U.S. Department of Labor

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

BRB No. 22-0106 BLA

JEFFREY A. MCCLURE (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CATENARY COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 6/08/2023
	)	
ARCH RESOURCES	)	
	)	
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 Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for Claimant.

Michael Pusateri (Greenberg Traurig, LLP), Washington, D.C., 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: GRESH, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits (2019-BLA-05817) rendered on a claim filed on August 17, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Catenary Coal Company (Catenary) is the responsible operator and Arch Resources (Arch) is the responsible carrier because Arch self-insured Catenary on the last day of the Miner's coal mine employment with it. He credited the Miner with 26.70 years of surface coal mine employment in conditions substantially similar to those in an underground mine and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant[1] invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because the removal provisions applicable to ALJs violate the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] It also argues the ALJ erred in finding Arch is the

[1] The Miner died on February 11, 2020. Claimant's Response Brief at 2. Joshua Adam McClure is pursuing the miner's claim on the Miner's estate's behalf. September 11, 2020 Order at 17 (unpaginated).

[2] 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.

[3] 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

liable carrier and in denying its related discovery requests. On the merits of entitlement, it contends the ALJ erred in finding Claimant established the Miner's coal mine employment occurred in conditions that were substantially similar to those in an underground mine and in finding it did not rebut the presumption. Claimant responds in support of the award of benefits.

The Director, Office of Workers' Compensation Programs (the Director), has filed a response urging the Benefits Review Board to reject Employer's constitutional challenge. Further, the Director urges the Board to affirm the ALJ's determinations that Catenary is the responsible operator and Arch is liable for the payment of benefits, and to reject Employer's argument regarding its related discovery requests. Employer has filed reply briefs to both Claimant's and the Director's briefs, reiterating its contentions.[4]

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).

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 18-23. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia v. SEC*,

---

> 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.

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established 26.70 years of coal mine employment and total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2); Decision and Order at 5, 27.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Tr. at 26, 34-35.

585 U.S. , 138 S. Ct. 2044 (2018).[6] *Id*. In addition, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd*., 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). *Id*. For the reasons set forth in *Howard v. Apogee Coal Co*., 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Catenary is the correct responsible operator and it was self-insured by Arch on the last day Catenary employed the Miner; thus we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 21, 23. 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). Employer's Brief at 31, 43, 47-50; Employer's Reply Brief to the Director's Brief at 5-6, 12-13.

In 2005, after the Miner ceased his coal mine employment with Catenary, Arch sold Catenary to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot. Employer's Brief at 43; Director's Response Brief at 2; Director's Exhibit 39 at 12. In 2011, the Department of Labor (DOL) authorized Patriot to insure itself and its subsidiaries, retroactive to 1973. Director's Response Brief at 13. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Catenary, Patriot later went bankrupt and can no longer provide for those benefits. *Id.* Nothing, however, relieved Arch of liability for paying benefits to miners last employed by Catenary when Arch owned and provided self-insurance to that company, as the Director states. *Id.* at 13-14.

Employer raises several arguments to support its contention that Arch was improperly designated the responsible carrier in this claim and thus the Trust Fund, not Arch, is responsible for the payment of benefits following Patriot's bankruptcy: (1) the district director is an inferior officer not properly appointed under the Appointments

[6] *Lucia* involved an Appointments Clause challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held, similar to Special Trial Judges at the United States Tax Court, that SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

Clause;[7] (2) 20 C.F.R. §725.495(a)(4) precludes Arch's liability; (3) the ALJ evaluated Arch's liability for the claim as a responsible operator or commercial insurance carrier rather than as a self-insurer; (4) the district director improperly "attempt[ed] to pierce Arch's corporate veil to hold it responsible" for the benefits of Catenary's employee, the Miner; (5) the Director did not prove that Arch's self-insurance covered Catenary for this claim; (6) the sale of Catenary to Magnum released Arch from liability for the claims of miners who worked for Catenary, and the DOL authorized Patriot to retroactively self-insure Catenary's liabilities;[8] (7) the DOL's issuance of Black Lung Benefits Act (BLBA) Bulletin No. 16-01[9] reflects a change in policy where the DOL began to retroactively impose new liability on self-insured mine operators that bypasses traditional rulemaking in violation of the APA;[10] (8) the United States Court of Appeals for the District of Columbia

[7] Employer first contested the district director's appointment before the ALJ in its Pre-Hearing Report. Employer's Pre-Hearing Report at 6.

[8] On August 22, 2019, Employer submitted a request for subpoenas to obtain deposition testimony and documents from Department of Labor (DOL) employees Michael Chance and Kim Kasmeier related to various liability-related topics, including Black Lung Benefits Act (BLBA) Bulletin No. 16-01 and the DOL's authorization of Arch Resources (Arch) to self-insure. *See* August 22, 2019 Subpoena Requests. The ALJ denied Employer's request, finding it failed to establish extraordinary circumstances for excusing its failure to timely designate liability witnesses or submit liability evidence to the district director. September 11, 2020 Order Denying Employer's Request for Issuance of Subpoenas at 9 (unpaginated); *see* 20 C.F.R. §§725.414(c), 725.456(b)(1). On November 4, 2019, Employer filed a motion to compel discovery responses related, in part, to BLBA Bulletin No. 16-01. The ALJ denied Employer's motion. September 11, 2020 Order Denying Employer's Motion to Compel at 16 (unpaginated). For the reasons set forth in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 11-13 (Oct. 25, 2022) (en banc); *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-313-15 (2022); and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-294-95 (2022), we affirm the ALJ's evidentiary rulings.

[9] BLBA Bulletin No. 16-01 is a memorandum the Director of the Division of Coal Mine Workers' Compensation issued on November 12, 2015, to "provide guidance for district office staff in adjudicating claims" affected by Patriot Coal Corporation's bankruptcy.

[10] Employer argues the DOL's policy is a retroactive change that amounts to an unlawful taking of its property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 50-51. As the Director correctly points out, a private contract cannot release Employer from liability and requiring Employer to pay benefits

Circuit permitted discovery to challenge BLBA Bulletin No. 16-01 in *Arch Coal, Inc. v. Acosta*, 888 F.3d 493 (D.C. Cir. 2018), and the ALJ's failure to allow discovery was a violation of its due process rights;[11] and (9) the Director is equitably estopped from imposing liability on Arch. Employer's Brief at 23-52.

The Board has previously considered and rejected these and similar arguments under the same determinative facts related to the Patriot bankruptcy in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022) (en banc); *Howard*, 25 BLR at 1-308-18; 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 Catenary and Arch are the responsible operator and carrier, respectively, and are liable for this claim.

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

Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if [Claimant] demonstrates that [the Miner] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001).

---

under the Act does not constitute an unconstitutional taking of property. Director's Response Brief at 15, *citing W. Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011) ("the mere imposition of an obligation to pay money does not give rise to a claim under the Takings Clause").

[11] Employer asserts the ALJ did not fully address all of its challenges to BLBA Bulletin No. 16-01. Employer's Brief at 35-43; Employer's Reply Brief to the Director's Brief at 8-9; *see* September 11, 2020 Order Denying Employer's Request for Issuance of Subpoenas and Motion to Compel at 9, 16 (unpaginated). Even if true, we consider any error to be harmless because the Board rejected similar challenges to the bulletin in *Howard*, 25 BLR at 1-313-15, 1-317-18. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

The ALJ noted the Miner testified that all of his coal mine employment was at a surface mine, he was exposed to coal mine dust daily,[12] and his job required drilling rock and shoveling "the cuttings away from the drill tape." Decision and Order at 3-5. The ALJ therefore found the conditions of all of the Miner's surface coal mine employment were substantially similar to those in an underground mine. *Id*. at 5.

Employer asserts the ALJ erred in failing to assess whether the conditions of the Miner's surface coal mine employment were substantially similar to those in an underground mine. Employer's Brief at 52-55. Employer's argument is unpersuasive.

An ALJ is not required to analyze the conditions of an underground mine in comparison to a miner's working conditions in surface mining. *See* 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013) (it is unnecessary for a claimant to prove anything about dust conditions existing at an underground mine; a claimant need only develop evidence addressing the dust conditions at the non-underground mine). Here, the ALJ rationally found the Miner's uncontradicted testimony regarding his dust exposure sufficient to show that he was regularly exposed to coal mine dust. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ evaluates the credibility of the evidence of record, including witness testimony); *see also Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490 (6th Cir. 2014) (a claimant's testimony that the conditions throughout his employment were "very dusty" met the claimant's burden to establish he was regularly exposed to coal mine dust); *Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-344-345 (1984) (the ALJ may rely on a miner's testimony, especially if the testimony is not contradicted by any documentation of record).

Because the ALJ acted within his discretion, we affirm his crediting of the Miner's uncontradicted testimony. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); Decision and Order at 5. As it is supported by substantial evidence, we further affirm his conclusion that Claimant established the Miner worked in conditions substantially similar to those in an underground mine. *See* 20 C.F.R. §718.305(b)(2); *see Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (the duty of explanation

[12] We reject Employer's assertion that the Miner testified "his enclosed cab offered him substantial, 'airtight' protection." Employer's Brief at 53-54. Contrary to Employer's assertion, the Miner testified Arch tried to do the right thing and put him in a more airtight enclosure around 1993, but nevertheless the "drills [he ran] didn't have windows or doors or anything on it. It was open cab. Dozers was open cab." Hearing Tr. at 26-27, 33, 36. The Miner further testified that when he was shoveling, there was dust blowing around and he was exposed to dust every day as a driller. Hearing Tr. at 22-23.

under the APA is satisfied if the reviewing court can discern what the ALJ did and why he did it).

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[13] 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 rebutted the presumption that the Miner suffered from clinical pneumoconiosis, but it did not rebut the presumption that he had legal pneumoconiosis or that no part of his total disability was caused by it. Decision and Order at 37, 39.

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).

Employer relies on the opinions of Drs. Rosenberg and Zaldivar that the Miner did not have legal pneumoconiosis.[14] Dr. Rosenberg opined the Miner had chronic obstructive pulmonary disease (COPD) and emphysema related to his smoking history, but not related

[13] "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).

[14] The ALJ also considered the opinions of Drs. Celko, Sood, and Go that the Miner had legal pneumoconiosis. Decision and Order at 35-36; Director's Exhibits 15, 20, 28; Claimant's Exhibits 4, 6, 6-A; Employer's Exhibit 11. As their opinions do not aid Employer on rebuttal, we need not address its argument that the ALJ erred in crediting them. *See Larioni*, 6 BLR at 1-1278; *see* Employer's Brief at 59-62.

to his coal mine dust exposure. Director's Exhibit 21 at 30-39; Employer's Exhibit 6. Dr. Zaldivar opined the Miner had asthma and either COPD or emphysema unrelated to his coal mine dust exposure. Employer's Exhibits 7, 14. The ALJ found their opinions not well-reasoned, and therefore insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 36.

Employer argues the ALJ erred in discrediting the opinions of Drs. Rosenberg and Zaldivar. Employer's Brief at 55-59. We disagree. Both physicians opined the Miner's COPD was due solely to cigarette smoking because his FEV_1 result on pulmonary function testing was severely reduced in comparison to his FVC result, and his diffusion capacity was too severely reduced to be due to coal mine dust exposure. Director's Exhibit 21; Employer's Exhibits 6, 14 at 7. Contrary to Employer's arguments, the ALJ permissibly found their rationale inconsistent with the scientific studies the DOL credited in the preamble to the 2001 revised regulations indicating that coal mine dust exposure may cause clinically significant obstructive lung disease, which can be shown by a reduction in the FEV_1/FVC ratio. *See* 65 Fed. Reg. at 79,943; *Stallard*, 876 F.3d at 671-72; *see also Sterling*, 762 F.3d at 491-92; Decision and Order at 36.

Moreover, Dr. Rosenberg opined the Miner did not have legal pneumoconiosis because "it is unlikely that a miner who has no impairment when he leaves coal mining will suddenly develop an obstruction related to coal dust years after the last exposure." Director's Exhibit 21 at 39. The ALJ permissibly discredited Dr. Rosenberg's opinion as inconsistent with the regulations' recognition that pneumoconiosis is a latent and progressive disease that may first become detectable after exposure to coal mine dust ends. *See* 20 C.F.R. §718.201(c); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); Decision and Order at 36; *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 408 (6th Cir. 2020). Further, the ALJ permissibly found Dr. Rosenberg did not adequately explain why the Miner's exposure to coal mine dust during his 26.70 years of qualifying coal mine employment did not contribute to his COPD and emphysema. *See Owens*, 724 F.3d at 555, 558; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Minich*, 25 BLR at 1-155 n.8; Decision and Order at 36.

Finally, Dr. Zaldivar opined that in a "setting such as this[,] one will think that legal pneumoconiosis was a possibility and certainly in the abstract it could be a possibility." Employer's Exhibit 7. He then opined that, considering the Miner's history of bronchospasm and shortness of breath, "the far more likely diagnosis is that he has had longstanding asthma poorly treated." *Id.* Further, he stated that he needed to review older records in order to determine the cause of the Miner's "breathing problem." *Id.* Thus, we discern no error in the ALJ's finding that Dr. Zaldivar's opinion is equivocal and unpersuasive to affirmatively establish that the Miner did not have legal pneumoconiosis.

Justice v. Island Creek Coal Co., 11 BLR 1-91, 1-94 (1988) (an ALJ may reject an equivocal medical opinion); Decision and Order at 36.

Because the ALJ acted within his discretion in finding the opinions of Drs. Rosenberg and Zaldivar insufficient to satisfy Employer's burden of proof, we affirm his determination that Employer did not disprove legal pneumoconiosis. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); Decision and Order at 35-36. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "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 37-39. The ALJ permissibly discredited the disability causation opinions of Drs. Rosenberg and Zaldivar because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the disease.[15] *See Hobet*, 783 F.3d at 504-05 (4th Cir. 2015); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 38. We therefore affirm the ALJ's finding that Employer failed to establish no part of the Miner's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 39.

[15] Drs. Rosenberg and Zaldivar did not address whether legal pneumoconiosis caused the Miner's total respiratory disability independent of their conclusions that he did not have the disease. Director's Exhibit 21; Employer's Exhibits 6, 7, 14.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge