U.S. Department of Labor

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

BRB No. 25-0033 BLA

PAUL WINEBARGER Claimant-Respondent v. PEABODY COAL COMPANY kna HERITAGE COAL COMPANY, LLC and Self-Insured through PEABODY ENERGY CORPORATION Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 12/09/2025 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

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

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

William M. Bush, Acting Counsel for Administrative Appeals (Jonathan Berry, Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, JONES, Administrative Appeals Judge, and ULMER, Acting Administrative Appeals Judge.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Awarding Benefits (2021-BLA-05507) rendered on a claim[1] filed on October 7, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Employer is the properly designated responsible operator. He credited Claimant with 25.22 years of underground coal mine employment and determined, based on the parties' stipulation, that Claimant established a totally disabling pulmonary or respiratory impairment, 20 C.F.R. §718.204(b)(2), and thus invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). The ALJ further found Employer did not rebut the presumption and therefore awarded benefits.

On appeal, Employer argues the ALJ erred in finding it is the responsible operator. On the merits of entitlement, Employer asserts the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[3] Claimant responds in support of the award of benefits.

[1] Claimant withdrew his two prior claims; thus, they are considered not to have been filed. *See* 20 C.F.R. §725.306(b); Director's Exhibits 1, 2. The ALJ therefore indicated he would treat the current claim as an initial claim. Decision and Order at 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 more than fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment and therefore invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710, 1-711 (1983); Decision

The Acting Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to affirm the ALJ's responsible operator determination.

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, 361 (1965).

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner for at least one year.[5] 20 C.F.R. §§725.494(c), 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 potentially liable 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 operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

Employer does not challenge that it meets the criteria of a potentially liable operator at 20 C.F.R. §725.494(a)-(e). Thus, we affirm this finding. *Skrack v. Island Creek Coal*

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and Order at 9, 13. While Employer does assert the ALJ erred in calculating the length of Claimant's coal mine employment, it argues Claimant has more time in coal mine employment than the ALJ found; it does not assert Claimant established fewer than fifteen years. *See* Employer's Brief at 19.

[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); Director's Exhibits 5, 8.

[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).

Co., 6 BLR 1-710, 1-711 (1983). Rather, Employer argues the ALJ erred in determining Claimant's work with a later employer, Hendrix Electric, Incorporated (Hendrix Electric), was not qualifying coal mine employment and thus erred in not finding Hendrix Electric is the responsible operator. Employer's Brief at 19; *see* Decision and Order at 6. The Director contends the Board does not need to address Employer's argument because there is no evidence in the record that Hendrix Electric is able to assume liability for the payment of benefits. Director's Brief at 3. We agree with the Director's position.

If the designated responsible operator is not the operator that most recently employed the miner, the district director is required to "explain[] the reasons for such designation." 20 C.F.R. §725.495(d). If the reasons include the more recent operator's inability to pay benefits, the district director must provide a statement that the Office of Workers' Compensation Programs has no record of insurance coverage or authorization to self-insure for that employer as of the miner's last day of employment. 20 C.F.R. §725.495(d). Such a statement in the record constitutes prima facie evidence that the subsequent employer is not financially capable of paying benefits, and the burden shifts to the designated responsible operator to prove another operator financially capable of assuming liability more recently employed Claimant. *Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 313-14 (6th Cir. 2014); 20 C.F.R. §725.495(c), (d).

After Claimant's employment with Peabody Coal Company ended, Claimant worked for Hendrix Electric. Director's Exhibit 10 at 5; Director's Exhibit 71 at 21-22. The district director did not designate Hendrix Electric as the responsible operator because, among other reasons, the Department of Labor had no record of its insurance coverage or authorization to self-insure to show Hendrix Electric was financially capable of paying benefits. Director's Exhibits 28; 76 at 9; *see* 20 C.F.R. §725.495(d). Because of this prima facie evidence that Hendrix Electric is not financially capable of assuming liability for the claim, Employer bears the burden of proving that Hendrix Electric *is* financially capable of paying benefits in order to establish that Employer is not the responsible operator. *Lawson*, 739 F.3d at 313-14; 20 C.F.R. §§725.494(e), 725.495(c)(2). Yet, before both the ALJ and the Board, Employer asserts only that Claimant's work with Hendrix Electric constituted coal mine employment. *See* Employer's Brief at 19-24; Employer's Post-Hearing Brief at 19-20. Employer has not identified any evidence or argued that Hendrix Electric is financially capable of paying benefits, a fact it must prove. 20 C.F.R. §725.495(c)(2). Since Employer therefore cannot establish that Claimant's more recent employer, Hendrix Electric, is financially capable of paying benefits, any error by the ALJ concerning the nature of Claimant's work with Hendrix Electric 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, 1-1278 (1984); 20 C.F.R. §725.495(c). For this reason, we decline to address Employer's

argument and therefore affirm the ALJ's finding that Employer is the responsible operator. 20 C.F.R. §725.495(c), (d); Decision and Order at 10, 12.

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 has neither legal nor clinical pneumoconiosis,[6] or "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 determined Employer failed to rebut the presumption by either method.[7] Decision and Order at 30.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have 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), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co*., 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, holds that this standard requires Employer to show Claimant's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal-dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id.* at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relies on Drs. Tuteur's and Rosenberg's opinions that Claimant does not have legal pneumoconiosis. Employer's Brief at 26. The ALJ found their opinions neither well-reasoned nor documented and thus insufficient to satisfy Employer's burden of proof.

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[6] "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). "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).

[7] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 27.

Decision and Order at 18, 21-22. Employer contends the ALJ erred in discrediting their opinions. Employer's Brief at 27-39. We disagree.

Dr. Tuteur diagnosed a mild, partially reversible obstructive abnormality with a totally disabling oxygen-gas exchange impairment and hypoventilation. Director's Exhibit 22 at 4-5; Employer's Exhibit 7 at 11-12, 16-17. He attributed Claimant's disabling gas exchange impairment and hypoventilation entirely to the injuries he sustained from, and the medication he took after, a car accident in 2005.[8] Director's Exhibit 22 at 4-5; Employer's Exhibit 7 at 19-20. Specifically, he explained coal mine dust exposure rarely causes increased PCO_2 on blood gas testing and that, when it does occur, it is associated with a severe obstructive impairment. Director's Exhibit 22 at 4-5; Employer's Exhibit 7 at 19-20. Because Claimant's obstructive impairment, as seen in his pulmonary function testing, "is of insufficient severity to contribute" to his oxygen-gas exchange impairment, Dr. Tuteur opined Claimant's history of coal mine dust exposure could not have contributed to his gas-exchange impairment. Director's Exhibit 22 at 4-5; Employer's Exhibit 7 at 19-20.

Contrary to Employer's contentions, Employer's Brief at 27-33, the ALJ permissibly discredited this rationale as contrary to the premises underlying the regulations that coal mine dust exposure may cause an impairment demonstrated by the results on arterial blood gas testing even in the absence of a qualifying pulmonary function study.[9]

[8] Dr. Tuteur explained the car accident caused Claimant's ribs to fracture in multiple places and form "flail chest," meaning a portion of the chest caves in when breathing because the rib cage is unable to sustain the negative pressure created to expand the chest, resulting in hypoventilation. Employer's Exhibit 7 at 12. He also explained Claimant sustained a pneumothorax when one of his ribs lacerated the lung lining and required a chest tube placement and opined the lung contusion and chest tube additionally contributed to Claimant's hypoventilation. *Id.* In addition, Dr. Tuteur stated Claimant takes medications that depress his ventilatory response to oxygen and opined "this combination of sustained injuries, persistent chest wall deformity and medications" resulted in the low PO_2, high PCO_2, and alveolar hypoventilation seen in his disabling blood gas study results. *Id.* at 13-14.

[9] Employer notes that when establishing disability, qualifying evidence in one category must be weighed against all remaining evidence and that the regulations recognize that blood gas studies are an "imperfect tool for establishing disability." Employer's Brief at 32; 20 C.F.R. §718.204(b)(2). It has already stipulated, and we have affirmed the ALJ's finding, that Claimant has a totally disabling respiratory or pulmonary impairment; thus, we reject its argument to the extent it is now challenging the ALJ's findings at 20 C.F.R. §718.204(b)(2). *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581,

20 C.F.R. §718.204(b)(2)(ii); *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993) ("[R]esults from [pulmonary function studies and blood gas studies] may consistently have no correlation since coal workers' pneumoconiosis may manifest itself in different types of pulmonary impairment."); *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984). The ALJ further permissibly discredited Dr. Tuteur's opinion because he failed to adequately explain why coal mine dust exposure could not have contributed to or aggravated Claimant's impairment. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 350, 356 (6th Cir. 2007); *Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 18.

Dr. Rosenberg diagnosed a blood-gas abnormality caused by medication-induced hypoventilation and unrelated to coal mine dust exposure. Employer's Exhibit 1 at 5-6. He explained testing demonstrated Claimant has a normal A-a gradient, which "objectively proves" his blood-gas impairment is not caused by coal mine dust exposure but rather by hypoventilation due to chronic use of pain medications suppressing the respiratory center in his brain.[10] Employer's Exhibits 1 at 5-6; 5 at 10-15.

Contrary to Employer's argument, the ALJ permissibly found Dr. Rosenberg's opinion not well-documented because he failed to cite medical literature supporting his opinion that Claimant's A-a gradient is inconsistent with coal mine dust exposure.[11] *See*

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587 (6th Cir. 2021); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-4-7 (1995) (party cannot raise an argument before the Board for the first time on appeal). To the extent this argument relates to rebutting the presumed presence of legal pneumoconiosis, it does not undermine the ALJ's finding that Dr. Tuteur's opinion is unpersuasive because he compared two different types of impairments in rendering his diagnosis. Decision and Order at 18.

[10] Dr. Rosenberg testified the A-a gradient measures the concentration of oxygen in the air sac of the lung against the concentration of oxygen in the bloodstream, thereby indicating how well a miner's lungs are transferring oxygen from inside the lungs to the bloodstream. Employer's Exhibit 5 at 10-12. He opined that if coal mine dust exposure were the cause of Claimant's impairment, then it would have damaged the interstitium within his lungs and that would have increased the A-a gradient. Employer's Exhibit 1 at 5-6. Further, he explained that Claimant's medications suppress his brain's response to rising CO_2 levels, causing hypoventilation. *Id.* at 6; Employer's Exhibit 5 at 17.

[11] Employer asserts Dr. Rosenberg did, in fact, cite to medical literature supporting his opinion, Employer's Brief at 36, but it fails to identify that literature or where in Dr. Rosenberg's report or deposition such a citation to medical literature may be found. As the ALJ noted, Dr. Rosenberg referenced only one medical article in his entire opinion and

Rowe, 710 F.2d at 255 (determination of whether opinion is sufficiently documented is "for the factfinder to decide"); Decision and Order at 21-22. He further permissibly discredited Dr. Rosenberg's opinion because it did not adequately explain why Claimant's history of coal mine dust exposure could not have contributed to any impairment caused by his medications.[12] *See Banks*, 690 F.3d at 356; *Barrett*, 478 F.3d at 356; Decision and Order at 22.

Employer's arguments on appeal constitute requests to reweigh the evidence, which we may not do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ permissibly discredited Drs. Tuteur's and Rosenberg's opinions, the only medical opinions supportive of Employer's burden on rebuttal, we affirm his finding that Employer did not disprove legal pneumoconiosis. *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); *Rowe*, 710 F.2d at 254-55; 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 24. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of [Claimant's] 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)(ii); Decision and Order at 27-30. He rationally discredited Drs. Tuteur's and Rosenberg's opinions on the cause of Claimant's disability because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the disease. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 29. Because Employer raises no specific allegations on disability causation other than its assertion that the ALJ erred in finding it failed to disprove legal pneumoconiosis, we affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 30.

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that was to support his calculation of the A-a gradient. Decision and Order at 21 n.126; Employer's Exhibit 1 at 5. He did not reference any literature to support his assertion that Claimant's A-a gradient value demonstrates the absence of pneumoconiosis.

[12] Because the ALJ provided valid reasons for discrediting Drs. Tuteur's and Rosenberg's opinions, we need not address Employer's arguments that the ALJ erred in discrediting their opinions on other grounds. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 27-39.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GLENN E. ULMER
Acting Administrative Appeals Judge