U.S. Department of Labor

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

BRB No. 20-0368 BLA

LARRY R. SETSER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 01/09/2023
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

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

Cynthia Liao (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: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2017-BLA-06187) rendered on a subsequent claim filed on February 11, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Eastern Associated Coal (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 Claimant had twenty-three years of underground coal mine employment and found he established a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). The ALJ therefore found Claimant established a change in an applicable condition of entitlement,[2] 20 C.F.R. §725.309(c), and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

[1] Claimant filed a prior claim on November 28, 2001, which was denied by the district director for failure to establish any element of entitlement. Director's Exhibit 1 at 10.

[2] When a miner 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); *see 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 Claimant did not establish any element of entitlement in his prior claim, he had to submit evidence establishing at least one element to obtain review of the merits of his current claim. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that the miner's total disability is due to pneumoconiosis if he had at least fifteen years of underground or

On appeal, Employer argues 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 Constitution, art. II §2, cl. 2.[4] It further argues the duties performed by the district director create an inherent conflict of interest that violates its due process. It also argues the ALJ erred in finding Peabody Energy to be the responsible carrier and in failing to address its arguments to the contrary. Finally, it argues the ALJ erred in excluding certain medical evidence and its post-hearing brief.[5]

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Benefits Review Board to reject Employer's constitutional and due process arguments. However, the Director agrees with Employer that the ALJ erred in failing to adequately consider Employer's liability arguments.

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.[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).

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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.

[4] 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 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.

[5] We affirm, as unchallenged on appeal, the ALJ's finding Claimant established twenty-three years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West

Responsible Insurance Carrier

Employer does not challenge Eastern's designation as the responsible operator and that it was self-insured by Peabody Energy on the last day Eastern employed Claimant; thus, we affirm these findings. 20 C.F.R. §§725.494(e), 725.495, 726.203(a); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6; Employer's Brief at 19. 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 (Trust Fund).[7] Employer's Brief at 19.

Patriot was initially another Peabody Energy subsidiary. Director's Exhibit 33. In 2007, after Claimant ceased his coal mine employment with Eastern, Peabody Energy transferred a number of its subsidiaries, including Eastern, to Patriot. Director's Exhibits 4, 33. That same year, Patriot was spun off as an independent company. Director's Exhibit 33. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. Director's Exhibit 34. 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 Exhibit 8. 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.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated as the self-insured carrier in this claim, and thus the Trust Fund is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 9-58. It argues the ALJ erred in finding Peabody Energy liable for benefits because: (1) the district director is an inferior officer not properly appointed under the

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Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Tr. at 19.

[7] Employer also states it "preserve[s]" its "ability to challenge" Black Lung Benefits Act (BLBA) Bulletin No. 16-01 as an invalid rule. Employer's Brief at 50. Generally, Employer 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 to permit the Board to consider the merits of the 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).

Appointments Clause;[8] (2) the regulatory scheme, under which the district director must determine the liability of a responsible operator and its carrier when, at the same time, the DOL administers the Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing;[9] (3) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) before transferring liability to Peabody Energy, the DOL must establish it exhausted any available funds from the security bond Patriot gave to secure its self-insurance status; (5) the DOL released Peabody Energy from liability; (6) the Director is equitably estopped from imposing liability on the company; (7) the ALJ's reliance on 20 C.F.R. §§725.495(a)(2)(i) and 725.493(b)(2) is misplaced; and (8) the DOL violated its due process rights by not maintaining adequate records with respect to Patriot's bond and failing to monitor Patriot's financial health.[10] 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. *Id.* at 13.

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) (en banc); *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 5-17

[8] Employer raises this argument for the first time on appeal.

[9] Employer also argues 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act and the Administrative Procedure Act. Employer's Brief at 51. 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 Swank 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 51. 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 it. *See Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

[10] 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 19, 43-44. 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).

(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.[11]

Exclusion of Medical Evidence

Employer argues the ALJ erred in excluding the opinions of Drs. Jarboe and Zaldivar without giving it an opportunity to "either establish good cause for allowing an additional report, or allowing substitution of the report" prior to issuing his decision.[12] Employer's Brief at 2-8.

[11] Employer argues the ALJ erred in excluding the depositions of David Benedict and Steven Breeskin, two former Department of Labor (DOL) Division of Coal Mine Workers' Compensation officials. Employer's Brief at 9-18. In *Bailey*, the same depositions were admitted and the Board held they do not support Employer's argument that the DOL released Peabody Energy from liability when it authorized Patriot to self-insure and released a letter of credit that Patriot financed under Peabody Energy's self-insurance program. *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 15 n. 17 (Oct. 25, 2022). Given the Board has previously held the depositions do not support Employer's argument, any error in excluding them here 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).

[12] Employer also argues the ALJ violated its right to due process and abused his discretion by not accepting its post-hearing brief. Employer's Brief at 44-45. We disagree. Due process requires only that a party be given notice and the opportunity to respond. *See Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807 (4th Cir. 1998). The ALJ notified Employer on multiple occasions that the due date for its brief was a "received by" date. August 20, 2019 Order Granting Motion to Extend Deadline ("[C]losing briefs shall be received by the undersigned by January 10, 2020."); Hearing Tr. at 23. Because Employer's failure to meet the briefing deadline was not due to a lack of notice or opportunity, we see no due process violation or abuse of discretion in the ALJ's enforcement of the deadline. *See Lockhart*, 137 F.3d at 807; *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc).

ALJs exercise broad discretion in resolving procedural and evidentiary matters. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc). A party seeking to overturn the disposition of an evidentiary issue must establish the ALJ's action represented an abuse of discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

The regulations set limits on the number of specific types of medical evidence the parties can submit into the record. *See* 20 C.F.R. §§725.414; 725.456(b)(1). Each party may submit, in support of its affirmative case, no more than two medical reports. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Medical reports exceeding that limitation "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

Prior to the hearing, Employer submitted its evidence summary form and designated the medical opinions of Drs. Broudy and Rosenberg as its two affirmative medical reports. October 22, 2018 Employer's Evidence Summary Form. It also filed a Motion for Extension of Time to submit their deposition transcripts. October 22, 2018 Motion for Extension of Time. On November 2, 2018, Employer submitted another Motion for Extension of Time to submit Dr. Rosenberg's deposition transcript. November 2, 2018 Motion for Extension. At that time, Employer also requested additional time to submit deposition testimony from Dr. Jarboe even though it had not designated his opinion as one of its two affirmative reports. *Id*. The ALJ did not respond to either motion before the hearing on November 8, 2018.

In discussing Employer's evidence at the hearing, the ALJ stated "Employer is going to have some stuff they're (sic) going to be submitting after the hearing. I didn't have a chance to respond to the motions because . . . it's a busy week." Hearing Tr. at 9. He then granted the extension to submit the deposition transcripts of Drs. Rosenberg and Jarboe. *Id.* at 10, 12.

On November 16, 2018, Employer filed a notice that Dr. Rosenberg's deposition was cancelled. On January 17, 2019, Employer filed a Motion to Dismiss for Reason of Abandonment or, in the Alternative, Motion to Compel because Claimant objected to attending an examination it had scheduled with Dr. Zaldivar – another physician whose report Employer had not designated as its two affirmative reports. November 16, 2018 Letter From Claimant to Employer. The ALJ granted the motion to compel Claimant to "attend an evaluation or test as requested by the Responsible Operator." January 25, 2019 Order Granting Motion to Compel.

On March 4, 2019, Employer submitted a written report from Dr. Jarboe; on April 12, 2019, it submitted his deposition transcript. March 4, 2019 Supplemental Notice of Filing; April 12, 2019 Supplemental Notice of Filing.

On August 9, 2019, the Employer filed a Motion for Leave to Obtain an Independent Medical Examination, requesting permission to obtain a report from Dr. Zaldivar and explaining it had been attempting to reschedule Claimant's evaluation with the physician since January 16, 2019 but the doctor had been unavailable. The ALJ granted an extension of the deadline to file the report until November 6, 2019. August 20, 2019 Order Granting Motion to Extend Deadline. On November 12, 2019 the Employer submitted Dr. Zaldivar's report with a cover sheet stating only that "Employer respectfully files the report of Dr. Zaldivar." November 12, 2019 Letter Submitting Dr. Zaldivar's report.

In his Decision and Order, the ALJ found, because Employer had designated the medical reports of Drs. Broudy and Rosenberg as its two affirmative reports, Dr. Jarboe's report and deposition testimony exceeded the evidentiary limitations at 20 C.F.R. §725.414(a)(3) and Employer failed to demonstrate good cause for its admission. Decision and Order at 3. Thus, he excluded Dr. Jarboe's report and deposition from consideration. *Id.* Additionally, he did not consider Dr. Zaldivar's report.

Employer moved for reconsideration arguing the ALJ violated its right to due process in excluding Dr. Jarboe's report. Citing the hearing transcript, and vaguely referring to conversations between the ALJ and the parties that "appear[] to have occurred off of the record," Employer argued that the ALJ was aware it intended to rely on the opinions of Drs. Jarboe and Rosenberg, but not Dr. Broudy.[13] The ALJ denied Employer's request for reconsideration and its reliance on "supposed 'off the record conversations.'" Order Denying Request for Reconsideration.

Employer does not dispute it specifically designated the medical opinions of Drs. Broudy and Rosenberg as its two affirmative medical reports under 20 C.F.R. §725.414(a)(3)(i). October 22, 2018 Employer's Evidence Summary Form. And, while Employer sought leave to *submit* (and ultimately did submit) opinions from Drs. Jarboe and Zaldivar, it does not point to anything in the record suggesting it notified the ALJ of an intent to withdraw Dr. Broudy's or Dr. Rosenberg's reports, or otherwise substitute or redesignate its affirmative medical opinion evidence. Thus, we conclude the ALJ did not abuse his discretion in relying on Employer's designation of Drs. Broudy's and Rosenberg's opinions as its two affirmative medical reports, rendering the opinions of Drs.

[13] Contrary to Employer's contention, its Petition for Reconsideration argues the ALJ erred in excluding Dr. Jarboe's opinion and does not mention Dr. Zaldivar's opinion. Employer's Brief at 6. Thus, its argument to the ALJ on reconsideration – that it intended to rely on Drs. Jarboe's and Rosenberg's opinions as its two affirmative medical reports, with no mention whatsoever of Dr. Zaldivar – further belies its contention on appeal that it intended to rely on Dr. Zaldivar's opinion as an affirmative medical report.

Jarboe and Zaldivar admissible under 20 C.F.R. §725.414(c) only upon a showing of good cause. As Employer did not allege good cause before the ALJ,[14] nor does it do so before the Board, we affirm the ALJ's exclusion of this evidence. *Blake*, 24 BLR at 1-113; *Dempsey*, 23 BLR at 1-63.

Additionally, we reject Employer's argument the ALJ erred in only first notifying the parties he was excluding the opinions of Drs. Jarboe and Zaldivar in his Decision and Order rather than by issuing a separate evidentiary order. Employer's Brief at 6. The ALJ's actions in this case satisfy the principles of fairness and administrative efficiency. *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en banc). As discussed above, the only medical opinions Employer designated in this case are the reports and testimony of Drs. Broudy and Rosenberg. Employer never attempted to amend its evidentiary designation forms. Employer sought to admit the medical reports and testimony of Drs. Jarboe and Zaldivar notwithstanding the evidentiary limitations at 20 C.F.R. §725.414(a)(3)(i), (c). And it did so by claiming the ALJ made off-the-record statements,[15] rather than by arguing good cause existed for the admission of the evidence in excess of the evidentiary limitations, or making an on-the-record request to re-designate its evidence. *See Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-312 (2003); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003). Remanding this case to allow Employer to now argue good cause or to re-designate its evidence impedes, rather than promotes, fairness and administrative efficiency. *Preston*, 24 BLR at 1-63.

Because the ALJ acted within his discretion in excluding the opinions of Drs. Zaldivar and Jarboe, and Employer does not raise any additional arguments regarding the

[14] Employer argues it did not address whether there was good cause to admit the opinions of Drs. Jarboe and Zaldivar because the ALJ erroneously rejected its brief as untimely. Yet, Employer concedes the brief it attempted to submit to the ALJ did not address whether good cause existed. Employer's Brief at 7. Further, despite the ALJ's finding Employer did not demonstrate good cause to admit Dr. Jarboe's opinion, Employer similarly failed to argue good cause existed in its Petition for Reconsideration. Decision and Order at 3.

[15] The Board is not empowered to consider alleged conversations regarding the submission of Employer's additional medical evidence that are "not part of the record." 20 C.F.R. §802.301(b); *Berka v. N. Am. Coal Corp.*, 8 BLR 1-183, 1-184 (1985).

elements of entitlement, we affirm the ALJ's finding Claimant is entitled to benefits.[16] *Skrack*, 6 BLR at 711; Decision and Order at 27.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[16] Employer also states that "the evidentiary limitations themselves are an unconstitutional denial of due process." Employer's Brief at 45. 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).