U.S. Department of Labor

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

BRB No. 20-0186 BLA

EDWARD R. MCGREGOR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY, LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION, C/O UNDERWRITERS SAFETY & CLAIMS	)	DATE ISSUED: 11/16/2022
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest		

Appeal of the Decision and Order Awarding Benefits and Order Denying Motion to Dismiss Peabody Energy Corporation as Responsible Operator of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jonathan C. Calianos's Decision and Order Awarding Benefits (2017-BLA-05918) and Order Denying Motion to Dismiss Peabody Energy Corporation as Responsible Operator, rendered on a claim filed on June 22, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-944 (2018) (Act).

The ALJ bifurcated the issues of responsible operator and liability for the payment of benefits from the merits of the claim. In his Order Denying Motion to Dismiss Peabody Energy Corporation as Responsible Operator, he first determined Heritage Coal Company, LLC (Heritage), as self-insured by Peabody Energy Corporation (Peabody Energy), is the responsible operator liable for payment of benefits.[1] In his Decision and Order Awarding Benefits, he accepted the parties' stipulation that Claimant had thirty-three years of underground coal mine employment and found Claimant established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked 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). He further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the district director, the Department of Labor (DOL) official who processes claims, is an inferior officer who was not appointed in a manner consistent with the Appointments Clause of the Constitution. Art. II § 2, cl. 2.[3] It further

[1] The ALJ relied on and incorporated into his order the analysis and findings regarding the liability issue provided in ALJ Scott R. Morris's decision in *Griffith v. Eastern Assoc. Coal Co.*, 2018-BLA-05046 (June 19, 2019) (Griffith Decision and Order). Aug. 22, 2019 Conference Transcript (Conference Transcript) at 11-14.

[2] Section 411(c)(4) 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); 20 C.F.R. §718.305.

[3] 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,

argues the ALJ erred in finding it liable for the payment of benefits. On the merits, Employer argues the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[4] Claimant responds, urging affirmance of the award and the determination that Employer is liable for benefits. Claimant further urges the Benefits Review Board to reject Employer's argument that district directors are inferior officers. The Director, Office of Workers' Compensation Programs, filed a limited response urging the Board to reject Employer's constitutional arguments and affirm the ALJ's determination that Employer is liable for benefits.

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.[5] 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 Heritage's designation as the responsible operator and that it was self-insured by Peabody Energy on the last day Heritage employed Claimant; thus, we affirm these findings.[6] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711

> 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.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant 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 6, 16.

[5] We 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); Director's Exhibit 3.

[6] Heritage Coal Company (Heritage) qualifies as a potentially liable operator because it is undisputed that: (1) Claimant's disability arose at least in part out of employment with Heritage; (2) Heritage operated a mine after June 30, 1973; (3) Heritage employed Claimant for a cumulative period of at least one year; (4) Claimant's employment included at least one working day after December 31, 1969; and (5) Heritage is capable of assuming liability for the payment of benefits through Peabody Energy

(1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Order Denying Motion to Dismiss Peabody Energy Corporation as Responsible Operator. Patriot Coal Corporation (Patriot) was initially a subsidiary of Peabody Energy. Director's Exhibit 28. In 2007, fourteen years after Claimant's coal mine employment ended, Peabody Energy transferred a number of its 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 self-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. Director's Exhibit 34. 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 and Order Denying Motion to Dismiss Peabody Energy Corporation as Responsible Operator; Aug. 22, 2019 Conference Transcript (Conference Transcript) at 11, 14, 19-20; *Griffith v. Eastern Assoc. Coal Co.*, 2018-BLA-05046 (June 19, 2019), slip op. at 4-10; Decision and Order at 2.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated the self-insured carrier in this claim and thus the Black Lung Disability Trust Fund (the Trust Fund), not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 4-50. 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;[7] (2) allowing the district director to make an initial determination of the responsible carrier in instances involving potential Trust Fund liability violates its due process rights; (3) 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; (4) the DOL released Peabody Energy from liability; (5) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (5) the DOL failed to maintain adequate records with respect to Patriot's bond and failing to comply with its duty to monitor Patriot's financial health; (6) the Director is equitably estopped from imposing liability on Peabody Energy; and (7) its due process rights were violated because discovery was cut off prematurely. *Id.* It maintains that a separation agreement—a private contract between Peabody Energy and Patriot—

Corporation's (Peabody Energy) self-insurance coverage. 20 C.F.R. §725.494(a)-(e). Because Heritage was the last potentially liable operator to employ Claimant as a miner, the ALJ designated Heritage as the responsible operator.

[7] Employer raised this argument for the first time in this claim in its post-hearing brief. Employer's Post-Hearing Brief at 27-33.

released Peabody Energy from liability and that the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. *Id.* at 29.

The Board has previously considered and rejected these arguments 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.*, BLR , BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022). 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.

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[8] 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. Decision and Order at 25-26.

Employer does not challenge the ALJ's finding that it failed to rebut the presumed existence of legal pneumoconiosis, Decision and Order at 25, and we therefore affirm that finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Rather, Employer contends the ALJ applied an incorrect legal standard for rebuttal of disability causation by requiring it to establish that "no part" of Claimant's totally disabling

[8] "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).

[9] "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).

impairment was caused by pneumoconiosis. Employer's Brief at 3-4. Employer's argument is without merit.

Contrary to Employer's assertion,[10] the ALJ correctly observed that, to disprove disability causation, Employer must establish that "no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis." Decision and Order at 25; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1070-71 (6th Cir. 2013); 20 C.F.R. §718.305(d)(1). The ALJ permissibly found the opinions of Drs. Selby and Tuteur unpersuasive because they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the existence of the disease. *See Ogle*, 737 F.3d at 1074; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 25; Director's Exhibit 16 at 5; Employer's Exhibits 8 at 6; 9 at 31. Thus, we affirm the ALJ's finding that Employer failed to establish that no part of Claimant's totally disabling impairment was caused by legal pneumoconiosis. *See Ogle*, 737 F.3d at 1070-71; 20 C.F.R. §718.305(d)(1)(ii). We therefore affirm the ALJ's conclusion that Employer did not rebut the Section 411(c)(4) presumption, and we affirm the award of benefits.

[10] In asserting the ALJ applied an incorrect legal standard at disability causation, Employer quotes extensively from the United States Court of Appeals for the Sixth Circuit's opinion in *Island Creek Coal Co. v. Young*, 947 F.3d 399 (6th Cir. 2020). Employer's Brief at 4. We note, however, that rebuttal of the existence of pneumoconiosis and rebuttal of disability causation are separate inquiries, and the portion of *Young* Employer quotes is concerned with rebutting legal pneumoconiosis, not disability causation. Employer's Brief at 3-4, *quoting Young*, 947 F.3d at 406 ("An employer *rebuts the presumption of legal pneumoconiosis* by showing that a miner's coal mine employment did not contribute, even in part, to his pneumoconiosis.") (emphasis added). As the Sixth Circuit has held, an employer "must show that coal mine employment played no part in causing the total disability" to disprove disability causation. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1070-71 (6th Cir. 2013); 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits and Order Denying Motion to Dismiss Peabody Energy Corporation as Responsible Operator.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge