal mine employment and established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Finally, she found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues it is not the correct responsible operator, the submission of an additional report by the physician who performed the Department of Labor (DOL)- sponsored complete pulmonary evaluation violates evidentiary limitations, and the ALJ erred in finding the Section 411(c)(4) presumption unrebutted.[3] Claimant has

[1] Where 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 she 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)(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).

Claimant's prior claim was denied because he failed to establish any element of entitlement. Director's Exhibit 1; *see* Decision and Order at 3. Thus, he had to submit evidence establishing at least one element of entitlement to obtain review of the merits of the current claim. *White*, 23 BLR at 1-3; Director's Exhibit 1.

[2] Under Section 411(c)(4) of the Act, a miner is presumed 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); 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established 23.46 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, and thus 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 18, 21-22.

not filed a response. The Director, Office of Workers' Compensation Programs (the Director), filed a response urging rejection of Employer's responsible operator argument.

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.[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, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[5] The district director is charged with determining which of the miner's "potentially liable operator[s]" is the responsible operator liable for benefits. 20 C.F.R. §§725.407(a), 725.410(c), 725.495(a)(1), (b).

The designated responsible operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or another operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c). If the designated responsible operator is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. 20 C.F.R. §725.495(d). If the reasons include the more recent operator's inability to assume liability for benefits, the record must include a statement that the Office of Workers' Compensation Programs has no record of insurance coverage or authorization to self-insure for that employer. *Id*. Such a statement constitutes prima facie evidence that the subsequent employer is not financially capable of paying benefits. *Id*. In

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 2, n.2; Director's Exhibit 4; Hearing Transcript at 17.

[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).

the absence of such a statement, the subsequent employer is presumed to be financially capable of paying benefits. *Id.*

The district director identified Employer as a potentially responsible operator. Director's Exhibit 27. Long-Airdox Company (Long-Airdox) most recently employed Claimant; however, the district director issued a 20 C.F.R. §725.495(d) statement providing that Long-Airdox was not insured or approved to self-insure on the last day of Claimant's employment. Director's Exhibits 8, 36. Employer timely contested its designation as the responsible operator throughout the proceedings before the district director but submitted no liability evidence.[6] Director's Exhibits 29, 31, 38.

After the district director issued the Proposed Decision and Order awarding benefits, Employer requested a hearing and reconsideration. Director's Exhibits 37, 38, 40. The district director denied Employer's motion for reconsideration, and the case was referred to the Office of Administrative Law Judges. Director's Exhibits 41, 45.

The ALJ found Employer meets the regulatory definition of a potentially liable operator. 20 C.F.R. §725.494(a)-(e); Decision and Order at 5. Employer does not contest this finding; thus, we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Nor does Employer allege it is financially incapable of assuming liability for benefits. Thus, it can avoid liability only by establishing that another financially capable operator employed Claimant more recently for at least one year.

The ALJ considered Employer's contention that the district director failed to properly investigate whether Long-Airdox was still in existence or had successors capable of assuming liability. Decision and Order at 5-6. She found that once the Director identified Employer as responsible operator, however, it was Employer's burden to establish another, more recent employer was capable of assuming liability. *Id.* She further found Employer failed to present such evidence before the district director. *Id.* at 6. Thus, the ALJ concluded Employer was the properly designated responsible operator. *Id.*

Employer asserts the ALJ erred in finding that the Director has no obligation to determine whether the last company to employ Claimant or a successor operator is still in existence, and in relying on the district director's determination that Long-Airdox had no insurance. Employer's Brief at 3-5. The Director argues Employer had the burden of proving a subsequent operator could pay benefits and failed to timely present such

[6] Employer requested multiple extensions of time for the submission of medical evidence but did not request additional time to obtain evidence related to the responsible operator issue or submit such evidence. Director's Exhibits 32-34.

evidence; therefore, it was properly designated as the responsible operator. Director's Brief at 2. We agree with the Director's argument.

Under the regulations, Employer can only escape liability by showing another, financially capable operator more recently employed Claimant for one year. 20 C.F.R. §725.495(c). Long-Airdox was a subsequent employer for more than one year, but the record contains prima facie evidence that Long-Airdox was not covered by a policy of federal black lung insurance or approved to self-insure and therefore is incapable of assuming liability. *Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 322-23 (6th Cir. 2014); Decision and Order at 6; Director's Exhibit 37; *see* 20 C.F.R. §725.495(d). Employer did not submit evidence to the contrary to the district director, as the regulation requires.

Aside from arguing the DOL is obligated to name Long-Airdox as the responsible operator because the company is allegedly still in existence or is owned by a company still in existence, Employer fails to provide any authority to support its position.[7] Employer's Brief at 4. Employer's contentions fail to recognize the burden placed on the named responsible operator once the Director meets his initial burden. 20 C.F.R. §725.495(c); Director Response at 2.

As Employer presented no evidence to satisfy its burden of showing that a subsequent operator is financially capable of assuming liability for benefits, we affirm the ALJ's determination that Employer is properly named the responsible operator. 20 C.F.R. §§725.495(a)(1), 725.495(c)(2); Decision and Order at 6.

Evidentiary Issue

ALJs are afforded significant discretion in rendering evidentiary orders. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc). Such orders may be overturned only if the party challenging them demonstrates the ALJ's action represented an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). Employer argues the ALJ erred in admitting Dr. Ajjarapu's "rehabilitative" medical report, obtained as part of the DOL's pilot program,[8] contending the development

[7] Further, as the ALJ found, all evidence relevant to liability must be submitted before the district director to be considered at the hearing. *See* 20 C.F.R. §725.408(b)(2); Decision and Order at 6.

[8] The Department of Labor (DOL) established the pilot program under the Act to provide for the supplementation of a miner's complete pulmonary examination in claims where the miner had fifteen or more years of coal mine employment, the DOL-sponsored pulmonary evaluation indicated the miner is entitled to benefits, and the employer submitted evidence contrary to a claims examiner's initial proposed finding of entitlement.

of such reports exceeds the DOL's evidentiary limitations. Employer's Brief at 6-17. We need not resolve this issue.

The sole argument Employer raises regarding the merits of entitlement is whether it rebutted the Section 411(c)(4) presumption. Employer's Brief at 17-24. Even if we were to agree with Employer that Dr. Ajjarapu's supplemental report should not have been admitted, the doctor's opinion was immaterial to the ALJ's findings that Employer did not rebut the Section 411(c)(4) presumption. Decision and Order at 23-25; Director's Exhibits 13, 24. Thus, it has not shown why the alleged error would require remand. *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); *see* Director's Response at 3. We therefore decline to address Employer's assertion of evidentiary error.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[9] or that "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.[10]

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),

See BLBA Bulletin 14-05 (Feb. 24, 2014). The program became standard procedure in 2019. *See* BLBA Bulletin No. 20-01 (Oct. 24, 2019).

[9] "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).

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

718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co*., 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit holds an employer can "disprove the existence of legal pneumoconiosis by showing that [the miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal-dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id*. at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relies on the opinions of Drs. Rosenberg and Tuteur to disprove legal pneumoconiosis. Dr. Rosenberg opined Claimant had mild to moderate restriction due to obesity, deconditioning, long-term use of medications that suppress bodily functions, and hyperreactive airways or asthma, all unrelated to coal mine dust exposure. Employer's Exhibits 2 at 3-4; 7 at 14-16. Dr. Tuteur found Claimant had a mild restrictive abnormality due to external factors, including obesity and the use of certain medications which inhibit deep breathing, which are unrelated coal dust exposure. Director's Exhibit 21; Employer's Exhibit 6 at 21-22, 28. The ALJ found Drs. Rosenberg's and Tuteur's opinions inadequately explained and entitled to little weight; thus, she found Employer failed to rebut the presumed existence of legal pneumoconiosis. Decision and Order at 24.

Employer argues the ALJ erred in discounting Drs. Tuteur's and Rosenberg's opinions. Employer's Brief at 17, 21. We disagree.

Initially, the ALJ discredited Dr. Rosenberg's opinion to the extent he relied on negative x-rays in excluding a diagnosis of legal pneumoconiosis, as being inconsistent with the principle that a miner may have legal pneumoconiosis with either a restrictive or obstructive defect, even absent a positive x-ray. 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. 79,920, 79,943 (Dec 20, 2000); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013); Decision and Order at 24. Employer does not contest this credibility finding; thus, it is affirmed. *See Skrack*, 6 BLR at 1-711.

Further, the ALJ permissibly rejected Dr. Tuteur's opinion because he failed to adequately explain why Claimant's 23.46 years of coal dust exposure did not also contribute to or aggravate Claimant's impairment. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002) (it is within the purview of the ALJ to weigh the evidence, draw inferences, and determine credibility); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000) (ALJ is not required to accept the opinion or theory of any medical expert); Decision and Order at 23-24. While Employer points to Dr. Tuteur's explanations regarding how extrinsic factors were sufficient to account for Claimant's impairment, Employer's Brief at 20-21, the ALJ addressed these explanations and found the physician

failed to adequately explain why Claimant's significant coal mine history did not also contribute to his impairment. Decision and Order at 10-12, 23-24. Employer's arguments are a request to reweigh the evidence, which we are not permitted to do. *Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 352-53 (6th Cir. 2007); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Thus, we affirm the ALJ's credibility determinations and her finding that the medical opinion evidence is insufficient to rebut the presence of legal pneumoconiosis as supported by substantial evidence. 20 C.F.R. §718.305(d)(1)(i)(A); *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Napier*, 301 F.3d at 713-14; Decision and Order at 24-25.

Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

To disprove disability causation, Employer must establish "no part of the miner'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). Employer raises no specific allegations of error regarding the ALJ's findings other than its general assertion that Claimant did not have legal pneumoconiosis, which we have rejected. Employer's Brief at 17-23. Thus, we affirm the ALJ's determination that Employer failed to establish no part of Claimant's totally disabling respiratory impairment was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Skrack*, 6 BLR at 1-711; Decision and Order at 25. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption. Decision and Order at 26.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge