U.S. Department of Labor

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

BRB No. 20-0168 BLA

CHESTER S. WHITE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY, LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 11/14/2022
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

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

Cynthia Liao (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2018-BLA-5360) rendered on a claim filed on March 2, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ initially found Heritage Coal Company (Heritage), self-insured through its parent company Peabody Energy Corporation (Peabody Energy), is the responsible operator liable for the payment of benefits. She credited Claimant with sixteen years of underground coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She thus found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer contends the district director and claims examiner, the Department of Labor (DOL) officials who initially process claims, are inferior officers who were not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[2] It further argues the ALJ erred in finding it is liable for the payment of benefits. Alternatively, Employer asserts the ALJ erred in finding it did not

[1] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has 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.

[2] 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 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.

rebut the Section 411(c)(4) presumption.[3] Both Claimant and the Director, Office of Workers' Compensation Programs respond in support of the award of benefits. The Director also urges the Benefits Review Board to affirm the ALJ's finding Employer is responsible for the payment of 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.[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/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 Heritage employed Claimant; thus we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 6-12. Patriot Coal Corporation ("Patriot") was initially another Peabody Energy subsidiary. Director's Exhibit 17. In 2007, after Claimant 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. *Id*. 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*.; *see* Director's Brief at 7. 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 that company, as the ALJ held. Decision and Order at 6-12.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated the self-insured carrier in this claim and thus the Black Lung Disability Trust Fund (the Trust Fund), not Peabody Energy, is responsible for the payment

[3] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established sixteen years of underground coal mine employment, total disability, and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

of benefits following Patriot's bankruptcy. Employer's Brief at 6-39. It argues the ALJ erred in finding Peabody Energy liable for benefits because: (1) the district director is an inferior officer not properly appointed under the Appointments Clause;[5] (2) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) 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; (5) the DOL released Peabody Energy from liability; (6) the Director is equitably estopped from imposing liability on the company; and (7) the DOL violated its due process rights by not maintaining adequate records with respect to Patriot's bond and failing to comply with its duty to monitor Patriot's financial health. *Id*. It maintains that a separation agreement – a private contract between Peabody Energy and Patriot – released it from liability and the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. *Id*.

The Board has previously 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), *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.*, BLR , BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments.

Employer also argues the ALJ erred in excluding the depositions of David Benedict and Steven Breeskin, two former Department of Labor (DOL) Division of Coal Mine Workers' Compensation officials. Employer's Brief at 12-23. The ALJ acknowledged Employer had given notice to the district director that it anticipated calling Mr. Breeskin and Mr. Benedict as liability witnesses, but she concluded Employer failed to depose them until the case was before the Office of Administrative Law Judges and thus excluded the evidence on this basis. January 22, 2019 Order at 7-9; *see* Hearing Tr. at 22-23 (ALJ reiterating her holdings from the January 22, 2019 Order). Alternatively, she found the testimony is not relevant, is protected by the deliberative process privilege, and would be unduly burdensome. January 22, 2019 Order at 10-14; Hearing Tr. at 22-23.

Initially, we note Employer does not specifically challenge the ALJ's finding that testimony from Messrs. Benedict and Breeskin is not admissible in this case because they would be addressing issues protected by the deliberative process privilege. January 22, 2019 Order at 11-12; Hearing Tr. at 17-24. Thus, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). However, we note that, because of the following, any error in this regard was harmless.

[5] Employer raised this argument for the first time in this claim during the March 27, 2019 hearing. Hearing Transcript at 6.

Employer argues the ALJ erred in finding the testimonies of Messrs. Benedict and Breeskin is not relevant. Employer's Brief at 17-18. It argues this evidence is relevant to establishing that "the actions taken by the [DOL] subsequent to [Claimant's] last date of exposure should operate to relieve [Peabody Energy] of liability." Employer's Brief at 16-23. In *Bailey*, the employer moved to submit the same evidence for the purposes of establishing Peabody Energy was improperly designated as the responsible carrier for claims that Patriot had been authorized to self-insure. The Board held the depositions of Messrs. Benedict and Breeskin do not support the argument that DOL released Peabody Energy from liability when it authorized Patriot to self-insure and released a letter of credit Patriot financed under Peabody Energy's self-insurance program. *Bailey*, BLR , BRB No. 20-0094 BLA, slip op. at 15 n. 17.[6] Thus we reject Employer's argument that the ALJ abused her discretion in excluding this evidence[7] as not relevant in the case at bar.[8] *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); January 22, 2019 Order at 11-12; Hearing Tr. at 17-24; Employer's Brief at 12-23.

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.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[9] or "no part of [his]

[6] This determination was necessary to the conclusion that Peabody was liable for benefits. *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 15 n.17 (Oct. 25, 2022).

[7] Employer states that it wants to "preserve" its argument that its due process rights were violated because the ALJ "cut off" discovery "prematurely." Employer's Brief at 37. Employer neither asks the Board to address this issue nor sets forth any argument that would permit our review. *See Cox v. Director*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b).

[8] Because the ALJ provided valid reasons for excluding the depositions of Messrs. Benedict and Breeskin, we need not address Employer's argument that her other bases for excluding this evidence are erroneous. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Employer's Brief at 12-23.

[9] "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 that is significantly related to, or substantially aggravated by, dust exposure in coal mine

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.

Clinical Pneumoconiosis

To disprove clinical pneumoconiosis, Employer must establish Claimant does not have any of the 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).

Although Employer concedes "the x-ray evidence standing alone would tend to indicate the existence of clinical pneumoconiosis," it argues the ALJ failed to consider the medical opinion evidence regarding clinical pneumoconiosis. Employer's Brief at 40-42. We disagree.

Dr. Zaldivar initially stated Claimant's x-ray is consistent with pulmonary fibrosis that is not caused "by coal workers' pneumoconiosis, but rather [fibrosis] caused by smoking, or [fibrosis that is] idiopathic" in nature. Claimant's Exhibit 1 at 2. He subsequently stated, however, that because he does not "have any other information and the x-ray could possibly be the result of coal workers' pneumoconiosis," he had to "classify [Claimant's] condition as one of clinical pneumoconiosis." *Id*. at 3. He further stated Claimant "has clinical pneumoconiosis with pulmonary impairment." *Id*.

Dr. Rosenberg opined Claimant "potentially has clinical [coal workers' pneumoconiosis]." Claimant's Exhibit 3 at 5. He stated Claimant "has profound parenchymal changes, category 3, which are consistent with a coal mine dust related disorder," but the "entire picture can be related to smoking with resultant emphysema and smoking-related interstitial lung disease." *Id*. He concluded that Claimant "potentially has a component of clinical coal workers' pneumoconiosis." *Id*. at 6.

The ALJ fully summarized the opinions of Drs. Zaldivar and Rosenberg. Decision and Order at 21-24. She permissibly found their opinions equivocal on the issue of clinical pneumoconiosis, entitled to reduced weight, and thus not supportive of Employer's rebuttal

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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).

burden.[10] *U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 389 (4th Cir. 1999); Decision and Order at 24. Because it is supported by substantial evidence, we affirm the ALJ's finding that the medical opinion evidence does not rebut the presumption of clinical pneumoconiosis, and the evidence as a whole does not rebut clinical pneumoconiosis.[11] *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); 20 C.F.R. §718.305(d)(1)(i)(B).

Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[12] *See* 20 C.F.R. §718.305(d)(1)(i). We thus affirm her determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing Claimant does not have pneumoconiosis.

[10] The ALJ found Dr. Porterfield did not discuss clinical pneumoconiosis. Decision and Order at 24. Employer does not challenge this finding. Thus we affirm it. *Skrack*, 6 BLR at 1-711.

[11] We agree with the Director that the ALJ's statement that Employer "has met its burden of proof to establish that [C]laimant's clinical pneumoconiosis did not arise out of coal mine employment" is a scrivener's error that does not require remand. Decision and Order at 25; *see U.S. v. Hython*, 443 F.3d 480, 488 (6th Cir. 2006); Director's Brief at 26. As Claimant had more than ten years of coal mine employment, he has invoked the presumption his pneumoconiosis arose out of coal mine employment and the burden shifted to Employer to establish clinical pneumoconiosis did not arise out of coal mine employment. 20 C.F.R.§ 718.203(b). The ALJ found there is no evidence of record indicating there is "another established cause" of clinical pneumoconiosis, and further rejected, as equivocal, the opinions of Drs. Rosenberg and Zaldivar that the irregularities on Claimant's x-rays may be due to smoking or are idiopathic. Decision and Order at 24.

[12] Employer argues the ALJ applied the stricter disability causation standard in finding it failed to rebut the presumption of legal pneumoconiosis by requiring it to establish no part of Claimant's pulmonary impairment was caused by coal mine dust exposure. Employer's Brief at 42-43. Because the ALJ's determination that Employer did not disprove clinical pneumoconiosis precludes a finding that Claimant does not have pneumoconiosis, we need not address Employer's argument that the ALJ erred in finding it failed to rebut legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Larioni*, 6 BLR at 1-1278.

Disability Causation

The ALJ also found Employer did not rebut the presumption by establishing "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); *see* Decision and Order at 25. Because Employer raises no specific arguments on disability causation, we affirm the ALJ's determination that Employer failed to prove no part of Claimant's total disability was caused by pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 25.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge