U.S. Department of Labor

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

BRB Nos. 21-0650 BLA
and 22-0001 BLA

BRENDA PHIPPS (o/b/o and Widow of BERNARD PHIPPS) Claimant-Respondent v. EASTERN ASSOCIATED COAL COMPANY and PEABODY ENERGY CORPORATION Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/30/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Tighe A. Estes and H. Brett Stonecipher (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, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Timothy J. McGrath's Decision and Order Awarding Benefits (2018-BLA-05209, 2017-BLA-05783) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on May 11, 2015,[1] and a survivor's claim filed on July 25, 2017.

The ALJ found Eastern Associated Coal Company (Eastern), self-insured through its parent company Peabody Energy Corporation (Peabody Energy), is the responsible operator liable for the payment of benefits. He accepted the parties' stipulation that the Miner had thirteen years of underground coal mine employment and thus found Claimant could not invoke 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). Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established legal and clinical pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.202(a), 718.203(b). He also found Claimant established a totally disabling respiratory or pulmonary impairment due to pneumoconiosis, 20 C.F.R. §718.204(b), (c), and therefore awarded benefits.

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

[1] Claimant is the widow of the Miner, who died on November 20, 2016. Director's Exhibit 12. She is pursuing both his claim and her survivor's claim. Director's Exhibit 64.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled 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); 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, 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

It also asserts the duties the district director performs create an inherent conflict of interest that violates its due process rights. In addition, it contends the ALJ erred in finding it liable for the payment of benefits. Finally, it asserts the ALJ erred in finding Claimant established the Miner had legal pneumoconiosis and his total disability was due to pneumoconiosis.[4]

Claimant has not filed a response. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's conflict of interest and Appointments Clause arguments and to 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, 362 (1965).

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 it employed the Miner; thus we affirm these findings.[6] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-

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> 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 findings that Claimant established thirteen years of underground coal mine employment, clinical pneumoconiosis arising out of coal mine employment, and a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.202(a), 718.203, 718.204(b)(2); Decision and Order at 2, 5, 37.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 7; Hearing Tr. at 25-26, 32.

[6] Employer also "preserve[s]" its "ability to challenge" Black Lung Benefits Act (BLBA) Bulletin No. 16-01 as an invalid rule. Employer's Brief at 44-45. Employer generally argues Bulletin No. 16-01 contradicts liability rules under the Act, was issued without notice and comment, and violates the Administrative Procedure Act. *Id.* Apart from one sentence summarizing its arguments, Employer has not set forth sufficient detail

710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 10-11. Patriot Coal Corporation ("Patriot") was initially another Peabody Energy subsidiary. Director's Exhibit 37. 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*. 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. Director's Exhibit 59. 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 Exhibits 38, 59. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed by Eastern when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 12.

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.[7] Employer's Brief at 14-54. It argues the ALJ erred in finding Peabody Energy liable for benefits because: (1) the district director is an

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to permit the Board to consider the merits of these issues. *See 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); 20 C.F.R. §802.211(b).

[7] Employer also argues 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act and the Administrative Procedures Act (APA). Employer's Brief at 47-48. That regulation specifies "[d]ocumentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances." 20 C.F.R. §725.456(b)(1). Employer has not identified any documentary evidence relevant to liability that the ALJ excluded. Further, although ALJ McGrath rendered the decision at issue in the present appeal, Employer asserts "ALJ [John P. Sellers, III] and the Director's actions in this matter ultimately devest [sic] the ALJ of any control over the discovery and development of the record on the liability issue which is inconsistent with the Act." Employer's Brief at 47. Employer has failed to identify any action or finding by either ALJ Sellers or "the Director" pertinent to this case which implicates the issue raised in its argument. Thus we decline to address this argument. *See Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

inferior officer not properly appointed under the Appointments Clause;[8] (2) the regulatory scheme, whereby the district director must determine the liability of a responsible operator and its carrier when at the same time the DOL also administers the Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing; (3) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) the DOL released Peabody Energy from liability; and (5) the Director is equitably estopped from imposing liability on the company.[9] Employer's Brief at 14-54. Moreover, 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.

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 (October 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. 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.

Entitlement - 20 C.F.R. Part 718

In order to obtain benefits without the aid of a statutory presumption, a 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. Failure to establish any of these elements precludes an award. *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).

[8] Employer raised this argument for the first time in its brief to the Board. Employer's Brief at 48-54.

[9] 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 42-44. Employer neither asks the Board to address this issue nor sets forth any argument that would permit our review. *See Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must establish the Miner suffered from 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). The United States Court of Appeals for the Fourth Circuit, whose law applies to this claim, has held a claimant can establish legal pneumoconiosis by showing coal dust exposure contributed "in part" to a miner's respiratory or pulmonary impairment. *See Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 309, 314 (4th Cir. 2012); *see also Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment.").

The ALJ considered the opinions of Drs. Forehand, Rosenberg, and Broudy. Decision and Order at 31-37. Dr. Forehand diagnosed legal pneumoconiosis in the form of totally disabling obstructive lung disease caused by exposure to coal mine dust and cigarette smoking. Director's Exhibit 16. Drs. Rosenberg and Broudy diagnosed totally disabling chronic obstructive pulmonary disease (COPD) caused by the Miner's history of smoking cigarettes and unrelated to his coal mine dust exposure.[10] Employer's Exhibits 11-13, 20. The ALJ credited Dr. Forehand's opinion as well-reasoned and documented, and discredited the opinions of Drs. Rosenberg and Broudy as inadequately explained and inconsistent with the regulations.[11] Decision and Order at 32, 36-37. He thus found Claimant established legal pneumoconiosis based on Dr. Forehand's opinion. *Id.* at 37.

Employer contends the ALJ erred in finding Dr. Forehand's opinion sufficient to meet Claimant's burden to establish legal pneumoconiosis because he relied on an inaccurate smoking history. Employer's Brief at 13-15. We disagree.

As the trier of fact, the ALJ is charged with determining the credibility of the evidence and whether a physician's opinion is adequately reasoned. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). The ALJ accepted the parties' stipulation to a

[10] Dr. Rosenberg also diagnosed emphysema and chronic bronchitis, which he opined were unrelated to the Miner's coal mine dust exposure. Employer's Exhibit 13.

[11] Although Employer generally argues the ALJ erred in crediting Dr. Forehand's opinion over those of Drs. Rosenberg and Broudy, it does not specifically challenge the ALJ's discrediting the opinions of Drs. Rosenberg and Broudy; thus, we affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order at 32-37.

seventy-five pack-year smoking history. Decision and Order at 2, 5. Dr. Forehand considered a sixty pack-year smoking history. Director's Exhibit 16.

Contrary to Employer's argument, the ALJ acknowledged Dr. Forehand relied on a sixty pack-year smoking history, but the ALJ also found Dr. Forehand considered the Miner smoked cigarettes for a significantly longer period than he was exposed to coal mine dust. Decision and Order at 17, 32. The ALJ recognized Dr. Forehand considered the Miner's work history, including his "history of prolonged occupational exposure to fresh-cut mixed silica and coal dust" at the face of the mine "where dust levels are highest," his medical history, and his objective testing. Director's Exhibit 16; *see* Decision and Order at 17-18, 31-32. Further, Dr. Forehand considered smoking and coal mine dust exposure as having additive effects and explained why he concluded coal mine dust exposure was a substantially contributing cause of the Miner's obstructive lung disease. *Id.* The ALJ permissibly credited Dr. Forehand's opinion that the Miner's exposure to coal mine dust and smoking were additive in causing his obstructive lung disease and thus the Miner had legal pneumoconiosis because his obstructive lung disease was significantly related to, or substantially aggravated by, coal mine dust exposure. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 31-32; Director's Exhibit 16.

Employer also generally asserts Dr. Forehand's opinion failed to address the Miner's "complicated medical history, which involved renal failure, congestive heart failure, pneumonia, asthma and leukocytosis." Employer's Brief at 12. We consider Employer's argument to be a request to reweigh the evidence, which we are not empowered to do.[12] *Anderson*, 12 BLR at 1-113. Thus, as it is supported by substantial evidence, we affirm the ALJ's finding that Dr. Forehand's opinion is reasoned, documented, and sufficient to establish legal pneumoconiosis.[13] *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 439-40; Decision and Order at 32. Therefore, we affirm the ALJ's finding that Claimant

[12] Employer asserts Dr. Forehand's discussion of whether nonsmoking coal miners develop restrictive lung disease is contrary to the Act, and therefore not credible. Employer's Brief at 12. However, Employer has not explained why Dr. Forehand's statement regarding restrictive lung disease renders his opinion not credible in light of the fact that Dr. Forehand diagnosed legal pneumoconiosis in the form of an obstructive lung disease. *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"); Director's Exhibit 16.

[13] Accordingly, we also reject Employer's argument that Dr. Forehand's opinion is not credible to establish disability causation because he had an inaccurate understanding of the Miner's medical and smoking histories. Employer's Brief at 12-13.

established the Miner had legal pneumoconiosis based on Dr. Forehand's opinion. 20 C.F.R. §718.202(a); Decision and Order at 37.

Disability Causation

To establish disability causation, Claimant must prove pneumoconiosis was a "substantially contributing cause" of the Miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment 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); *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 37-38 (4th Cir. 1990).

We reject Employer's argument that Dr. Forehand's opinion cannot establish disability causation. Employer's Brief at 12-13. Drs. Forehand, Rosenberg, and Broudy all agreed the Miner's obstructive lung disease was totally disabling, and Employer does not allege he was totally disabled by a respiratory condition other than obstructive lung disease. Director's Exhibit 16; Employer's Exhibits 11, 13. Thus, the ALJ's determination that the Miner's obstructive lung disease constitutes legal pneumoconiosis necessarily encompassed a finding that the Miner was totally disabled due to legal pneumoconiosis. *Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 186-87 (4th Cir. 2014) (death causation satisfied where the court found the miner's COPD constituted legal pneumoconiosis and all medical experts agreed COPD contributed to the miner's death); *see Energy West Mining Co. v. Dir., OWCP, 49 F.4th 1362, 1369 (10th Cir. 2022); Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013) (where all the medical experts agreed COPD caused the miner's total disability, the legal pneumoconiosis inquiry "completed the causation chain from coal mine employment to legal pneumoconiosis which caused [the miner's] pulmonary impairment that led to his disability"); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 255-56 (2019).

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability due to pneumoconiosis through Dr. Forehand's opinion. 20 C.F.R. §718.204(c); Decision and Order at 37. Consequently, we affirm the ALJ's finding that Claimant established entitlement under 20 C.F.R. Part 718 and affirm the award of benefits in the miner's claim. Decision and Order at 37.

Survivor's Claim

The ALJ determined Claimant established all the necessary elements for automatic entitlement to survivor's benefits. 30 U.S.C. §932(*l*); Decision and Order at 38.

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the survivor's claim award, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge