U.S. Department of Labor

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

BRB No. 20-0261 BLA

JUNIOR L. SHANKS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATON	)	DATE ISSUED: 11/23/2022
	)	
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 Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for Claimant.

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

Jeffrey S. Goldberg (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, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jerry R. DeMaio's Decision and Order Awarding Benefits (2018-BLA-05117) rendered on a claim filed on April 15, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Heritage Coal Company (Heritage) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier liable for the payment of benefits. He credited Claimant with at least twenty years of surface coal mine employment in conditions substantially similar to those in an underground mine and found Claimant has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus 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). The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the district director, the Department of Labor (DOL) official who initially processes claims, is an inferior officer who was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[2] It also contends the ALJ erred in excluding documentary evidence and deposition transcripts

[1] Section 411(c)(4) of the Act 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 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.

purportedly relevant to Employer's liability. Finally, it argues the ALJ erred in finding it liable for the payment of benefits.[3]

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 arguments. He also argues the ALJ did not err in excluding documentary evidence and deposition testimony pertaining to Peabody Energy's liability, but agrees with Employer that the ALJ erred in failing to adequately consider Employer's liability arguments.

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).

Evidentiary Issues

We first address Employer's evidentiary arguments. Because an ALJ exercises broad discretion in resolving procedural and evidentiary matters, *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc), a party seeking to overturn an ALJ's disposition of a procedural or evidentiary issue must establish the ALJ's action represented an abuse of discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

Employer first argues the ALJ erred in excluding documentary evidence marked Employer's Exhibits 13 through 19 relevant to the liability issue. Employer's Brief at 2-7. In a November 1, 2018 Order, the ALJ excluded Employer's Exhibits 13 through 19 because he found they concerned the responsible operator/carrier issue, were not submitted to the district director, and Employer did not establish extraordinary circumstances for failing to submit them. *See* 20 C.F.R. §725.456(b)(1); Nov. 1, 2018 Order at 2.

Employer argues the ALJ erred in excluding Employer's Exhibits 13 through 19 because (1) evidence pertaining to the carrier's liability is not subject to the limitations set

[3] We affirm, as unchallenged, the ALJ's finding Claimant established entitlement to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 7, 8.

forth at 20 C.F.R. §725.456(b)(1);[5] and (2) in determining whether extraordinary circumstances exist, an ALJ must first determine if Employer "actually obtained" the documents while the claim was before the district director, as such documents are subject to a more lenient good cause standard for admission.[6] Employer's Brief at 2-7. 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 11-13 (Oct. 25, 2022) and *Graham v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0221 BLA, slip op. at 6-7 (June 23, 2022). For the reasons set forth in *Bailey* and *Graham*, we reject Employer's arguments.

Employer also argues the ALJ abused his discretion in denying its request to obtain and submit testimony from two former DOL Division of Coal Mine Workers' Compensation employees, David Benedict and Steven Breeskin.[7] Employer's Brief at 2-7. At the October 16, 2018 hearing, Employer requested subpoenas to obtain deposition testimony from these individuals. Hearing Transcript at 8; *see* Nov. 1, 2018 Order at 2-3. It alternatively requested that, if the ALJ denied the subpoenas, he should allow Employer to submit any deposition transcripts it was able to obtain from other black lung cases.

[5] Employer argues 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act (Longshore Act) and the Administrative Procedure Act (APA) insofar as Congress incorporated those administrative schemes into the Act. Employer's Brief at 43-43; *see* 30 U.S.C. § 932(a). It argues 20 C.F.R. §725.456(b)(1) divests the ALJ of his authority under the Longshore Act, 33 U.S.C. §919(d), and the APA, 5 U.S.C. §556(d), to receive evidence and adjudicate issues de novo. Employer's Brief at 43-43. We reject this argument. As the Director correctly argues, 30 U.S.C. §932(a) incorporated the provisions of the Longshore Act and the APA to black lung claims "except as otherwise provided . . . by regulations of the Secretary." 30 U.S.C. §932(a). Thus the Secretary of Labor has the "authority to adopt regulations that differ from the APA and the Longshore Act." Director's Brief at 23, *citing Nat'l Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001), *rev'd in part on other grounds*, *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 869 (D.C. Cir. 2002).

[6] Employer also states it wants to "preserve" its argument that its due process rights were violated because the ALJ "cut off" discovery "prematurely." Employer's Brief at 38-40. Employer neither asks the Board to address this issue nor sets forth any argument that would permit our review. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

[7] In response to the district director's Schedule for the Submission of Additional Evidence, Employer identified potential liability witnesses, including Mr. Breeskin and Mr. Benedict. Director's Exhibit 39.

Hearing Transcript at 8. The ALJ denied the subpoenas as an untimely discovery request. Nov. 1, 2018 Order at 2-3. He informed the parties, however, that he would keep the record open post-hearing until December 7, 2018, for the submission of evidence. Hearing Transcript at 8.

On December 13, 2018, six days after the ALJ's deadline for the close of the record post-hearing, Employer notified him it had actually deposed Mr. Benedict and Mr. Breeskin as part of a different black lung claim. Employer's Dec. 13, 2018 Motion for Extension of Proof Time (Motion for Extension). It requested the ALJ further keep the record open until January 7, 2019, so it could submit the deposition transcripts, asserting the depositions are relevant to its liability in the present claim. Motion for Extension. The ALJ denied Employer's request to keep the record open as untimely. January 8, 2019 Order.

Employer contends the ALJ abused his discretion by denying its subpoenas for the deposition testimony of Mr. Breeskin and Mr. Benedict, then denying its request for an additional extension of time to submit the deposition transcripts it obtained from other black lung cases. Employer's Brief at 2-5. It argues the ALJ had already held the record open until after the date of the scheduled depositions for the submission of other evidence. *Id*. Further, it argues the ALJ treated the requested deposition testimony differently than the other evidence in this claim that was admitted post-hearing. *Id.* at 4. We disagree.

In finding Employer's request for the subpoenas untimely, the ALJ considered the notice provided in his pre-hearing order that post-hearing submissions were highly discouraged and would not be admitted absent "extraordinary circumstances." Nov. 1, 2018 Order at 2-3; Notice of Assignment, Hearing, and Pre-Hearing Order (Pre-hearing Order) at 2, 7. The ALJ also indicated discovery was to end twenty-five days prior to the hearing, yet Employer did not submit its request for the subpoenas until the day of the hearing. Nov. 1, 2018 Order at 2-3; Pre-hearing Order at 3. Further, the ALJ found that the witnesses were known to Employer well before the hearing date, as evidenced by their scheduled depositions in other cases;[8] thus, the subpoenas could have been timely requested. Nov. 1, 2018 Order at 2-3. Therefore, the ALJ found Employer did not make any showing to excuse its untimely subpoena request. *Id.*

Employer argues the ALJ treated the evidence submitted post-hearing disparately, without adequate basis, apparently referring to the ALJ's admitting the post-hearing depositions of Drs. Selby and Tuteur. Employer's Brief at 2-5; *see* Dec. 26, 2018 Briefing

[8] Further, as noted above, Employer had identified them as potential liability witnesses before the district director. Director's Exhibit 39.

Order. The record reflects, however, that Employer gave the ALJ notice of its late submission of these medical depositions before the October hearing, in contrast to its liability depositions. In a September 21, 2018 letter to the ALJ, Employer requested an extension of time to December 1, 2018 "to submit Drs. Tuteur's and Selby's deposition transcript[s]" because it "recently completed Dr. Selby's deposition and [had] scheduled Dr. Tuteur's evaluation to occur" on November 1, 2018. Sept. 21, 2018 Letter to ALJ. In an October 11, 2018 joint pre-hearing statement, Employer informed the ALJ that Dr. Tuteur's deposition was scheduled for November 1, 2018, subsequent to the October 16, 2018 hearing. *See* Joint Pre-Hearing Statement. In an October 12, 2018 telephone conference between the ALJ and the parties, Employer indicated Dr. Tuteur's deposition had to be "pushed back because he is going to be out of the country for a period of time." Oct. 12, 2018 Telephone Transcript at 5-6. Finally, no party objected to the late submission of Drs. Selby's and Tuteur's depositions.

In contrast, Employer did not file the subpoenas for the testimony of Mr. Breeskin and Mr. Benedict until the day of the hearing, and the Director objected to their issuance. Hearing Transcript at 8; Nov. 1, 2018 Order at 2-3. Although the ALJ gave the parties an opportunity to submit evidence post-hearing until December 7, 2018, Employer did not apprise the ALJ that it needed additional time to submit the deposition transcripts of Mr. Breeskin and Mr. Benedict until December 13, 2018,[9] after the deadline the ALJ set. Hearing Transcript at 8; Dec. 13, 2018 Motion for Extension.

Given the ALJ's pre-hearing order, and his findings that Employer was aware of the witnesses it wished to depose well before the hearing date and provided no excuse for untimely requesting the subpoenas, we see no abuse of discretion in the ALJ's ruling. *Dempsey*, 23 BLR at 1-63; *Blake*, 24 BLR at 1-113; Nov. 1, 2018 Order at 2-3. Further, we decline to hold the ALJ abused his discretion in allowing and admitting the unopposed, and previously-noticed, post-hearing depositions of Drs. Tuteur and Selby while denying Employer's untimely request for an extension of time to submit post-hearing depositions

[9] Employer acknowledges it "had scheduled the depositions of the requested deponents for December 4-6, 2018." Employer's Brief at 3.

of Mr. Breeskin and Mr. Benedict.[10] *Dempsey*, 23 BLR at 1-63; *Blake*, 24 BLR at 1-113; January 8, 2019 Order.[11]

Responsible Operator/Carrier

We next turn to Employer's arguments to support its contention that Peabody Energy was improperly designated as the responsible carrier.[12]

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[10] Employer also argues it "properly preserved" its right to depose Mr. Breeskin and Mr. Benedict under 20 C.F.R. §725.457(c)(1) by informing the district director they would be liability witnesses and their depositions should have been admitted once taken and submitted to the ALJ because the testimony was relevant to its theory regarding its liability in this case. Employer's Brief at 4-5. Whether Employer provided proper notice of liability witnesses to the district director is not pertinent to whether it timely pursued obtaining their testimony before the ALJ. Further, the relevancy of their testimony is not at issue given that the ALJ declined to issue subpoenas for their testimony because the request was untimely, and Employer failed to show extraordinary circumstances that would excuse its delay.

[11] Employer argues the ALJ erred in excluding the depositions of Mr. Breeskin and Mr. Benedict. Employer's Brief at 2-5. In *Bailey*, the same depositions were admitted and the Board held they do not support Employer's argument the Department of Labor (DOL) released Peabody Energy Corporation (Peabody Energy) from liability when it authorized Patriot Coal Corporation (Patriot) to self-insure and released a letter of credit Patriot financed under Peabody Energy's self-insurance program. *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 15 n. 17 (Oct. 25, 2022). Given the Board has previously held the depositions do not support Employer's argument, any error in excluding them here is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[12] Employer also asserts it "preserve[s]" its "ability to challenge" Black Lung Benefits Act (BLBA) Bulletin No. 16-01 as an invalid rule. Employer's Brief at 40. Employer generally argues Bulletin No. 16-01 contradicts liability rules under the Act, was issued without notice and comment, and violates the APA. *Id.* Employer's one-sentence summary of its arguments does not set forth sufficient detail to permit the Board to consider the merits of these issues. *See Cox*, 791 F.2d at 446-47; *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b).

Employer does not challenge the ALJ's findings that Heritage is the correct responsible operator. Decision and Order at 18. Moreover, Employer concedes Heritage was self-insured by Peabody Energy on the last day Heritage employed Claimant. Employer's Brief at 20 ("Peabody Energy was previously authorized to self-insure its obligations . . . on [Claimant's] last date of exposure."). 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).

Patriot Coal Corporation ("Patriot") was initially another Peabody Energy subsidiary. Director's Exhibit 39. 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. *See* Employer's Brief at 11; Director's Brief at 2. 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 that company.

Employer argues the ALJ erred by failing to address several arguments that Peabody Energy should not be held liable in this case.[13] Employer's Brief at 7-43. The Board has previously considered and rejected these arguments in *Bailey*, BLR , BRB No. 20-

[13] Employer argues Peabody Energy is not liable for benefits because: (1) the district director is an inferior officer not properly appointed under the Appointments Clause (which it raised for the first time before the ALJ in Employer's post-hearing brief); (2) the regulatory scheme, whereby the district director must determine the liability of a responsible operator and its carrier when the DOL also administers the Black Lung Disability Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing; (3) 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. Employer's Brief at 7-43. 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*.

0094 BLA, slip op. at 3-19, *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 5-17 (Oct. 18, 2022), and *Graham*, BLR , BRB No. 20-0221 BLA, slip op. at 7-8. Given that binding precedent, any error by the ALJ in failing to address these arguments is harmless as a matter of law. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). 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.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge