U.S. Department of Labor

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

BRB No. 22-0190 BLA

ROSEMARY BAILEY (Widow of SHERMAN BAILEY) Claimant-Respondent v. HERITAGE COAL COMPANY, LLC and PEABODY ENERGY CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/27/2023 DECISION and ORDER

Appeal of Corrected Decision and Order Awarding Benefits of Lystra A. Harris, 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 (Bowles Rice LLP), Charleston, West Virginia, for Employer and its Carrier.

William M. Bush (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: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lystra A. Harris's Corrected Decision and Order Awarding Benefits (2019-BLA-06248) 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 June 29, 2017.[1]

The ALJ found Heritage Coal Company, LLC (Heritage), self-insured through Peabody Energy Corporation (Peabody Energy), is the responsible operator liable for the payment of benefits. She also found Claimant[2] established the Miner had 21.14 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant established a change in an applicable condition of entitlement,[3] 20 C.F.R. §725.309, and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption and awarded benefits.

[1] This is the Miner's third claim for benefits. Director's Exhibits 1-2. The ALJ noted the Miner filed his prior claim on November 26, 2012, and the district director denied it on October 31, 2013, for failure to establish total disability. Decision and Order at 2.

[2] Claimant is the widow of the Miner, who died on April 15, 2019. Hearing Tr. at 12. She is pursuing the miner's claim on his estate's behalf. Claimant's Exhibit 5.

[3] 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); *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 the Miner did not establish total disability in his prior claim, Claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of the Miner's current claim. *Id;* Decision and Order at 2.

[4] 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.

On appeal, Employer argues Peabody Energy is not the responsible carrier and liability for the payment of benefits should transfer to the Black Lung Disability Trust Fund (the Trust Fund). On the merits of entitlement, Employer argues the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[5] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to affirm the ALJ's determination that Employer is liable for benefits.

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

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Heritage is the correct responsible operator and it was self-insured by Peabody Energy on the last day it employed the Miner; thus we affirm these findings. *See* 20 C.F.R. §§725.494, 725.495, 726.203(a); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 50-51; Employer's Brief at 29-48. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Trust Fund.[7] *Id.*

[5] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established 21.14 years of underground coal mine employment, total disability at 20 C.F.R. §718.204(b)(2), and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-9, 33-34.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 16.

[7] We reject Employer's arguments that the district director erred in failing to put the Black Lung Disability Trust Fund (the Trust Fund) on notice of this claim as a potentially responsible party and act on its request for reconsideration of the district director's Proposed Decision and Order (PDO). Employer's Brief at 29-30. The Act provides that the Director is a party in all black lung claims and represents the interests of the Trust Fund. 30 U.S.C. §932(k); *see Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 502 n.5 (4th Cir. 1999) (Director is a party in all black lung claims); *see also Boggs v. Falcon Coal Co.*, 17 BLR 1-62, 1-65-66 (1992); *Truitt v. N. Am. Coal Corp.*, 2 BLR 1-199, 1-202

Patriot was initially another Peabody Energy subsidiary. Director's Exhibits 5-11; 62. In 2007, after the Miner ceased his coal mine employment with Heritage, Peabody Energy transferred a number of its other subsidiaries, including Heritage, 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. Director's Exhibits 38, 62. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Heritage, Patriot later went bankrupt and can no longer provide for those benefits. *Id.* Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed by Heritage when Peabody Energy owned and provided self-insurance to Heritage, as the ALJ held. Decision and Order at 51-57.

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: (1) the Director failed to present evidence that Peabody Energy self-insured Heritage; (2) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (3) because Patriot cannot pay benefits, Black Lung Benefits Act Bulletin Nos. 12-07 and 14-02 place liability on the Trust Fund; (4) before transferring liability to Peabody Energy, the Department of Labor (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; and (6) the Director is equitably estopped from imposing liability on Peabody Energy. Employer's Brief at 29-48. Moreover, 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 38-45.

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 (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. Thus, we affirm the ALJ's determination that Heritage and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.

(1979); Director's Response Brief at 7 n.5. Further, while Employer requested reconsideration of Peabody Energy Corporation's designation as the responsible carrier in the district director's PDO, it also requested that the district director forward the claim for a hearing before the Office of Administrative Law Judges (OALJ). Director's Exhibit 62. The district director forwarded the claim to the OALJ as requested. Director's Exhibit 65.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[8] 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.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did 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 ALJ considered the medical opinions[9] of Drs. Zaldivar and Basheda that the Miner did not have legal pneumoconiosis.[10] Decision and Order at 47; Director's Exhibit 25; Employer's Exhibits 4, 5, 17. Dr. Zaldivar opined the Miner had a disabling pulmonary impairment unrelated to coal mine dust exposure. Director's Exhibit 25 at 4, 10-12, 19-21. Dr. Basheda opined the Miner had an intermittent airway obstruction also unrelated to

[8] "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).

[9] Employer listed Dr. Basheda's deposition as Employer's Exhibit 16. The ALJ noted the doctor's deposition, along with a rebuttal x-ray interpretation from Claimant, was not submitted to the OALJ. Decision and Order at 10 n.10.

[10] The ALJ also considered the opinions of Drs. Raj and Nader that the Miner had legal pneumoconiosis. Decision and Order at 46-47; Director's Exhibit 22 at 3; Claimant's Exhibits 1 at 5, 4 at 5. She found Dr. Raj's opinion entitled to no probative weight and Dr. Nader's opinion entitled to "normal" probative weight. *Id.* Employer does not contest the ALJ's weighing of Dr. Raj's opinion.

coal mine dust exposure. Employer's Exhibit 5 at 19-21. The ALJ found their opinions not well-reasoned. Decision and Order at 47-48.

Employer argues the ALJ erred in discrediting the opinions of Drs. Zaldivar and Basheda. Employer's Brief at 19-29. We disagree.

Initially we reject Employer's argument that the ALJ applied the wrong standard when addressing the issue of rebuttal of legal pneumoconiosis. Employer's Brief at 13-14. Contrary to Employer's argument, the ALJ applied the correct standard by requiring Employer to affirmatively disprove the existence of legal pneumoconiosis by a preponderance of the evidence. 20 C.F.R. §§718.201(b)(2), (c), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8; Decision and Order at 34, 45-48. Moreover, as discussed below, she discredited Drs. Zaldivar's and Basheda's opinions because she found they are not reasoned and failed to explain their *own* conclusions that any lung disease or impairment the Miner had was unrelated to coal dust exposure -- not because they failed to meet a particular legal standard. Decision and Order at 47-48.

We also reject Employer's argument that the ALJ provided invalid reasons for finding the opinions of Drs. Zaldivar and Basheda not credible. Employer's Brief at 19-29.

Dr. Zaldivar excluded coal mine dust exposure as a cause or contributing factor of the Miner's pulmonary impairment. Director's Exhibit 25 at 4; Employer's Exhibit 4 at 12. He opined the Miner had disabling "pulmonary abnormalities" resulting from rheumatoid arthritis, kidney disease, and cardiac disease that caused a restrictive impairment. Director's Exhibit 25 at 4. He also believed the Miner may have had "some element of an obstructive impairment" from asthma and emphysema, but concluded any disability was "not the result of his working in the coal mines nor have the coal mines contributed to it in any way." *Id.*; *see also* Employer's Exhibit 4 at 10-12.

The ALJ noted Dr. Zaldivar "accepted that [the Miner] suffered from a mixed pulmonary impairment prior to the onset of pulmonary damage caused by the highlighted, long-term conditions." Decision and Order at 47. She stated Dr. Zaldivar also noted the Miner "suffered from both hypoxemia and hypercarbia based on the results of his arterial blood gas studies." *Id*. She permissibly found Dr. Zaldivar did not adequately explain why the Miner's coal mine dust exposure did not also contribute to, or aggravate, his hypoxemia and hypercarbia. *See Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) (rebuttal inquiry is "whether the employer has come forward with affirmative proof that the [miner] does not have legal pneumoconiosis, because his impairment is not in fact significantly related to his years of coal mine employment"); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP*

[*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); 20 C.F.R. §718.201(b)(2), (c); Decision and Order at 47.

Similarly, Dr. Basheda excluded coal mine dust exposure as a cause or contributing factor of the Miner's pulmonary impairment. Employer's Exhibit 5 at 19, 21. He opined the Miner had an intermittent airway obstruction consistent with asthma, mild to moderate restriction due to pulmonary parenchymal disease that was caused by chronic inflammatory process and bronchiectasis, and intermittent respiratory acidosis due to medications. Employer's Exhibit 5 at 19-21. Further, he opined there was "no evidence of a chronic obstructive disease." *Id.* at 21. He noted the Miner smoked cigarettes in excess of "10 pack-years" and "worked in the coal mining industry for 20+ years" and "did not miss work due to asthma symptoms." *Id*. at 17, 19. Specifically, he stated that "[d]espite [the Miner's] coal dust exposure and cigarette smoking, the spirometry demonstrated intermittent airway obstruction" and "[t]his is not chronic airway obstruction typical of tobacco-induced COPD or coal dust-induced obstruction." *Id*. at 19. He thus concluded the Miner's pulmonary impairment was "unrelated to coal mining work or coal dust exposure." *Id.* at 21.

The ALJ noted Dr. Basheda "has merely pointed out the variability is consistent with an inflammatory condition, such as asthma." Decision and Order at 47. She permissibly found Dr. Basheda did not adequately explain why the Miner's coal mine dust exposure did not significantly contribute to, or aggravate, his pulmonary impairment. *See Smith*, 880 F.3d at 699; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Clark v. Karst-Robins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 47.

Employer generally argues the ALJ should have found the opinions of Drs. Zaldivar and Basheda well-reasoned. Employer's Brief at 19-29. We consider Employer's argument to be a request that the Board 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 the ALJ acted within her discretion in discrediting Drs. Zaldivar's and Basheda's opinions, the only opinions that could support Employer's burden on rebuttal,[11] we affirm her finding that Employer did not disprove the existence of legal pneumoconiosis.[12] 20 C.F.R.

[11] As Dr. Nader's opinion diagnosing legal pneumoconiosis does not aid Employer on rebuttal, we need not address Employer's arguments regarding the ALJ's weighing of her opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 17-19.

[12] As Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i), we

§718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis.[13] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ also found Employer failed to establish "no part of [the Miner'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 48-49. As Employer does not challenge this finding, we affirm it. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 48-49. We therefore affirm the award of benefits.

decline to address its contentions regarding the ALJ's finding that it failed to disprove clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 3-16.

[13] Employer contends the ALJ is biased against it because she used "the words 'claimed', 'supposed', 'supposition', [and] 'alleged' numerous times to describe the opinions and explanations of Drs. Zaldivar and Basheda." Employer's Brief at 11 n.1. It argues the ALJ's "language indicates a predisposition to reject and denigrate the medical opinions of the employer's experts." *Id.* A charge of bias against an ALJ is not substantiated by a mere allegation but must be established by concrete evidence of prejudice against a party's interest. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992). Here, Employer points to no concrete evidence establishing the ALJ exhibited a bias in her consideration of Drs. Zaldivar's and Basheda's opinions. Thus we reject Employer's claim.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge