U.S. Department of Labor

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

BRB No. 22-0278 BLA

DIANELL PACK (o/b/o RONALD E. PACK) Claimant-Respondent v. STERLING SMOKELESS COAL COMPANY, LLC and PEABODY ENERGY CORPORATION Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 6/16/2023 DECISION and ORDER

Appeal of the 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.

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

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

GRESH, Chief Administrative Appeals Judge, and BOGGS, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Awarding Benefits (2020-BLA-05291) rendered on a subsequent claim filed on August 28, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ initially found Sterling Smokeless Coal Company, LLC (Sterling) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier. On the merits, the ALJ credited the Miner with twenty-eight years of qualifying coal mine employment based on the parties' stipulation and as supported by the record. She also found the Miner had complicated pneumoconiosis thereby concluding Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act and established a change in the applicable condition of entitlement.[2]

[1] The Miner filed four prior claims. Director's Exhibits 1-4. On August 11, 2016, the district director denied his previous claim, filed on December 23, 2015, because the Miner failed to establish total disability. Director's Exhibit 4. The Miner died on February 16, 2021, and Claimant, the Miner's widow, is pursuing the claim on his behalf. Order Granting Party Substitution dated May 7, 2021; Director's Brief at 4; Hearing Transcript at 26. Claimant filed a survivor's claim but the ALJ did not adjudicate it, as it was not assigned to her. Decision and Order at 2 n.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 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 district director denied the Miner's previous claim for failure to establish total disability, Claimant must submit new evidence establishing this element to warrant a

30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §§718.304, 725.309. Further finding the Miner's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203(b), the ALJ awarded benefits.

On appeal, Employer argues the ALJ erred in finding it is the responsible operator and that Peabody Energy is the liable carrier. On the merits, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis and invoked the irrebuttable presumption. 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 reject Employer's constitutional challenges and to affirm the ALJ's finding that Employer is responsible for the payment of benefits. The Director does not address Employer's challenges to the ALJ's award on its merits.

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.[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 that most recently employed the miner.[4] 20 C.F.R. §725.495(a)(1). To be a "potentially liable operator," a coal mine operator must have employed the miner for a cumulative period of not less than one year and be financially capable of assuming liability for the payment of benefits. 20 C.F.R. §§725. 494(c), (e). Once the Director properly identifies a potentially liable operator, it may be relieved of liability only if it proves either that it is financially incapable

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review of the Miner's subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 4.

[3] The Board will apply the law of 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); Decision and Order at 4 and n.4; Director's Exhibit 7; Hearing Transcript at 21.

[4] The regulation at 20 C.F.R. §725.494 further requires that the miner's disability or death must have arisen at least in part out of employment with the operator, the operator or any person with regard to which the operator may be considered a successor operator was an operator for any period after June 30, 1973, and the miner's employment included at least one working day after December 31, 1969. 20 C.F.R. §725.494(a)-(e).

of paying benefits, or that another financially capable operator more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

Relying on *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-02 (6th Cir. 2019) (holding that 125 working days constitutes a year of coal mine employment), Employer argued to the ALJ that because the Miner worked for Barrett Fuel Corporation (Barrett) for 127 days in 1982, Barrett is the responsible operator as it is the last coal mine operator to employ the Miner for a cumulative period of one year. Employer's Post-Hearing Brief at 4-9; Employer's Motion to Dismiss dated February 18, 2021 at 2. The ALJ rejected Employer's argument, explaining that she must first determine whether the Miner had an employment relationship with Barrett for a period of one calendar year, or partial periods totaling 365 days, prior to considering whether he worked 125 days in coal mine employment for it. Decision and Order at 25-26 (citing *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002) and *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003)). Because the record failed to establish the Miner had a one calendar-year employment relationship with Barrett, she found Employer failed to establish Barrett employed the Miner for at least one year and did not reach the issue of whether the Miner had at least 125 working days with Barrett in 1982.[5] *Id*. at 27.

Employer argues the ALJ erred by not applying the formula at 20 C.F.R. §725.101(a)(32)(iii) and *Shepherd* to calculate the length of the Miner's employment with Barrett. Employer's Brief at 5-11 (unpaginated). We disagree. This case arises within the jurisdiction of the Fourth Circuit, which has not adopted *Shepherd* or otherwise held that 125 days of earnings establishes a year of coal mine employment. Fourth Circuit case law requires an ALJ to first determine whether the miner engaged in coal mine employment for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 330-31, 334, 336 (4th Cir. 2007) (a one-year employment relationship must be established, during which the miner had 125 working days); *Armco, Inc.*, 277 F.3d at 474-75 (recognizing the 2001 amendments to the regulations require a one-year employment relationship during which the miner worked 125 days to establish a year of employment); *Clark*, 22 BLR at 1-280. *If the threshold one-year period is met*, the ALJ must then determine whether the miner

[5] The ALJ observed that Employer need not prove that Barrett is financially capable of paying benefits because the district director did not issue a statement pursuant to 20 C.F.R. §725.495(d) for Barrett and stated in the Proposed Decision and Order that Barrett was insured, suggesting it is financially capable of paying benefits. Decision and Order at 25 n. 21; Director's Exhibit 44 at 12.

worked for at least 125 working days within that one-year period.[6] 20 C.F.R. §725.101(a)(32)(emphasis added). Proof that a miner worked at least 125 days or that a miner's earnings exceeded the industry average for 125 days of work in a given year, however, does not satisfy the requirement that such employment occurred during a 365-day period and therefore, by itself, does not establish one full year of coal mine employment as defined in the regulations. *See Clark*, 22 BLR at 1-281.

The Miner's Employment History forms from his first three prior claims reflect the Miner worked for Barrett from January 1982 through July 1982, while his Employment History forms from his previous claim and the current claim indicate he worked for Barrett in 1982 without specifying a specific time frame. Director's Exhibits 1 at 75; 2 at 127; 3 at 138; 4 at 2; 7 at 2. The Miner's Social Security earnings records (SSER) reflect he worked for two employers in 1982. Director's Exhibit 10 at 6. The Miner's pension calculation worksheet for 1982 reflected he worked 1,177 hours, suggesting less than a full year of coal mine employment. Director's Exhibit 1 at 59. Considering all of the Miner's Employment History forms, his 1982 SSER, and his pension calculation worksheet for 1982, the ALJ found the Miner did not work for Barrett for at least one year. Decision and Order at 26-27.

Other than simply pointing to the Sixth Circuit's decision in *Shepherd* and an unpublished Sixth Circuit case following it, Employer identifies no other error in the ALJ's finding. As it is rational, supported by substantial evidence, and in accordance with Fourth Circuit law, we affirm the ALJ's conclusion that Employer is the responsible operator, as it failed to establish a more recent operator employed the Miner for at least one year. 20 C.F.R. §§725.494, 725.495; *Daniels Co.*, 479 F.3d at 330-31, 334, 336; *Armco, Inc.*, 277 F.3d at 474-75; *Clark*, 22 BLR at 1-280; Decision and Order at 26-27.

Responsible Insurance Carrier

Patriot was initially another Peabody Energy subsidiary. Director's Brief at 2. In 2007, after the Miner ceased his coal mine employment with Sterling, Peabody Energy transferred a number of its other subsidiaries, including Sterling, 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*. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who

[6] If the threshold one-year period is met, "it must be presumed, in the absence of evidence to the contrary, that the miner spent 125 working days in such employment[,]" in which case the miner would be entitled to credit for one full year of employment. 20 C.F.R. §725.101(a)(32)(ii).

worked for Sterling, 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 Sterling when Peabody Energy owned and provided self-insurance to that company. *Id.*

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 Black Lung Disability Trust Fund (Trust Fund) 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 Clause;[7] (2) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (3) by 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; (4) the DOL released Peabody Energy from liability; (5) the Director is equitably estopped from imposing liability on Peabody Energy; (6) 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; (7) the regulatory scheme whereby the district director determines the liability of a responsible carrier and its operator, while also administering the Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing; (8) 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act and the Administrative Procedure Act; and (9) the ALJ's reliance on 20 C.F.R. §§725.495(a)(2)(i) and 725.493(b)(2) is misplaced.[8] Employer's Brief at 13-49 (unpaginated). Employer further 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.*

[7] Employer first challenged the authority of the district director after the claim had already been transferred to the Office of Administrative Law Judges, at the hearing before the ALJ on June 23, 2021. Hearing Transcript at 6.

[8] Employer also states it intends to "preserve" its "ability to challenge" Black Lung Benefits Act (BLBA) Bulletin No. 16-01 as an invalid rule. Employer's Brief at 45-46 (unpaginated). Employer generally argues Bulletin No. 16-01 contradicts liability rules under the Act, was issued without notice and comment, and violates the Administrative Procedure Act; Employer also contends the Department of Labor acted arbitrarily and capriciously by not following its own self-insurance regulations. *Id.* Apart from one sentence summarizing its arguments, Employer has not set forth sufficient detail to permit the Board to consider the merits of these issues. *See* 20 C.F.R. §802.211(b); *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).

The Board has previously considered and rejected these and similar 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.*, 25 BLR 1-301, 1-308-18 (2022); and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-295-99 (2022) under the same dispositive facts. For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments.[9] Thus, we affirm the ALJ's determination that Peabody Energy is the responsible carrier and is liable for this claim.[10] *See* Decision and Order at 28-32.

Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

In determining whether Claimant has invoked the irrebuttable presumption, the ALJ must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *Scarbro*, 220 F.3d at 255-56; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The ALJ found the x-ray evidence supports finding complicated pneumoconiosis while the computed tomography (CT) scans, the Miner's hospital and treatment records, and medical opinions warranted little weight. Decision and Order at 6-17. Weighing the evidence together, she gave greatest probative weight to the positive x-ray evidence, found

[9] Contrary to Employer's argument, the ALJ did not rely on 20 C.F.R. §§725.493(b)(2) and 725.495(a)(2) to determine Peabody Energy is liable. Rather, she determined Peabody Energy is liable for this claim as Sterling's self-insurer, not as the responsible operator. *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-316 n.19 (2022); Decision and Order at 28-32; Employer's Brief at 36-38 (unpaginated).

[10] Employer states that it wants to "preserve" its argument that the ALJ violated its due process rights because she "cut off" discovery "prematurely." Employer's Brief at 46-48 (unpaginated). But it neither asks the Board to address this issue nor sets forth any argument that would permit our review. *Cox*, 791 F.2d at 446-47; *Sarf*, 10 BLR at 1-120-21; 20 C.F.R. §802.211(b).

Claimant established complicated pneumoconiosis, and that Claimant had invoked the irrebuttable presumption. *Id*. at 17.

X-ray Evidence

The ALJ considered four readings of three x-rays dated November 16, 2017, November 6, 2019, and August 16, 2020. Decision and Order at 8-10. Drs. DePonte and Crum, each of whom is a dually qualified Board-certified radiologist and B reader, read the November 16, 2017 x-ray as positive for complicated pneumoconiosis, and there were no negative readings of this film.[11] Decision and Order at 9-10; Director's Exhibits 16, 24. Dr. Zaldivar provided the sole reading of the November 6, 2019 x-ray, finding it negative for complicated pneumoconiosis. Decision and Order at 10; Employer's Exhibit 1. Dr. DePonte provided the sole reading of the August 16, 2020 x-ray, finding it positive for complicated pneumoconiosis. Decision and Order at 10; Claimant's Exhibit 1.

The ALJ credited the two positive x-rays over the one negative x-ray because Dr. Zaldivar, unlike Drs. DePonte and Crum, is not a dually qualified radiologist.[12] Decision and Order at 10. Because the ALJ performed both a qualitative and quantitative assessment of the x-ray evidence, and gave permissible reasons for the weight accorded the conflicting readings, we affirm her finding that the x-ray evidence, considered in isolation, supports finding complicated pneumoconiosis at 20 C.F.R §718.304(a). *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); Decision and Order at 10; Director's Exhibits 16, 24; Claimant's Exhibit 1; Employer's Exhibit 1.

Medical Opinions, CT Scans, and Evidence as a Whole

Dr. Ratcliff read the February 8, 2018 CT scan as showing "innumerable tiny pulmonary nodules," which he characterized as stable and "appearing [to] conglomerate [into] masses in the upper lung zones." Director's Exhibit 15 at 1-2. He opined these findings were "most consistent with complicated pneumoconiosis" and showed "no

[11] The ALJ said she considered five readings; however, Dr. Gaziano, a B reader but not a Board-certified radiologist, reviewed the November 16, 2017 x-ray to assess its film quality only. Decision and Order at 9 n.10; Director's Exhibit 19.

[12] The ALJ noted Dr. Zaldivar is Board-certified in Internal Medicine and Pulmonary Disease, but is not a Board-certified radiologist, and has not been a B reader since 2018. Decision and Order at 10; Director's Exhibit 22 at 36.

significant change" from the Miner's January 13, 2017 CT scan.[13] *Id*. The ALJ found the February 8, 2018 CT scan supported a finding of complicated pneumoconiosis but gave it little probative weight since Claimant did not present evidence to establish CT scans are "medically acceptable and relevant" to establishing or refuting the presence of pneumoconiosis.[14] Decision and Order at 11, *citing* 20 C.F.R. §718.107(b).

The ALJ also considered three medical opinions. The ALJ gave little weight to the opinions of Drs. Habre and Werchowski that the Miner had complicated pneumoconiosis because she found their conclusions to be little more than a restatement of the positive x-ray evidence. Decision and Order at 15; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000) ("a mere restatement of an x-ray should not count as a reasoned medical judgment"); Director's Exhibit 16 at 2; Claimant's Exhibit 1 at 3. Similarly, the ALJ rejected Dr. Zaldivar's opinion that the Miner did not suffer from complicated pneumoconiosis because it was based on Dr. Zaldivar's negative x-ray reading, contrary to the ALJ's determination that the weight of the x-ray evidence was positive for the disease. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000) (a medical opinion based on a discredited x-ray is not probative evidence that the miner has pneumoconiosis).

Employer generally asserts the ALJ erred in rejecting Dr. Zaldivar's opinion because he reviewed all of the medical evidence, including the other x-ray readings of record, and thus his opinion was not based solely on his own negative interpretation of the Miner's x-ray and CT scan. Employer's Brief at 11-13 (unpaginated). However, the ALJ correctly and permissibly observed that Dr. Zaldivar relied on an x-ray which he admitted was of poor quality and made no attempt to reconcile his opinion that the Miner did not have complicated pneumoconiosis with Dr. DePonte's positive x-ray readings which Dr. Zaldivar reviewed in preparing his report. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc) (an ALJ may reject a medical opinion where he finds the doctor failed to adequately explain his diagnosis); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985) (ALJ must consider factors that tend to undermine the reliability of a physician's conclusions before accepting the medical opinion); Decision and Order at 15-

[13] This latter scan is not of record.

[14] The ALJ noted the record contained additional CT scans from the Miner's prior claims but properly declined to consider them as they predate the denial of the Miner's previous claim on August 11, 2016. 20 C.F.R. §725.309(c)(4); *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69, 1-74 (1997); Decision and Order at 11 n.12; Director's Exhibit 15 at 12, 15, 22-23.

16; Employer's Exhibit 1. We therefore affirm the ALJ's discrediting of Dr. Zaldivar's opinion on complicated pneumoconiosis.

Although the ALJ found Claimant did not establish complicated pneumoconiosis at 20 C.F.R. §718.304(c), she correctly observed that there is no credible or probative evidence to outweigh the positive x-ray evidence and thus concluded Claimant established the disease. Because the ALJ considered all the relevant evidence and her determination that the Miner had complicated pneumoconiosis is supported by substantial evidence, we affirm it. *See Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 255-56; *Melnick*, 16 BLR at 1-33-34. Thus, we affirm the ALJ's conclusion that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis and established a change in the applicable condition of entitlement. 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.304, 725.309.

We affirm, as unchallenged, the ALJ's finding that Claimant established the Miner's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Daniels Co.*, 479 F.3d at 337; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 20.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring:

Given the ALJ permissibly found the x-rays and evidence as a whole establish complicated pneumoconiosis, any error in her failure to address whether the treatment records Claimant submitted that include CT scans containing unequivocal diagnoses of complicated pneumoconiosis form a reliable basis to conclude CT scans are medically acceptable and relevant in this case under Section 718.107(b) is harmless. Decision and Order at 11-12, citing *Mullins v. ICG Hazard, LLC*, BRB Nos. 20-285 BLA and 20-0300 BLA (Aug. 31, 2021) (unpub.) (Rolfe, J., dissenting), *appeal pending*, No. 23-3027 (6th Cir.); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). So too her blanket

statement that "it is well established that more recent evidence is likely to reflect a miner's current condition" and presumably therefore entitled to greater weight because of its recency alone. Decision and Order at 19 (citation omitted).

JONATHAN ROLFE
Administrative Appeals Judge