U.S. Department of Labor

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

BRB No. 20-0144 BLA

WANDA C. CARTER (Widow of HAROLD D. CARTER) Claimant-Respondent v. EASTERN ASSOCIATED COAL LLC and PEABODY ENERGY CORPORATION Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/14/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

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

Kathleen H. Kim (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), 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 (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits (2018-BLA-05208) rendered on a survivor's claim filed on February 8, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ found Eastern Associated Coal LLC (Eastern) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier. On the merits of entitlement, the ALJ found the Miner had thirty-six years of underground coal mine employment and suffered from complicated pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.304, 718.203. Thus, she found Claimant invoked the irrebuttable presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(3) of the Act and awarded benefits. 30 U.S.C. §921(c)(3) (2018).

On appeal, Employer argues the ALJ lacked the authority to decide the case because she was not appointed in accordance with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[2] It also contends the district director, the Department of Labor (DOL) official who initially processes claims, is an inferior officer who was not appointed in a

[1] Claimant is the widow of the Miner, Harold D. Carter, who died on November 4, 2015. Director's Exhibit 18.

[2] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, cl. 2.

manner consistent with the Appointments Clause. Further, it argues the ALJ erred in finding it liable for the payment of benefits.[3] Claimant and the Director, Office of Workers' Compensation Programs (the Director), in separate briefs, respond urging the Benefits Review Board to reject Employer's Appointments Clause challenges and to affirm the ALJ's determination that Employer is liable for benefits. Although the Director addresses Employer's challenge to the district director's appointment, Claimant argues Employer forfeited its challenge of the district director's appointment because it did not timely raise the issue.

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).

Appointments Clause – ALJ

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[5] Employer's Brief at 37-39. It acknowledges the Secretary of Labor, as the Head of a Department under the Appointments Clause, ratified the prior appointments of all sitting DOL ALJs on December 21, 2017. *Id*. at 39. However, Employer contends that because the ALJ issued a Notice of Docketing; Directions to

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant invoked the irrebuttable presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2018). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 29.

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

[5] *Lucia* involved an Appointments Clause challenge to the selection of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

Parties (Notice of Docketing) prior to the ratification,[6] her Decision and Order must be vacated and the case remanded for a new hearing before a different, constitutionally appointed ALJ. *Id*. The Director responds, asserting the Notice of Docketing merely conveys general information and its issuance therefore does not require reassignment to a different ALJ. Director's Brief at 27-28. We agree with the Director's argument.

The ALJ issued a Notice of Docketing on December 12, 2017. The issuance of the Notice of Docketing involved no consideration of the merits of this case, nor could it color the ALJ's consideration of the merits. It simply reiterated the statutory and regulatory requirements governing pre-hearing procedures.[7] *See Noble v. B & W Res., Inc.*, 25 BLR 1-267, 1-271-72 (2020).

Thus, unlike the situation in *Lucia* where the judge had presided over a hearing and issued an initial decision while he was not properly appointed, the issuance of the Notice of Docketing did not affect the ALJ's ability in this case "to consider the matter as though [s]he had not adjudicated it before." *Lucia*, 138 S. Ct. at 2055. It therefore did not taint the adjudication with an Appointments Clause violation requiring remand, and we decline to remand this case to the Office of Administrative Law Judges (OALJ) for a new hearing before a different, properly appointed ALJ. *Noble*, 25 BLR at 1-272.

Due Process Challenge

Employer next generally asserts that the regulatory scheme whereby the district director must determine the liability of a responsible operator and its carrier, while also administering the Black Lung Disability Trust Fund (Trust Fund), creates a conflict of interest that violates its due process right to a fair hearing. Employer's Brief at 45-49. For the reasons set forth in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 18-19 (Oct. 25, 2022) (en banc), we reject Employer's argument.

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Eastern is the correct responsible operator and was self-insured by Peabody Energy on the last day Eastern

[6] Employer does not argue the ALJ's appointment remained improper after it was ratified by the Secretary, only that the ALJ impermissibly took action in this case prior to the ratification.

[7] The December 12, 2017 Notice of Docketing instructed representatives to file their notices of appearance, advised the parties of the discovery process, provided general advice to parties proceeding without counsel, and addressed other routine procedural matters.

employed the Miner; thus, we affirm these findings.[8] 20 C.F.R. §§725.494(e), 725.495, 726.203(a); *see Skrack*, 6 BLR at 711; Decision and Order at 37. Patriot Coal Corporation ("Patriot") was initially a Peabody Energy subsidiary. Director's Exhibit 32 at 1, 8. In 2007, after the Miner ceased his coal mine employment with Eastern, Peabody Energy transferred a number of its other subsidiaries, including Eastern, to Patriot. *Id.* at 4-58. That same year, Patriot became an independent company. *Id.* On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. *Id.* at 58-60. 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 Exhibit 23. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners who were last employed by Eastern when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 34.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated as 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 3-49. It argues the ALJ erred in finding Peabody Energy liable for benefits because: (1) the district director is an inferior officer not properly appointed under the Appointments Clause;[9] (2) the ALJ erroneously excluded its liability evidence; (3) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) before transferring liability to Peabody Energy, the DOL must establish it exhausted any available funds from the security bond Patriot gave to secure its self-insurance status; (5) the DOL released Peabody Energy from liability; (6) the Director is equitably estopped from imposing liability on the company; and (7) the DOL violated its due process rights by not maintaining adequate records with respect to Patriot's bond and failing to comply with its

[8] Employer also states it intends to "preserve" its "ability to challenge" Black Lung Benefits Act (BLBA) Bulletin No. 16-01 as an invalid rule. Employer's Brief at 39-40 (unpaginated). Employer generally argues Bulletin No. 16-01 contradicts liability rules under the Act, was issued without notice and comment, violates the Administrative Procedure Act, and the DOL has acted arbitrarily and capriciously by not following its own self-insurance regulations. *Id.* Apart from one sentence summarizing its arguments, Employer has not set forth sufficient detail to permit the Board to consider the merits of these issues. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

[9] Employer first contested the district director's appointment in its post-hearing brief to the ALJ.

duty to monitor Patriot's financial health. *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.*

The Board has previously addressed arguments (1), and (3) through (7), and rejected them in *Bailey*, BRB No. 20-0094 BLA, slip op. at 3-19; *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.*, BLR , BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022). Thus, for the reasons set forth in *Bailey*, *Howard* and *Graham*, we reject Employer's arguments. We also reject Employer's argument (2) with respect to the exclusion of evidence for the reasons set forth in those decisions; however, in order to establish the relevant factual context, we describe the relevant procedural history in this case below.

Exclusion of Evidence -- Relevant Procedural History

The district director issued a Notice of Claim on February 24, 2016, designating Eastern, as self-insured through Peabody, as a "potentially liable operator." Director's Exhibit 25. This notice gave Employer ninety days to submit evidence disputing its designation as a potentially liable operator or carrier. *Id*. Employer responded, denying liability, and requested the district director dismiss Peabody Energy from the claim, arguing Patriot was the proper responsible carrier. Director's Exhibit 27. Employer did not provide any documentary evidence to support its contention that Patriot, not Peabody Energy, was liable for benefits. *Id.*

Thereafter the district director issued a Schedule for the Submission of Additional Evidence (SSAE), identifying Eastern and Peabody Energy as the responsible operator and carrier, respectively. Director's Exhibit 33. The district director informed them that they had until August 1, 2016, to submit additional documentary evidence relevant to liability and should identify any witnesses they intended to rely on if the case was referred to the OALJ. *Id*. 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 [OALJ]." *Id*. at 3 (citing 20 C.F.R. §725.456(b)(1)).

Employer responded to the SSAE on June 21, 2016, contesting liability. Director's Exhibit 36. Thereafter, it requested multiple extensions to submit medical evidence. Director's Exhibits 40, 42, 44, 46, 48. The district director gave Employer until May 30, 2017, to submit evidence. Director's Exhibit 49. Employer submitted documents to the district director on April 10, 2017, to support its controversion of liability. Director's Exhibit 32. Specifically, it submitted a 2007 Separation Agreement between Peabody Energy and Patriot; a March 4, 2011 letter from Mr. Breeskin, former Director of the Division of Coal Mine Workers' Compensation (DCMWC), to Patriot releasing a letter of

credit financed under Peabody's self-insurance program; and the DCMWC's decision authorizing Patriot to self-insure. Director's Exhibit 32. Employer also identified a number of potential liability witnesses, including Mr. Breeskin and another former DCMWC employee, Mr. Benedict. *Id*. Employer did not request any additional time to submit further liability evidence.

The district director issued a Proposed Decision and Order on August 30, 2017, awarding benefits and designating Eastern and Peabody Energy as the responsible operator and carrier, respectively. Director's Exhibit 50. Employer requested a hearing, and the case was forwarded to the OALJ on November 17, 2017. Director's Exhibits 57, 60.

After the case was transferred to the OALJ, Employer filed documentary evidence marked Employer's Exhibits 1 through 7 pertaining to the responsible operator issue.[10] Hearing Transcript at 8-9. The ALJ excluded Exhibits 3 through 7 because she found Employer did not submit them to the district director or establish extraordinary circumstances for failing to do so. *Carter v. E. Ass'd Coal Corp.*, OALJ No. 2018-BLA-05208, slip op. at 3-6 (Aug. 28, 2018) (Order) (unpub.); *see* 20 C.F.R. §§725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000). Subsequently, the ALJ rejected Employer's argument that Patriot is the liable carrier and concluded Eastern and Peabody Energy were correctly designated the responsible operator and carrier, respectively. Decision and Order at 30-37.

[10] The documentary evidence pertaining to liability that Employer submitted before the ALJ included: Employer's Exhibit 1, Patriot's authorization to self-insure; and Employer's Exhibit 2, the March 4, 2011 letter from Mr. Breeskin to Patriot. Both exhibits had been submitted to the district director and were also admitted by the ALJ as Director's Exhibit 32. Hearing Transcript at 6.

While the case was pending before the ALJ, Employer submitted for the first time Employer's Exhibit 3, a November 23, 2010 letter from Mr. Breeskin returning to Patriot two unsigned copies of an indemnity bond; Employer's Exhibit 4, an undated letter from Mr. Chance, the current Director of the DCMWC, regarding Patriot's self-insurance reauthorization audit requiring retroactive coverage for all claims through July 1, 1973; Employer's Exhibit 5, a March 4, 2011 indemnity agreement releasing Bank of America from liability arising from the loss of an original letter of credit for $13 million issued for Peabody's self-insurance because the DOL had either lost or destroyed it; Employer's Exhibit 6, documentation dated November 17, 2015, showing a transfer of $15 million from Patriot to the Black Lung Disability Trust Fund; and Employer's Exhibit 7, Peabody's Indemnity Bond.

For the reasons set forth in *Bailey*, BRB No. 20-0094 BLA, slip op. at 11-13; *Howard*, BRB No. 20-0229 BLA, slip op. at 10-12; and *Graham*, BRB No. 20-0221 BLA, slip op. at 6-7, we affirm the ALJ's determination that Employer failed to timely submit the excluded evidence or establish extraordinary circumstances justifying its failure, thus precluding its admission before the ALJ.

Thus, we affirm the ALJ's determination that Eastern and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim. Accordingly, the ALJ'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