U.S. Department of Labor

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

BRB No. 20-0269 BLA

JESSE H. KING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	
c/o UNDERWRITERS SAFETY & CLAIMS	)	DATE ISSUED: 11/22/2022
	)	
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, Supplemental Order on Director's Objection to the Admissibility of the Depositions of David Benedict and Steven Breeskin, and Order on Employer's Motion for Reconsideration of the Order of September 3, 2019 of Jason A. Golden, 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 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, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits, his Supplemental Order on Director's Objection to the Admissibility of the Depositions of David Benedict and Steven Breeskin, and his Order on Employer's Motion for Reconsideration of the Order of September 3, 2019 (2017-BLA-05286) rendered on a subsequent claim filed on March 30, 2015,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ initially found Eastern Associated Coal Company (Eastern) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier. He determined Claimant established over fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant established a change in an applicable condition of entitlement[2] and invoked the presumption of total disability due to pneumoconiosis at

[1] Claimant filed three previous claims. The district director denied Claimant's most recent prior claim for failing to establish any element of entitlement. Director's Exhibit 3.

[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 also deny the subsequent claim unless he 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)(1); *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 Claimant did not establish any element of entitlement in his prior claim, he had to establish at least one element of entitlement in order to obtain review of the merits of his current claim. 20 C.F.R. §725.309(c)(3), (4).

Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2018).[3] The ALJ further concluded 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.[4] It also asserts the duties the district director performs create an inherent conflict of interest that violates its due process rights. Further, it argues the ALJ erred in finding Peabody is the responsible carrier. On the merits, Employer argues the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption. Claimant responds urging affirmance of the award. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging the Benefits Review Board to reject Employer's Appointments Clause and due process challenges. The Director also contends the ALJ properly determined Eastern is the responsible operator and Peabody Energy is the responsible carrier.[5]

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

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[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled 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); *see* 20 C.F.R. §718.305.

[4] 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.

[5] We affirm, as unchallenged on appeal, the ALJ's finding Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

with applicable law.[6] 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).

Due Process Challenge

"Out of an abundance of caution," Employer identifies a due process challenge in order to preserve the issue for appeal. Employer's Brief at 20-25. It generally asserts 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 (Trust Fund), creates a conflict of interest that violates its due process right to a fair hearing. *Id.* For the reasons set forth in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 18-19 (Oct. 25, 2022) (en banc), we reject Employer's argument.

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Eastern is the correct responsible operator and it was self-insured by Peabody Energy on the last day Eastern employed Claimant; thus we affirm these findings. *See Skrack*, 6 BLR at 711; 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 14. Patriot Coal Corporation ("Patriot") was initially another Peabody Energy subsidiary. Director's Exhibit 46. In 2007, after Claimant ceased his coal mine employment with Eastern, Peabody Energy transferred a number of its other subsidiaries, including Eastern, 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. Director's Exhibit 68 at 6-9. 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 Exhibits 37. 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 11-12.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated the self-insured carrier in this claim and thus the Trust Fund, not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 13-55. It argues the ALJ erred in finding Peabody Energy

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 22; Director's Exhibit 7.

liable for benefits because: (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) the DOL released Peabody Energy from liability; (4) the Director is equitably estopped from imposing liability on the company; (5) 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act and the Administrative Procedure Act (APA); (6) Black Lung Benefits Act (BLBA) Bulletin No. 16-01[8] is unlawful because it contradicts the DOL's own self-insurance regulations and constitutes retroactive rulemaking not issued in accordance with the APA at 5 U.S.C. §553(b); 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.* at 26-27.

The Board has previously addressed these arguments in *Bailey*, BRB No. 20-0094 BLA, slip op. at 3-19; and *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. We also reject Employer's argument with respect to the exclusion of evidence for the reasons set forth below.

Employer 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 1, 12-13. At the June 11, 2019 hearing, Employer sought to admit deposition testimony from Mr. Benedict and Mr. Breeskin, which it had designated as Employer's Exhibits 9-12. Hearing Transcript at 8. The ALJ admitted these exhibits subject to any objection by the Director. *Id.* On June 24, 2019, the Director objected to the admission of Employer's Exhibits 9-12 as irrelevant, and the ALJ issued an Order on July 15, 2019, ordering that the parties had fourteen days from the date of the Order to file a response to the Director's objection. July 15, 2019 Order at 1-2. Employer responded on August 2, 2019. In his September 3, 2019 Supplemental Order, the ALJ found Employer's response to the Director's objection to the admission of the deposition testimonies untimely filed and struck it from the record because Employer had

[7] Employer first challenged the district director's appointment before the ALJ. Employer's Closing Brief at 2; Employer Supplemental Brief at 2-8.

[8] The 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's bankruptcy.

not moved to admit its response out of time nor argued that excusable neglect justified its untimely filing as 29 C.F.R. §18.32(b)(2) requires.[9] Sept. 3, 2019 Supplemental Order at 2. In the alternative, the ALJ found that even if Employer's response was timely filed, neither Employer's response nor anything else in the record explained why Director's Exhibits 9-12 are relevant to Employer's liability defense. *Id.* at 2-3 (citing 5 U.S.C. §556(d) and 20 C.F.R. §725.455(b) for an ALJ's authority to entertain objections to evidentiary submissions and to exclude irrelevant evidence).

On September 20, 2019, Employer timely moved for reconsideration of the ALJ's September 3, 2019 Supplemental Order and briefed its argument as to the relevancy of the testimony of Mr. Benedict and Mr. Breeskin. Motion for Reconsideration at 1-9. Noting Employer "again failed to provide an excusable reason for its failure to timely file its response to the Director's Objection" pursuant to 29 C.F.R. §l8.32(b)(2), the ALJ held "Employer's Motion for Reconsideration is not well taken" and declined to consider its new arguments concerning the relevancy of Employer's Exhibits 9-12. Oct. 16, 2019 Order Denying Reconsideration at 2-3.

On appeal, Employer contends the ALJ erroneously found Employer's response untimely and erred in finding the depositions of Mr. Benedict and Mr. Breeskin not relevant. Employer's Brief at 12-13. In *Bailey*, 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 Mr. Benedict and Mr. Breeskin do not support the argument that the DOL released Peabody Energy from liability when it authorized Patriot to self-insure and released a letter of credit that Patriot financed under Peabody Energy's self-insurance program. *Bailey*, BRB No. 20-0094 BLA, slip op. at 15 n. 17.[10] Given the Board's determination in *Bailey*, we reject Employer's argument, as any error by the ALJ in

[9] In relevant part, 29 C.F.R. §18.32(b) provides:

> *Extending time*. When an act may or must be done within a specified time, the judge may, for good cause, extend the time:
>
> > (2) On motion made after the time has expired if the party failed to act because of excusable neglect.

[10] This determination was necessary to the conclusion that Peabody was liable for benefits. *Bailey*, BRB No. 20-0094 BLA, slip op. at 19.

excluding this evidence constituted harmless error.[11] *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).[12]

Entitlement to Benefits

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

Because Claimant invoked the Section 411(c)(4) presumption, 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); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015). The ALJ found Employer did not establish rebuttal by either method.[14]

[11] Employer 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 44. Employer neither asks the Board to address this issue nor sets forth any argument that would permit our review. *See* 20 C.F.R. §802.211(b); *Cox v. Director*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

[12] Since any error in excluding this evidence that bears on Employer's liability was harmless, we also need not address Employer's argument that the ALJ's other bases for excluding this evidence are erroneous. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Employer's Brief at 12-13.

[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). This 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 pneumoconiosis, *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 found Employer disproved clinical pneumoconiosis. Decision and Order at 21.

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." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich*, 25 BLR at 1-155 n.8. An employer may prevail under this standard by showing that coal dust exposure did not contribute, in part, to the miner's alleged pneumoconiosis. *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013).

Employer relies on the opinions of Drs. Zaldivar and Rosenberg that Claimant's combined restrictive and obstructive impairment is unrelated to coal dust exposure. Employer's Exhibits 1, 4, 21, 23. It contends the ALJ erred in finding neither opinion adequately reasoned to satisfy its burden of proof. Decision and Order at 22-24. We disagree.

Dr. Zaldivar attributed Claimant's obstruction to asthma, obesity, and obstructive sleep apnea. Employer's Exhibit 21 at 15, 21. He opined Claimant's asthma is not legal pneumoconiosis because coal dust exposure does not cause asthma. *Id.* at 21.[15] Specifically, Dr. Zaldivar eliminated coal mine dust exposure as contributing to Claimant's obstructive impairment because it was partially reversible after administration of bronchodilators, which he described as more consistent with asthma. Employer's Exhibit 4 at 4-5. We see no error in the ALJ's finding that Dr. Zaldivar did not adequately explain why coal dust exposure did not aggravate Claimant's asthma or how Claimant's partial response to bronchodilators precluded coal mine dust exposure from contributing to the fixed component of Claimant's obstruction. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012) (ALJ may accord less weight to a physician who fails to adequately explain why a miner's chronic lung disease "was not due at least in part to his coal dust exposure"); *Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356 (6th Cir. 2007) (ALJ may accord less weight to a physician who fails to adequately explain why a miner's response to bronchodilators necessarily eliminated coal

[15] Employer argues the ALJ erred "in stating that 'Dr. Zaldivar's opinion that coal mine dust does not cause asthma is contrary [to] regulations that explain that COPD includes asthma, and COPD caused by coal dust exposure is legal pneumoconiosis, which, by its nature, is latent and progressive.'" Employer's Brief at 7 (quoting Decision and Order at 23). Even if we were to agree, Employer identifies no specific error in the ALJ's alternative bases for discounting Dr. Zaldivar's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

dust exposure as a cause of his obstructive lung disease); Decision and Order at 23. Based on these permissible findings, we affirm the ALJ's rejection of Dr. Zaldivar's opinion. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

Regarding Dr. Rosenberg's opinion, the ALJ noted he opined Claimant does not have legal pneumoconiosis, in part, because he would not expect latent and progressive respiratory impairments caused by coal mine dust exposure to develop years after leaving coal mine employment. Employer's Exhibit 23 at 16, 37. The ALJ found Dr. Rosenberg's opinion unpersuasive because the doctor acknowledged during his deposition that he could not exclude coal mine dust exposure as a cause of Claimant's 2011 mild obstruction, which had progressed into a disabling impairment by 2018. Decision and Order at 24; Employer's Exhibit 23 at 31-32, 35-36.

Employer maintains that the ALJ's reference to "exclude" when discussing Dr. Rosenberg's testimony indicates he applied the wrong legal standard. We disagree. Dr. Rosenberg used the term and the ALJ was merely acknowledging Dr. Rosenberg's opinion. The ALJ clearly set forth the proper legal standard when he described at the outset of his analysis that Employer must establish coal mine dust exposure was not a substantially contributing cause of Claimant's respiratory impairment in order to disprove legal pneumoconiosis. *See* Decision and Order at 21. In that regard, the ALJ permissibly found Dr. Rosenberg's opinion insufficient to affirmatively disprove legal pneumoconiosis as he opined Claimant's Hodgkin's disease and radiation treatment could explain all of his respiratory impairment but did not adequately explain why Claimant's twenty-nine years of coal mine employment did not significantly contribute to or substantially aggravate his respiratory impairment. *See Owens*, 724 F.3d at 558; *Looney*, 678 F.3d at 313-14; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 24. Thus, we affirm the ALJ's rejection of Dr. Rosenberg's opinion on legal pneumoconiosis.

Employer's arguments on appeal are a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ permissibly discredited Drs. Zaldivar's and Rosenberg's opinions, the only opinions supportive of a finding that Claimant does not have legal pneumoconiosis, we affirm his determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 24.

Disability Causation

To disprove disability causation, Employer must establish "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). Contrary to Employer's assertion, the ALJ did not apply an incorrect standard. He correctly stated the standard and applied it in his analysis, although he quoted statutory language. Moreover, he did not preclude Employer from rebutting the presumption based on a de minimus contribution by pneumoconiosis. Rather, he found the opinions of Employer's experts not credible because they failed to diagnose pneumoconiosis, contrary to his finding, and did not set forth a compelling reason to accept their conclusions (which were premised on pneumoconiosis not existing). Decision and Order at 24; *see Bender*, 782 F.3d at 143-44. Because Employer does not otherwise challenge the ALJ's finding that "Employer has failed to rule out any causal relationship between Claimant's disability and his coal mine employment by a preponderance of the evidence," we affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order at 25. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii) and the award of benefits.

Accordingly, the ALJ's Decision and Order Awarding Benefits, Supplemental Order on Director's Objection to the Admissibility of the Depositions of David Benedict and Steven Breeskin, and Order on Employer's Motion for Reconsideration of the Order of September 3, 2019 are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge