U.S. Department of Labor

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

BRB No. 23-0006 BLA

KENNETH E. HEDRICK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GREEN BRANCH MINING INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 02/22/2024
	)	
ARROWPOINT CAPITAL	)	
	)	
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.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for Employer and its Carrier.

David Casserly (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals),

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Awarding Benefits (2020-BLA-06138) rendered on a claim filed on July 19, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

Initially, the ALJ determined that Employer is the properly designated responsible operator. He credited Claimant with 15.25 years of underground coal mine employment and further found, based on the parties' stipulation, that he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges its designation as the responsible operator. It also argues the ALJ erred in finding it did not rebut the presumption.[2] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a response, urging affirmance of the ALJ's finding that Employer is the responsible operator.

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] 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); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's findings of more than fifteen years of qualifying coal mine employment, that Claimant is totally disabled at 20 C.F.R. §718.204(b)(2), and thus 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 2, 10, 12.

accordance with applicable law.[3] 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 Operator

The responsible operator is the potentially liable operator[4] that most recently employed the miner for at least one year. 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 responsible operator, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or 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)(2). If the operator finally designated as responsible is not the operator that most recently employed the miner, the regulations require the district director to explain the reason for such designation. 20 C.F.R. §725.495(d).[5]

Claimant worked for multiple coal mine operators after he worked for Employer. After working for Employer in 1989 and 1990, Claimant worked for DMC Energy, Inc. (DMC Energy) in 1991, Gem Coal Inc. (Gem Coal) in 1991, Kline Coal Company, Inc. (Kline Coal) in 1992, Key Mining, Inc. (Key Mining) in 1992, and Cross Mountain Coal,

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3 n.3; Director's Exhibits 7; 85 at 55, 74.

[4] 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).

[5] The district director acknowledged Employer is not the operator that most recently employed Claimant, but designated Employer as the responsible operator because no subsequent operators employed Claimant for a period of at least one year. Director's Exhibits 75, 95.

Inc. (Cross Mountain) in 1992 and 1993. Director's Exhibits 7; 85 at 55-58. At his deposition, Claimant testified that four of these operators -- DMC Energy, Gem Coal, Kline Coal, and Key Mining -- were all owned by members of the Asbury family. Director's Exhibit 85 at 55-58, 70-72.

The ALJ applied *Shepherd v. Incoal Inc.*, 915 F.3d 392 (6th Cir. 2019)[6] and found none of the subsequent operators employed Claimant for at least 125 working days.[7] Decision and Order at 7-8, 12 n.16. He further concluded that the evidence was insufficient to establish DMC Energy, Gem Coal, Kline Coal, and Key Mining operated as a single entity. *Id.* at 11. Therefore, he declined to aggregate Claimant's employment with those operators for purposes of determining the responsible operator. *Id.* at 11-12. Thus, the ALJ determined Employer was properly designated as the responsible operator because it was the last operator to employ Claimant for at least one year. *Id.* at 12.

Employer argues the ALJ erred in determining the evidence is insufficient to find DMC Energy, Gem Coal, Kline Coal, and Key Mining operated as a single entity and thus erred in finding Employer is the responsible operator. Employer's Brief at 2-4. The Director argues that the ALJ's findings are supported by substantial evidence. Director's Response at 2-3. We agree with the Director's position.

Initially, Employer does not challenge the ALJ's finding that it is a potentially liable operator; thus, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11. Employer contends Claimant's testimony regarding the ownership of DMC Energy, Gem Coal, Kline Coal, and Key Mining is uncontested and, although the ALJ found Claimant's testimony "vague, uncertain, and not always consistent," he points to no such inconsistencies. Employer's Brief at 4; Decision and Order at 11. Similarly, Employer contends Claimant's testimony that he moved between the companies without having to apply establishes they were "a series of interchangeable mines operated as a seamless unit." Employer's Brief at 6.

[6] The Sixth Circuit held in *Shepherd v. Incoal Inc.*, 915 F.3d 392, 403 (6th Cir. 2019), that 125 working days constitutes a year of coal mine employment even if the miner did not have a full calendar year employment relationship with the employer.

[7] The ALJ determined Claimant had 74.6 days of employment with DMC Energy, Inc., thirty days with Gem Coal, Inc, ninety-two days with Kline Coal Company, Inc. (Kline Coal), 5.8 days with Key Mining, Inc. (Key Mining), and 82.4 days with Cross Mountain Coal, Inc. Decision and Order at 12 n.16. Employer does not contest these findings; thus, they are affirmed. *See Skrack*, 6 BLR at 1-711; Employer's Brief at 3.

Contrary to Employer's argument, the ALJ explained why he found Claimant's deposition testimony inconsistent, indicating that while Claimant stated DMC Energy, Gem Coal, Kline Coal, and Key Mining were the "same company" and were owned by three brothers with the last name Asbury, he also acknowledged he was unaware of the corporate structure. Decision and Order at 11; Director's Exhibit 85 at 55-57, 70-71, 76. The ALJ also noted that while Claimant testified the companies were at different mine sites, he later indicated he thought Gem Coal and Kline Coal may have been at the same mine, but he was not sure. Decision and Order at 11; Director's Exhibit 85 at 70, 72, 74. As the ALJ has broad discretion in evaluating the credibility of the evidence of record, including witness testimony, we affirm the ALJ's findings. *See Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986).

The ALJ further indicated that even if Claimant's testimony was sufficiently credible, the fact that family members were involved in the various companies does not justify treating them as a single employer. Decision and Order at 11. He concluded that the record did not establish DMC Energy, Gem Coal, Kline Coal, and Key Mining were a single entity, but rather found the evidence demonstrated they were separately organized corporate entities. *Id.* He noted that, with the exception of Kline Coal and Key Mining,[8] all had different mailing addresses and employer identification numbers and Claimant's pay was issued by each individual company. *Id.* at 5, 11; Director's Exhibits 7; 85 at 71. Thus, the ALJ permissibly found the evidence insufficient to establish those subsequent companies constituted a single entity for purposes of identifying the responsible operator. *See Rider v. C&C Coal Co., Inc.*, 6 BLR 1-227, 1-231 (1983) (Board affirmed ALJ's determination that companies which had the same officers, same mailing address, and the same employees were a single entity); Decision and Order at 11.

Based on the foregoing, we affirm the ALJ's finding that Employer is the properly designated responsible operator. 20 C.F.R. §§725.494, 725.495(c); *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 11-12.

[8] The ALJ noted that on Claimant's Social Security Administration earnings statement, Kline Coal and Key Mining had different employee identification numbers but the same mailing address. Decision and Order at 11 n.15; Director's Exhibit 7. He indicated that even assuming sharing the same mailing address is sufficient to establish these two companies are one entity, the length of employment for both combined still would be insufficient to establish a year of coal mine employment for purposes of determining the responsible operator. Decision and Order at 11 n.15.

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,[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.[10] Decision and Order at 23.

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 Corp.*, 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, requires Employer to establish 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 the opinion of Dr. Tuteur, who opined that Claimant's chronic obstructive pulmonary disease (COPD) was due to tobacco smoke and unrelated to coal mine dust exposure. Director's Exhibit 18; Employer's Exhibit 1. The ALJ found his opinion unreasoned and undocumented and inconsistent with the premises underlying the

[9] "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 that is 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).

[10] The ALJ found Employer rebutted the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 20.

regulations and therefore insufficient to rebut legal pneumoconiosis. Decision and Order at 21-23.

Employer argues the ALJ erroneously rejected Dr. Tuteur's opinion because he relied on statistics to distinguish the effects of cigarette smoke and coal mine dust on Claimant's COPD. Employer's Brief at 8-10. We disagree.

Dr. Tuteur excluded coal mine dust as a contributing factor in Claimant's lung disease, emphasizing the statistical rarity of COPD due to coal mine dust. Director's Exhibit 18; Employer's Exhibit 1. He opined that cigarette smoke is far more likely to cause obstruction than coal mine dust exposure and, given Claimant's exposure histories, found it unlikely that his COPD was caused by coal mine dust. *Id.*

The ALJ permissibly found Dr. Tuteur's opinion unpersuasive because he relied on statistics and not the specifics of Claimant's case and further did not adequately explain why Claimant "could not be one of those statistically rare cases" that develop COPD from coal mine dust exposure. *See Wilgar Land Co. v. Director, OWCP* [*Adams*], 85 F.4th 828, 841 (6th Cir. 2023); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985) (ALJ may discount a physician's reasoning because it is based on generalities and not the specifics of a claimant's case); Decision and Order at 22.

Moreover, the ALJ permissibly found Dr. Tuteur's opinion less credible because he did not sufficiently address why Claimant's coal mine dust exposure did not have an additive effect on Claimant's respiratory condition even if it was primarily caused by cigarette smoking. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 22.

Therefore, we affirm the ALJ's determinations that Dr. Tuteur's opinion is neither well-reasoned nor well-documented and fails to adequately explain why Claimant's coal mine dust exposure was not a contributing or aggravating factor in his obstructive disease.[11] *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Rowe*, 710 F.2d at 255; Decision and Order at 22.

[11] Employer also contends the ALJ erred in requiring Dr. Tuteur to provide his opinion with "absolute certainty" rather than reasonable medical certainty. Employer's Brief at 8-9. While the ALJ noted that Dr. Tuteur acknowledged he could not opine with absolute certainty that coal mine dust did not contribute Claimant's chronic obstructive pulmonary disease (COPD), the ALJ did not require Dr. Tuteur to do so. Rather, the ALJ found that Dr. Tuteur eliminated a contribution by coal mine dust but, given the presumption, did not adequately explain why Claimant was not one of those statistically

As Dr. Tuteur's opinion was the only opinion to potentially rebut the presence of legal pneumoconiosis, we affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing Claimant does not have legal pneumoconiosis.[12] 20 C.F.R. §718.305(d)(1); Decision and Order at 23. Employer's failure to disprove legal pneumoconiosis precludes a 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). Employer does not challenge the ALJ's findings beyond its arguments raised regarding legal pneumoconiosis; thus, 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); *see Skrack*, 6 BLR at 1-711; *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013) (ALJ permissibly discounted expert opinion regarding the cause of disability because he did not diagnose legal pneumoconiosis); Decision and Order at 23. We therefore affirm the ALJ's finding that Employer failed to rebut the Section 411(c)(4) presumption. Decision and Order at 23.

unlikely miners whose coal mine dust exposure contributed to his COPD. Decision and Order at 21-22.

[12] The ALJ also considered Dr. Mansour's opinion, which diagnosed Claimant with legal pneumoconiosis in the form of COPD. Director's Exhibits 16, 19. As the ALJ found, his opinion does not support Employer's burden. Decision and Order at 21.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge