U.S. Department of Labor

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

BRB No. 20-0424 BLA

RANDY D. HILL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KIAH CREEK MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
Self-Insured through QUAKER COAL COMPANY, c/o EAST COAST RISK MANAGEMENT	)	DATE ISSUED: 10/29/2021
	)	
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 Jason A. Golden, Administrative Law Judge, United States Department of Labor.

C. Phillip Wheeler, Jr. (Kirk Law Firm, PLLC), Pikeville, Kentucky, for Claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, 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) Jason A. Golden's Decision and Order Awarding Benefits (2019-BLA-05169) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on May 24, 2017.[1]

The ALJ found Kiah Creek Mining is the responsible operator and Quaker Coal is the responsible carrier. He credited Claimant with 14.19 years of 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, 30 U.S.C. §921(c)(4) (2018).[2] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.202(a)(4), 718.204(b)(2). Thus he found Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). He also found Claimant is totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(c). Thus, he awarded benefits.

On appeal, Employer argues the ALJ erred in finding Quaker Coal is the responsible carrier. It also contends the ALJ erred in finding Claimant established legal pneumoconiosis and total disability due to legal pneumoconiosis.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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

[1] This is Claimant's third claim for benefits. The district director denied Claimant's most recent claim on October 4, 2013, because he did not 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established total disability and a change in an applicable condition of entitlement. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.204(b), 725.309.

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 Associates, Inc.*, 380 U.S. 359 (1965).

Responsible Carrier

The responsible operator is the potentially liable operator that most recently employed the miner.[5] 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or that another "potentially liable operator" that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

An operator will be deemed capable of assuming liability for benefits if one of three conditions is met: 1) the operator is covered by a policy or contract of insurance in an amount sufficient to secure its liability; 2) the operator was authorized to self-insure during the period in which the miner was last employed by the operator, provided that the operator still qualifies as a self-insurer or the security given by the operator pursuant to 20 C.F.R. §726.104(b) is sufficient to secure the payment of benefits; or 3) the operator possesses sufficient assets to secure the payment of benefits awarded under the Act. 20 C.F.R. §725.494(e)(1)-(3). Insurance coverage for black lung benefits exists only if the insurance policy is in effect on the last day of the miner's exposure to coal dust while employed by the insured. 20 C.F.R. §726.203(a).

Employer argues the ALJ erred in finding Kiah Creek Mining was insured through Quaker Coal on Claimant's last day of coal mine employment in August 1996 and, thus,

[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); Hearing Transcript at 53.

[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).

erred in finding Quaker Coal is the responsible carrier. Employer's Brief at 4-5 (unpaginated). Employer's argument has no merit.

The ALJ noted the record in this case includes a Department of Labor (DOL) OWCP-1 statement titled "Agreement and Undertaking." Decision and Order at 6-7; Director's Exhibit 25. Quaker Coal submitted this statement to support its application for self-insurance authorization. Director's Exhibit 25. Quaker Coal's president signed and notarized the statement on August 23, 1994, and indicated the company would deposit funds into a 501(c)(21) Trust to secure the payment of benefits under the Act in support of its application for self-insurance. *Id*. The statement lists subsidiaries and contractors covered by the self-insurance authorization. *Id*. It specifically identifies Kiah Creek as one such covered entity. *Id*. The ALJ also noted the record includes a statement from the district director representing that she searched the DOL records, and these records do not indicate Kiah Creek "was removed from this contractor coverage by Quaker Coal Company." Director's Exhibit 32. Based on this evidence, the ALJ rationally found "Kiah Creek Mining was self-insured through [Quaker Coal] at the time of Claimant's last employment" in August 1996. Decision and Order at 7; *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305-06 (6th Cir. 2005); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

Employer generally argues the evidence of record is insufficient to establish Kiah Creek was insured by Quaker Coal. Employer's Brief at 4-5 (unpaginated). Employer's argument is a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the ALJ's finding that Quaker Coal is the responsible carrier. Decision and Order at 7. As Employer does not separately challenge the ALJ's finding that Kiah Creek is the responsible operator, we also affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §725.495(a)(1); Decision and Order at 7.

Legal Pneumoconiosis

Without the benefit of any presumption, Claimant must establish disease (pneumoconiosis); disease causation (pneumoconiosis 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 one of these elements 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, 1-2 (1986) (en banc).

To establish legal pneumoconiosis, Claimant must prove he has 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(b). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held a miner may establish his lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014).

Before weighing the medical opinions, the ALJ found Claimant had a cigarette smoking history of "approximately" thirty years. Decision and Order at 26-28. This finding is affirmed as Employer does not challenge it. *Skrack*, 6 BLR at 1-711.

The ALJ then weighed the medical opinions of Drs. Forehand and Baker that Claimant has legal pneumoconiosis in the form of an obstructive lung disease due to cigarette smoking and coal mine dust exposure, and the opinions of Drs. Dahhan and Rosenberg that Claimant's obstructive lung disease is due to cigarette smoking alone, and unrelated to coal mine dust exposure. Director's Exhibits 17, 22; Claimant's Exhibit 1; Employer's Exhibits 1, 2, 5, 7. The ALJ discredited the opinions of Drs. Dahhan and Rosenberg as inadequately reasoned and based on rationales that conflict with the medical science set forth in the preamble to the 2001 revised regulations. Decision and Order at 29-31. He found the opinions of Drs. Forehand and Baker well-reasoned and documented.

Employer argues the ALJ erred in crediting the opinions of Drs. Forehand and Baker despite their reliance on an inaccurate cigarette smoking history. Employer's Brief at 5-8 (unpaginated). It asserts he improperly substituted his judgment for the medical experts in finding this discrepancy did not undermine their opinions. *Id.* We disagree.

The effect of an inaccurate smoking history on the credibility of a medical opinion is for the ALJ to determine. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988). The ALJ acknowledged Dr. Forehand and Dr. Baker relied on a smoking history of sixteen years and ten to twenty years, respectively, a "likely" underestimation compared to his finding of 30 years.[6] Decision and Order at 28-29. Although he found their opinions "somewhat undermined" on this basis, the ALJ nevertheless permissibly credited their attribution of Claimant's impairment, in part, to coal mine dust exposure because they assumed a "significant" smoking history and accounted for the additive risks of both smoking and coal mine dust on Claimant's obstructive lung impairment. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Bobick*, 13 BLR at 1-54. As Employer does not

[6] The ALJ found it is "impossible to accurately estimate Claimant's smoking history as he is an inconsistent, inaccurate historian . . . ." Decision and Order at 28.

otherwise challenge the ALJ's finding that their opinions are reasoned and documented, we affirm his decision to credit the opinions of Drs. Forehand and Baker. *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 28-31.

Employer next argues the ALJ shifted the burden of proof and improperly discredited the opinions of Drs. Dahhan and Rosenberg because they did not "rule out" coal mine dust exposure as a cause of Claimant's obstructive lung disease. Employer's Brief at 8-9 (unpaginated). We disagree. The ALJ correctly stated Claimant bears the burden of establishing legal pneumoconiosis, which 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); Decision and Order at 24-26. As discussed above, the ALJ found the opinions of Drs. Forehand and Baker sufficient to meet Claimant's burden of proof.

In considering the contrary evidence, the ALJ did not reject Drs. Dahhan's and Rosenberg's opinions because they failed to "rule out" coal mine dust exposure as a cause of Claimant's impairment. Rather, he found their opinions completely excluding coal dust as a causative factor inadequately reasoned and based on rationales that are inconsistent with the regulations and the scientific studies cited in the preamble to the 2001 revised regulations. Decision and Order at 29-31.

The ALJ set forth several credibility findings, none of which Employer challenges. The ALJ found both doctors relied on general statistics to exclude legal pneumoconiosis and failed to address Claimant's specific condition. *Island Creek Coal Co. v. Young*, 947 F.3d 399, 408-08 (6th Cir. 2020); *Groves*, 277 F.3d at 836; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 20-23, 29-31. He found both doctors opined Claimant's obstructive respiratory impairment is unrelated to coal mine dust exposure because it is partially reversible after the administration of bronchodilators, but neither adequately explained why the irreversible portion of Claimant's obstructive impairment is not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 30. The ALJ also found Dr. Rosenberg relied on reasoning that is inconsistent with the scientific studies cited in the preamble to the 2001 revised regulations when excluding coal mine dust exposure as a cause of Claimant's obstructive impairment. *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Decision and Order at 30. Because Employer does not challenge these credibility findings, we affirm them. *Skrack*, 6 BLR at 1-711

As it is supported by substantial evidence, we affirm the ALJ's determination that Claimant established legal pneumoconiosis based on the opinions of Drs. Forehand and

Baker. 20 C.F.R. §718.202(a); Decision and Order at 31. Because Employer does not separately challenge the ALJ's finding that Claimant's total disability is due to pneumoconiosis, we also affirm this finding. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.204(c); Decision and Order at 38-40.

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