U.S. Department of Labor

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

BRB No. 20-0209 BLA

GLENNIE L. GUTHRIE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 11/29/2022
	)	
PEABODY ENERGY	)	
	)	
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Awarding Benefits (2017-BLA-05637) rendered on a

subsequent claim filed on January 29, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Peabody Coal Company (Peabody Coal), self-insured through its parent company Peabody Energy Corporation (Peabody Energy), is the responsible operator liable for the payment of benefits. He further accepted the parties stipulation that Claimant had fourteen years of underground coal mine employment, and thus found Claimant could not invoke 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).[2] Turning to whether Claimant could establish entitlement at 20 C.F.R. Part 718, the ALJ found the new evidence established total disability and therefore a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). He also found the evidence established Claimant is totally disabled due to legal pneumoconiosis[4] and therefore awarded benefits. 20 C.F.R. §§718.202(a)(4), 718.204(c).

[1] The district director finally denied Claimant's prior claim on March 20, 1992, for failure to establish any element of entitlement. Director's Exhibit 2.

[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.

[3] Where a claimant 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); *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 his prior claim was denied for failure to establish any element of entitlement, Claimant had to submit new evidence establishing at least one element of entitlement to obtain review of his claim on the merits. 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3; Director's Exhibit 2.

[4] "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).

On appeal, Employer argues the ALJ erred in finding it liable for the payment of benefits. It further contends the ALJ erred in finding the evidence established legal pneumoconiosis and total disability due to pneumoconiosis.[5] Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response.

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.[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 Peabody Coal is the correct responsible operator and it was self-insured by Peabody Energy on the last day Peabody Coal employed Claimant; thus we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 7-8. Rather, it alleges Patriot Coal Corporation (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 19. In 2007, after Claimant ceased his coal mine employment with Peabody Coal, Peabody Energy transferred a number of its other subsidiaries, including Peabody Coal, 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 Peabody Coal, Patriot later went bankrupt and can no longer provide for those benefits. *See* Hearing Transcript at 52. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed by Peabody Coal when Peabody

[5] We affirm, as unchallenged on appeal, the ALJ's findings of fourteen years of coal mine employment and that the new evidence establishes total disability, and therefore a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.204(b)(2), 725.309(c).

[6] 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 Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 65; Director's Exhibit 7.

Energy owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 8; Hearing Transcript at 62-63, 78.

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: (1) 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; (2) 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; (3) the DOL released Peabody Energy from liability; (4) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; and (5) the Director is equitably estopped from imposing liability on the company. 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. Employer's Brief at 18-47 (unpaginated).

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), *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.[7]

Employer also asserts the ALJ erred in denying its requested subpoenas of David Benedict and Steven Breeskin, two former Department of Labor (DOL) Division of Coal Mine Workers' Compensation officials, and in excluding the depositions after they were obtained in another case.[8] Employer's Brief at 9-12 (unpaginated). In *Bailey*, the employer

[7] Employer additionally argues the Director failed to comply with its duty to monitor Patriot's financial health. Employer's Brief at 35-36 (unpaginated). As Employer has not established Patriot is liable in this case, we need not address its argument.

[8] Employer argues the ALJ abused her discretion in denying it the requested subpoenas of Mr. Benedict and Mr. Breeskin when it properly identified the witnesses while the case was before the district director and provided information sufficient to establish the relevance of the testimony sought. Employer's Brief at 9-10 (unpaginated). Employer further argues the ALJ erred in not reopening the record to receive the depositions that were obtained in another case when it had no way to obtain this information without the subpoenas. *Id*. at 10-12 (unpaginated).

moved to submit the same evidence for the purposes of establishing Peabody Energy was improperly designated as the responsible carrier for claims that Patriot had been authorized to self-insure. *Bailey*, BLR , BRB No. 20-0094 BLA, slip op. at 15 n. 17. For the reasons stated in *Bailey*, we conclude any error by the ALJ in excluding these depositions is harmless. *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 (1984).

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

Part 718 Entitlement

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); 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 claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any of them 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).

Legal Pneumoconiosis

To establish legal pneumoconiosis, 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 has held that a claimant can satisfy this burden by showing that the disease was caused "in part" by coal mine dust exposure. *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99, 600 (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.'").

Medical Opinions

The ALJ considered the medical opinions of Drs. Green and Dahhan. Decision and Order at 19-20. Dr. Green diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) arising out of coal mine dust exposure. Director's Exhibit 10. Dr. Dahhan opined Claimant does not have legal pneumoconiosis, but instead

has a restrictive ventilatory impairment due to rheumatoid arthritis, congestive heart failure, and fractured ribs. Employer's Exhibits 3, 13, 17.

The ALJ found Dr. Green's opinion well-reasoned because it is based on Claimant's physical examination, symptoms, and history. Decision and Order at 20. We reject Employer's assertion that the ALJ erred in crediting Dr. Green's opinion because the doctor had an inaccurate understanding of Claimant's coal mine employment history. Employer's Brief at 13 (unpaginated). The effect of an inaccurate coal mine dust exposure history on the credibility of a medical opinion is a determination for the ALJ to make. *See Huscoal, Inc., v. Dir., OWCP* [*Clemons*], 48 F.4th 480, 491 (6th Cir. Sept. 7, 2022); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1994); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988). Contrary to Employer's arguments, the ALJ repeatedly acknowledged Dr. Green relied on a fifteen year coal mine employment history, but rationally found the difference between fourteen years and fifteen years of coal mine employment is not so significant that it would undermine the reliability of Dr. Green's opinion on legal pneumoconiosis.[9] *See Clemons*, 48 F.4th at 491; *Trumbo*, 17 BLR at 1-89; *Sellards*, 17 BLR at 1-80-81; *Bobick*, 13 BLR at 1-54; Employer's Brief at 13-14 (unpaginated). Nor was the ALJ required to discredit Dr. Green because the doctor did not review and address all the evidence of record. *See Church v. E. Associated Coal Corp*., 20 BLR 1-8, 1-13 (1996) Employer's Brief at 14-15 (unpaginated). Rather, the ALJ permissibly found Dr. Green's opinion that Claimant has legal pneumoconiosis in the form of COPD due to coal mine dust exposure well-reasoned and documented, as it was based on his examination of Claimant, objective testing, and Claimant's medical, social, and work histories. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 20.

We further reject Employer's argument that the ALJ erred in discrediting Dr. Dahhan's opinion. Employer's Brief at 15 (unpaginated).

Dr. Dahhan opined that Claimant has a restrictive impairment, coal mine dust exposure can cause restrictive impairments, and Claimant has a sufficient history of coal mine dust exposure to have developed occupational lung disease. Director's Exhibit 17; Employer's Exhibits 3, 17. However, he opined Claimant's fourteen years of coal mine dust exposure did not contribute to his restrictive impairment in this case, as the impairment

[9] The ALJ also observed that Dr. Dahhan opined the fourteen-year coal mine employment history is sufficient for a susceptible individual to develop pneumoconiosis. Decision and Order at 20; Director's Exhibit 17; Employer's Exhibit 3.

reflected on Claimant's blood gas studies "waxes and wanes."[10] Employer's Exhibit 17 at 25-26. He attributed it instead to rheumatoid arthritis, an old chest wall injury with fractured ribs, and congestive heart failure. Director's Exhibit 17; Employer's Exhibits 3, 17. The ALJ permissibly found Dr. Dahhan's opinion does not adequately explain why Claimant's fourteen years of coal mine dust exposure did not also contribute to his impairment, in addition to the other factors he identified. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012); *Napier*, 301 F.3d at 713-14; Decision and Order at 20.

Employer's arguments amount to a request to reweigh the evidence, which the Board may not do. *Anderson*, 12 BLR at 1-113. Because it is supported by substantial evidence, we affirm the ALJ's finding that Dr. Green's opinion establishes Claimant has legal pneumoconiosis in the form of COPD arising out of dust exposure in his coal mine employment. *See Banks*, 690 F.3d at 489; *Napier*, 301 F.3d at 713-14; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); 20 C.F.R. §718.202(a); Decision and Order at 20.

Computed tomography (CT) scan readings

The ALJ stated that the only CT scan readings submitted in connection with this claim were contained in Claimant's treatment records.[11] Decision and Order at 21. The ALJ found that "neither party submitted any evidence to establish that the CT scan evidence is medically acceptable and relevant to establishing or refuting" Claimant's entitlement to benefits. Decision and Order 21. As such, the ALJ stated he would not consider the CT scan evidence. *Id.*

Employer argues the ALJ erred in failing to consider two CT scan reports it submitted as part of its affirmative case:[12] Dr. Adcock's reading of the February 20, 2018 CT Scan, Employer's Exhibit 10, and Dr. Tarver's reading of the June 12, 2018 CT Scan, Employer's Exhibit 12. Employer's Brief at 16 (unpaginated). It further maintains that,

[10] The ALJ found the pulmonary function studies establish total disability, but not the arterial blood gas studies. Decision and Order at 10-11.

[11] The ALJ listed Dr. Tiu's readings of the May 21, 2007 and October 8, 2012 CT scans, Dr. Desai's June 9, 2011 CT scan, and Dr. Buck's February 20, 2018 CT scan. Decision and Order 21; Employer's Exhibits 6 at 59, 6 at 115, 6 at 121.

[12] On its evidence summary form, Employer stated it was submitting Dr. Adcock's reading of the February 20, 2018 CT scan, Employer's Exhibit 10, and Dr. Tarver's reading of the June 12, 2018 CT scan, Employer's Exhibit 12.

contrary to the ALJ's finding, both Dr. Adcock and Dr. Tarver provided statements addressing the relevance and utility of CT scans. *Id.* Employer thus argues the case must be remanded for the ALJ to consider all the relevant CT scan evidence of record. *Id.* We disagree.

While the ALJ did not specifically discuss Employer's two designated CT scans in rendering his findings on legal pneumoconiosis, any alleged error is harmless. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278. Employer did not argue before the ALJ that the CT scans were relevant to whether Claimant has legal pneumoconiosis; rather, it asserted only that the scans "emphasize the lack of clinical pneumoconiosis" and "do not indicate the existence of clinical pneumoconiosis." Employer's Post-Hearing Brief at 16, 21. Further, Employer's expert, Dr. Dahhan, accurately acknowledged that under the regulations, a diagnosis of legal pneumoconiosis can be made in the absence of radiographic evidence of clinical pneumoconiosis. Employer's Exhibit 17 at 25 (legal pneumoconiosis can exist "regardless of the radiological data"); *see* 20 C.F.R. §718.202(a)(4). And while Drs. Tarver and Adcock both offered statements as to the medical acceptability of CT scan interpretations, neither identified their relevance as pertaining to diagnosing legal pneumoconiosis or offered an opinion on legal pneumoconiosis.[13] Employer's Exhibit 10, 12. As clinical and legal pneumoconiosis are separately-defined diseases, and the diagnosis of legal pneumoconiosis is not dependent on evidence of clinical pneumoconiosis, we reject Employer's assertion that the ALJ "ignore[d] the findings in these reports . . . that corroborate the medical opinion that Claimant's impairment was caused primarily by a non-coal-dust related mechanism." Employer's Brief at 17 (unpaginated).

The ALJ specifically found Dr. Dahhan's identification of these non-coal-dust related conditions was not a sufficient explanation for the physician's conclusion that coal mine dust did not also contribute to Claimant's disabling impairment. Decision and Order at 20. Instead, the ALJ permissibly concluded that Claimant's coal mine dust exposure was a significant contributor and aggravating factor to his obstructive impairment based on Dr. Green's opinion. *Id.* And while Employer argues the CT scan readings undermine Dr.

[13] Dr. Adcock stated CT scans are medically acceptable for the "detection of . . . pulmonary opacities of pneumoconiosis" and concluded the scan did not reveal "small or large opacities of occupational lung disease." Employer's Exhibit 10. Dr. Tarver stated CT scans are relevant to identifying "the presence or absence of coal worker's pneumoconiosis" and concluded the scan did not contain "findings consistent with coal workers' pneumoconiosis." Employer's Exhibit 12.

Green's opinion because they confirm diagnoses of rheumatoid arthritis, congestive heart failure, and an old chest injury, Dr. Green did not ignore the existence of these conditions. Employer's Brief at 14-17 (unpaginated). He acknowledged Claimant's "non pulmonary disabling" diagnoses of rheumatoid arthritis, heart disease, and rib injuries, but maintained his opinion that Claimant's obstructive pulmonary impairment was significantly related to coal mine dust exposure. Director's Exhibit 10; Employer's Brief at 14 (unpaginated).

We thus affirm the ALJ's finding that Claimant established his COPD constitutes legal pneumoconiosis. Decision and Order at 20; 20 C.F.R. §718.201(a)(2).

Disability Causation

The ALJ next considered whether Claimant established his pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

Because the ALJ found Claimant's totally disabling obstructive impairment constitutes legal pneumoconiosis, he determined Claimant also established he is totally disabled due to pneumoconiosis. Decision and Order at 26. Employer asserts the ALJ conflated the issues of legal pneumoconiosis and disability causation, and thus created an improper presumption that Claimant's impairment is due to legal pneumoconiosis. Employer's Brief at 18-19 (unpaginated). We disagree.

Because the ALJ permissibly found Dr. Green's opinion reasoned and documented, and therefore sufficient to prove Claimant's totally disabling obstructive lung disease constitutes legal pneumoconiosis, the ALJ rationally found his opinion also establishes Claimant is totally disabled due to the disease; it is the only logical conclusion from these facts. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); Decision and Order at 26.

As Employer raises no other arguments, we affirm the ALJ's determination that Claimant established his total pulmonary disability is due to legal pneumoconiosis, and therefore affirm the award of benefits. 20 C.F.R. §718.204(c); Decision and Order at 26.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge