U.S. Department of Labor

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

BRB No. 21-0626 BLA

JANICE P. MILLER (Widow of GARY MILLER) Claimant-Respondent v. EASTERN ASSOCIATED COAL, LLC and PEABODY ENERGY CORPORATION Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 5/17/2023 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theresa C. Timlin, 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; Andrea J. Appel, Counsel for Administrative Appeals),

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, ROLFE, JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits (2019-BLA-06018) rendered on a survivor's claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Eastern Associated Coal Company (Eastern) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier liable for benefits in this case. She also found Claimant[1] established 16.63 years of qualifying coal mine employment and that the Miner had a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the rebuttable presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). The ALJ further found Employer did not rebut the presumption and thus awarded benefits.

On appeal, Employer argues the ALJ erred in finding Eastern the responsible operator and Peabody Energy the liable carrier. It also contends she erred in failing to consider all the evidence. On the merits, Employer argues the ALJ erred in determining the length of the Miner's smoking history and concluding Employer failed to rebut the Section 411(c)(4) presumption.[3] Claimant responds in support of the award of benefits.

[1] Claimant is the surviving spouse of the Miner, who died on August 5, 2014. Director's Exhibit 12. Because the Miner was not entitled to benefits during his lifetime, Claimant is not eligible for derivative survivor's benefits at Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018). *See* Director's Exhibit 2.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was 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.

[3] Employer does not contest the ALJ's findings that Claimant established the Miner had 16.63 years of qualifying coal mine employment and a totally disabling respiratory impairment and therefore invoked the Section 411(c)(4) presumption. These findings are

The Director, Office of Workers' Compensation Programs (the Director), responds, urging rejection of Employer's responsible operator and liability arguments.

The Benefits Review 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.[4] 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, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed a miner." 20 C.F.R. §725.495(a)(1). Once the district director identifies a potentially liable operator,[5] that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits, or that another operator financially capable of assuming liability more recently employed the miner for at least one year. *See* 20 C.F.R. §725.495(c). If the operator finally designated as responsible is not the operator that most recently employed the miner, the regulations require the district director to explain the reason for such a designation. 20 C.F.R. §725.495(d).

The record establishes that Eastern was not the Miner's most recent coal mine employer. The Miner last worked for Eastern in 1973, with subsequent employment with Diamond Energy Corporation (Diamond Energy) and Eagle Delta Coal Company (Eagle Delta). Director's Exhibits 3-6. After revisions of the notice of claim, Eastern was ultimately identified as a potentially responsible operator, as self-insured by Peabody

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therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10-11, 28.

[4] 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); Decision and Order at 7; Hearing Transcript at 35; Director's Exhibit 6.

[5] For a coal mine operator to be a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator, the operator must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of not less than one year, the employment must have occurred after December 31, 1969, and the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

Energy, in the September 18, 2018 Notice of Claim. Director's Exhibit 51. Employer timely denied liability. Director's Exhibits 32, 34, 62, 63. While noting the Miner had employment subsequent to Eastern with Diamond Energy and Eagle Delta for more than one year,[6] the district director determined they were not insured or authorized to self-insure as of the Miner's last date of employment for each company. Director's Exhibits 18, 19.

In the final Schedule for the Submission of Additional Evidence (SSAE) designating Eastern as the responsible operator, the district director noted that while the Miner last worked for Eagle Delta, it was uninsured at the time of his last employment. Director's Exhibits 64. Employer continued to contest Eastern's designation as responsible operator before the district director and the ALJ. Director's Exhibits 66, 67, 77, 82; Hearing Transcript at 8; Employer's Closing Argument at 4-5; *see* 20 C.F.R. § 725.410(a)(3).

Employer argues the district director failed to adequately investigate whether Eagle Delta, the Miner's most recent employer, was capable of assuming liability. Employer's Brief at 3. Specifically, it contends the district director erroneously relied on a finding that Eagle Delta was not insured as of April 3, 1992, when the only evidence of the record provides that the Miner's last day of employment with Eagle Delta was on February 18, 1992. *Id.* at 3-5. The Director argues that once Eastern was identified as a potentially liable operator,[7] the burden shifted to Employer to demonstrate that Eagle Delta was capable of assuming liability or Employer was incapable of assuming liability and it failed to do so. Director's Response at 6-8. We agree with the Director's argument.

As the ALJ found, the Director holds the initial burden to identify potential liable operators; however, once identified, the burden shifted to the Employer, who is presumed capable of assuming liability. 20 C.F.R. §§725.408(a)(3), 725.494, 725.495(b); Decision and Order at 59-60. Further, the record contains the required statement from the district director indicating that Eagle Delta, a subsequent operator, was not insured on the Miner's last date of employment, determined to be April 3, 1992. 20 C.F.R. §725.495(d); Decision and Order at 60; Director's Exhibit 19. This statement is prima facie evidence that the company is incapable of assuming liability. 20 C.F.R. §725.495(d); Director's Response at 6; Decision and Order at 60. As the ALJ found, Employer put forth no evidence that

[6] The record notes other employment after the Miner worked for Eastern; however, all such employment either was for less than one year or did not constitute coal mine employment. Director's Exhibits 5-7, 64; Hearing Transcript at 34; Decision and Order at 9-10.

[7] Employer does not contest that it meets the criteria of a potentially liable operator; thus, this finding is affirmed. *See Skrack*, 6 BLR at 1-711; Decision and Order at 59.

Eagle Delta was insured or otherwise capable of assuming liability during the relevant time frame. Decision and Order at 60-61.

Moreover, the ALJ specifically considered the work history Claimant submitted, the evidence Employer contends established that the Miner's last date of employment with Eagle Delta was February 18, 1992; she found this evidence to be inconsistent and unreliable. Decision and Order at 9; Director's Exhibits 4 and 5; Employer's Brief at 4-5. Employer does not challenge this credibility finding. Thus, the ALJ permissibly found Employer failed to demonstrate that April 3, 1992 was not the Miner's last day of employment or otherwise provide evidence that Eagle Delta was capable of assuming liability.[8] Decision and Order at 60-61. Further, Employer has not argued that it is incapable of assuming liability. *Id.* at 61. Thus, we affirm the ALJ's finding that Eastern is properly named as the responsible operator. *See* 20 C.F.R. §725.495(c); Decision and Order at 61.

Responsible Carrier

While not contending it is incapable of assuming liability,[9] Employer alleges Peabody Energy is not the correct carrier for this claim and that Patriot Coal Corporation (Patriot) should have been named the responsible carrier. Employer's Brief at 18-30. Thus, it contends liability should transfer to the Black Lung Disability Trust Fund (the Trust Fund). *Id.* at 30.

Patriot was initially another Peabody Energy subsidiary. Director's Exhibit 59. In 2007, after the Miner ceased his coal mine employment with Eastern, Peabody Energy transferred a number of its subsidiaries, including Eastern, to Patriot. *Id.* That same year, Patriot was spun off as an independent company. *Id.* In 2011, the Department of Labor (DOL) authorized Patriot to insure itself and its subsidiaries, retroactive to July 1, 1973.

[8] While Employer argues February 18, 1992, should have been considered the date of the Miner's last date of employment, it has not argued or pointed to any evidence demonstrating that Eagle Delta was insured on that date.

[9] Employer argues there is no evidence of record that Peabody Energy Corporation (Peabody Energy) was the self-insurer of Eastern Associated Coal Company (Eastern). Employer's Brief at 20, 23. However, the Notice of Claim specifically identifies Peabody Energy as Eastern's self-insurer, Director's Exhibit 51, and other arguments Employer raises apparently acknowledge that Peabody Energy was the self-insurer of Eastern at the time of the Miner's last date of employment. *See, e.g.*, Employer's Brief at 21-23 (arguing the correct insurer is not the insurer of Eastern employees on their last date of employment).

Director's Exhibit 58. 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 23. 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, as the ALJ held. Decision and Order at 61.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated the self-insured carrier in this claim and thus the Trust Fund, not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy: (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; (4) the Director is equitably estopped from imposing liability on the company; and (5) because Patriot cannot pay benefits, Black Lung Benefits Act Bulletin Nos. 12-07 and 14-02 place liability on the Trust Fund. Employer's Brief at 18-22. Employer also 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.[10] Employer's Brief at 23-30.

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 Eastern and Peabody Energy are the

[10] Employer also alleges the ALJ erred in failing to name the Black Lung Disability Trust Fund (the Trust Fund) as a party to this claim, and that the district director failed to act on its request for reconsideration of the Proposed Decision and Order (PDO). Employer's Brief at 20. The Director represents the Trust Fund's interests and is a party to all claims under the Act. 30 U.S.C. §932(k); *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 (1979); Director's Brief at 11. Further, while Employer requested reconsideration of Peabody Energy'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 77. The district director forwarded the claim to the OALJ as Employer requested. Director's Exhibit 82.

responsible operator and carrier, respectively, and are liable for this claim. Decision and Order at 61.

Evidentiary Issue

At the hearing of this matter, Employer requested permission to obtain a rehabilitative autopsy report from Dr. Swedarsky, addressing the report of Dr. Perper, and to submit it post-hearing. Hearing Transcript at 11-12, 15. After discussing whether such an opinion would fit within Employer's evidentiary limitations,[11] the ALJ granted Employer's motion, advising that Dr. Swedarsky's opinion, as a rehabilitative report, must be limited to addressing Dr. Perper's opinion. *Id.* at 15-26.

After the hearing, the ALJ reviewed Dr. Swedarky's June 22, 2020 autopsy report and September 8, 2020 supplemental report and issued an evidentiary order excluding the supplemental report. Evidentiary Order; Employer's Exhibit 3. She found while Dr. Swedarsky's June 22, 2020 report was a "valid rebuttal autopsy report," his supplemental September 8, 2020 report was "not as advertised." Evidentiary Order; *see* Decision and Order at 5 n.3. She indicated that Dr. Swedarsky's September 8, 2020 report had been admitted at the hearing based on her understanding that Employer was relying on this report as rehabilitative evidence addressing Dr. Perper's opinion. Evidentiary Order; Decision and Order at 5 n.3; Hearing Transcript at 25. However, Dr. Swedarsky's September 8, 2020 report did not address Dr. Perper's opinion, but rather considered evidence beyond that of a rebuttal or rehabilitative autopsy report, including CT scan evidence and treatment records, which the ALJ found turned the report into an affirmative medical opinion. Evidentiary Order; Decision and Order at 5 n.3. The ALJ thus determined the September 8, 2020 report was inadmissible as rehabilitative evidence and further exceeded the evidentiary limitations at 20 C.F.R. §725.414(a)(3)(i) because Employer had already designated its two affirmative medical opinions. Evidentiary Order; Decision and Order at 5 n.3.

Employer contends the ALJ erred by failing to consider the rehabilitative report of Dr. Swedarsky, dated December 8, 2020, that it submitted post-hearing. Employer's Brief at 6; Employer's Exhibit 11. It maintains the ALJ mistakenly considered the September 8, 2020 supplemental report, submitted prior to hearing, to be the rehabilitative report she had granted Employer permission to submit post-hearing. Employer's Brief at 7; Hearing

[11] Employer had already designated two affirmative medical opinions by Drs. Basheda and Rosenberg, an affirmative autopsy report by Dr. Oesterling, and a rebuttal autopsy report by Dr. Swedarsky. *See* 20 C.F.R. §725.414; Director's Exhibit 16; Employer's Exhibits 1-3, 9, 10; Employer's Evidence Summary Form.

Transcript 25-26. Employer argues her failure to consider the December 8, 2020 report is not harmless as it undermines her analysis on all the relevant issues. Employer's Brief at 7-8. Claimant argues the ALJ's failure to consider Dr. Swedarsky's December 8, 2020 report is harmless as his opinions are no different from his initial report. Claimant's Response at 10. Employer's argument has merit.

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

As Employer argues, it submitted Dr. Swedarsky's rehabilitative report, dated December 8, 2020, which the ALJ failed to consider. Employer's Exhibit 11. We agree the ALJ erroneously considered Dr. Swedarsky's September 8, 2020 supplemental report to be the rehabilitative report she allowed to be submitted post-hearing. Because her evidentiary rulings are not consistent with the record and result in potentially excluding relevant evidence, we must remand the claim for her to resolve the evidentiary issue in the first instance.[12] *Blake*, 24 BLR at 1-113; *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (failure to consider all relevant evidence requires remand).

We disagree with Claimant's argument that the ALJ's failure to consider Dr. Swedarsky's December 8, 2020 report is harmless error. The proposed rehabilitative report addresses Dr. Perper's opinion, which the ALJ previously allowed in her ruling at the hearing. Employer's Exhibit 11. Further, it is the role of the ALJ, as the trier-of-fact, to weigh the evidence, draw appropriate inferences, and determine credibility. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). We remand for this purpose as it is properly the responsibility of the ALJ, not the Board. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ's function as trier of fact is to weigh the evidence); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012).

[12] Employer does not contest the ALJ's exclusion of Dr. Swedarsky's September 8, 2020 report as exceeding evidentiary limitations; thus, this ruling is affirmed. *See Skrack*, 6 BLR at 1-711; Evidentiary Order; Decision and Order at 5 n.3.

Consequently, we vacate the ALJ's finding that Employer failed to establish rebuttal of the Section 411(c)(4) presumption and thus the award of benefits.[13] On remand, the ALJ must address whether Employer's post-hearing evidentiary submission of Dr. Swedarsky's December 8, 2020 report should be admitted into the record under 20 C.F.R. §725.414 given her ruling at the hearing. Once the evidentiary record is complete, the ALJ must reconsider whether Employer is able to rebut the Section 411(c)(4) presumption.[14] 20 C.F.R. §718.305(d).

Smoking History

While we remand the claim for further consideration, in the interest of judicial economy, we address the ALJ's findings regarding the Miner's smoking history.

The ALJ noted the only evidence of record relevant to the Miner's smoking history was provided in the Miner's treatment records. Decision and Order at 3. She summarized the conflicting accounts, which ranged from a history of no smoking to as many as three packs a day for forty years. *Id*. She found the accounts the Miner provided to Dr. Porterfield when seeking treatment and when performing pulmonary function tests to be the most reliable and considered the records which noted no smoking history to be in error or mistake. *Id.* at 3. Considering the most reliable accounts, she found the Miner had an "extensive" smoking history of "at least" thirty pack-years. *Id.* at 3-4. Employer contends the ALJ's finding regarding the Miner's smoking history is a "gross underassessment." Employer's Brief at 9-10. We disagree with that contention.

The ALJ specifically relied upon the evidence Employer argues supports a greater smoking history. She noted the accounts ranged from the Miner smoking between one and three packs of cigarettes per day for between twenty and forty years. Decision and Order at 3. Her specific conclusion is primarily based on the least of these histories (one and a half packs a day for twenty years); however, she did not limit her finding to only thirty pack years, noting the Miner's smoking history was "extensive" and he smoked "at least" that long. *Id.* at 3-4.

[13] The parties do not challenge the ALJ's findings that the hospitalization and treatment records aid Employer in rebutting clinical pneumoconiosis, but do not aid it in rebutting legal pneumoconiosis. Decision and Order at 55. Thus, those findings are affirmed. *Skrack*, 6 BLR at 1-711.

[14] Thus, we decline to address, as premature, Employer's arguments that the ALJ erred in her credibility findings regarding rebuttal of the Section 411(c)(4) presumption. Employer's Brief at 10-18.

The ALJ has considerable discretion in assessing the evidence. *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985) (length and extent of a miner's smoking history is a factual determination for the ALJ). Because it is based on substantial evidence, we affirm the ALJ's finding that the Miner's smoking history was "extensive" and for "at least" thirty pack years. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order at 3-4.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge