U.S. Department of Labor

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

BRB No. 21-0017 BLA

IVAN M. ACORD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PINE RIDGE COAL COMPNAY, c/o PEABODY ENERGY	)	
	)	
and	)	
	)	DATE ISSUED: 01/19/2023
PEABODY ENERGY CORPORATION, c/o UNDERWRITERS SAFETY & CLAIMS	)	
	)	
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 Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

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

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP) Charleston, West Virginia, for Employer and its Carrier.

Ann Marie Scarpino (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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lauren C. Boucher's Decision and Order Awarding Benefits (2019-BLA-05900) rendered on a subsequent claim[1] filed on May 2, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 34.75 years of qualifying coal mine employment and found he established a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant established a change in an applicable condition of entitlement[2] and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). The ALJ further found Employer did not rebut the presumption and awarded benefits.

[1] This is Claimant's second claim for benefits. Claimant filed his first claim on June 26, 2012, which the district director denied for failure to establish any element of entitlement. Decision and Order at 2.

[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 she 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)(1); *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.

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

On appeal, Employer argues the ALJ erred in finding it liable for benefits. On the merits, Employer argues the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[4] Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response urging rejection of Employer's liability argument.

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 (1965).

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Pine Ridge Coal Company (Pine Ridge) is the correct responsible operator and it was self-insured by Peabody Energy on the last day Pine Ridge employed Claimant; thus, we affirm this finding. 20 C.F.R. §§725.494(e), 725.495, 726.203(a); *see Skrack*, 6 BLR at 711; Decision and Order at 36-38. Rather, it alleges that 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 (the Trust Fund).

Patriot was initially a Peabody Energy subsidiary. Director's Exhibit 56 at 30-83. In 2007, after Claimant ceased his coal mine employment with Pine Ridge, Peabody Energy transferred a number of its other subsidiaries, including Pine Ridge, 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. *Id.* at 12-13. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Pine Ridge, Patriot later went bankrupt and can no longer provide for those benefits. Director's Brief at 2. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established a change in applicable condition of entitlement and 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 27-28.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 34.

liability for paying benefits to miners who were last employed by Pine Ridge when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 39; Director's Brief at 2.

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 20-32. It argues the ALJ erred in finding Peabody Energy liable for benefits because: (1) the DOL released Peabody Energy from liability; (2) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (3) 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; and (4) the Director is equitably estopped from imposing liability on Peabody Energy. *Id.* 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.*

The Board has previously addressed these arguments and rejected them 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 (Oct. 18, 2022); and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-295-99 (2022). For the reasons set forth in *Bailey, Howard* and *Graham*, we reject Employer's arguments.[6] Thus, we affirm the ALJ's determination that Pine Ridge and Peabody Energy are the responsible operator and carrier, respectively and are liable for this claim.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis[7] or that "no

[6] As Claimant filed his 2012 claim prior to Patriot's bankruptcy, we reject Employer's assertion that the Department's decision to name Patriot as the self-insurer responsible for Claimant's 2012 claim proves that DOL released Peabody Energy from liability. Employer's Brief at 21-22. We agree with the Director that Patriot's designation as the self-insurer in Claimant's prior claim does not preclude the Department from identifying Peabody Energy as the liable carrier in the present claim, as Employer does not dispute that Peabody Energy self-insured Pine Ridge on the date of Claimant's last coal mine employment. Director's Brief at 8, 14.

[7] 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). This definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment

part of [his] respiratory or pulmonary total disability is 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.[8] Decision and Order at 34.

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).

Employer relies on the opinions of Drs. Zaldivar and Rosenberg that Claimant does not have legal pneumoconiosis. Director's Exhibit 25; Employer's Exhibit 5, 12, 13. Employer argues the ALJ applied the wrong legal standard in discrediting their opinions because she improperly required them to eliminate coal dust exposure as a possible contributing cause of Claimant's respiratory impairment and "prove that he was not a miner." Employer's Brief at 14. We disagree.

The ALJ accurately stated the legal standard, noting Employer has the burden to "affirmatively disprove the existence of pneumoconiosis" and defining legal pneumoconiosis as any chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 28-19; *see* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich*, 25 BLR at 1-155 n.8. Regardless, as explained below, the ALJ rejected the opinions of Employer's experts because she found them insufficiently reasoned and not because they failed to satisfy a heightened legal standard.

Dr. Zaldivar diagnosed Claimant with a disabling chronic obstructive pulmonary disease (COPD), which he attributed solely to smoking-related asthma and emphysema. Director's Exhibit 25 at 8; Employer's Exhibit 12 at 26. He eliminated coal dust exposure

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"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).

[8] The ALJ found Employer failed to establish that Claimant does not have either clinical pneumoconiosis or legal pneumoconiosis. Decision and Order at 29-33.

as a contributing cause of Claimant's impairment because "smoking is three times as powerful an inducer of COPD, emphysema as mining" and Claimant's clinical presentation is consistent with smoking-related COPD. Employer's Exhibit 12 at 29, 31. The ALJ permissibly found Dr. Zaldivar's opinion unpersuasive because he did not adequately address why Claimant's nearly 35 years of coal mine dust exposure was not an additive or aggravating cause of Claimant's smoking-related COPD. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); Decision and Order at 31-32.

Dr. Rosenberg diagnosed Claimant with disabling COPD and emphysema due solely to smoking. Employer's Exhibit 5 at 3-6. He eliminated coal dust exposure as a contributing cause of Claimant's impairment in part because his pulmonary function tests showed a reduced FEV1/FVC ratio which is consistent with a smoking related obstruction. *Id*. at 4-7. He also observed that "there are no studies that show latent legal CWP presents after decades without respiratory complaints." *Id.* at 5. The ALJ permissibly found Dr. Rosenberg's opinion contrary to the studies cited in the preamble to the revised regulations which recognize COPD due to coal dust exposure may be detected by decrements in the FEV1/FVC ratio. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); Decision and Order at 32. The ALJ further permissibly found Dr. Rosenberg's opinion contrary to the regulations which recognize pneumoconiosis as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (a medical opinion not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); *Lewis Coal Co. v. Director, OWCP*, 373 F.3d 570, 580 (4th Cir. 2004) (it is appropriate to give little weight to medical findings that conflict with the Act's implementing regulations); Decision and Order at 32.

Employer's arguments amount to a request to reweigh the evidence, which the Board may not do. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993); *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the ALJ's conclusion that Employer failed to disprove the existence of legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), §718.305(d)((1)(i)(A); Decision and Order at 35-36. Employer's failure to disprove legal pneumoconiosis

precludes a rebuttal finding that Claimant does not have pneumoconiosis.[9] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next addressed 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 33-34. She permissibly discredited the opinions of Drs. Zaldivar and Rosenberg because they did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove the disease.[10] *See Epling*, 783 F.3d at 504-05; Decision and Order at 34. We therefore affirm the ALJ's conclusion that Employer failed to establish no part of Claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Thus, we affirm the ALJ's award of benefits.

[9] Consequently, we need not address Employer's challenge to the ALJ's finding that it also failed to establish Claimant does not have clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 5-7.

[10] Drs. Zaldivar and Rosenberg did not address whether legal pneumoconiosis caused Claimant's total respiratory disability independent of their conclusions that he did not have the disease. Director's Exhibit 25; Employer's Exhibits 5, 12-13.

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

JONATHAN ROLFE
Administrative Appeals Judge