U.S. Department of Labor

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

BRB No. 20-0348 BLA

ROBERT G. ROLLINS 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: 11/30/2022 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.

Ann Marie Scarpino (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 GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits (2018-BLA-06000) rendered on a subsequent claim filed on December 12, 2016,[1] 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. She also accepted the parties' stipulation that Claimant had twenty-five years of coal mine employment, all of which she found to be qualifying for purposes of invoking the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2018). In addition, she determined the evidence established total disability, 20 C.F.R. §718.204(b)(2), and therefore found Claimant invoked the presumption[2] and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). She further found Employer failed to rebut the presumption and awarded benefits.

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[1] This is Claimant's third claim for benefits. Director's Exhibits 1, 2, 4. ALJ Richard T. Stansell-Gamm finally denied his prior claim on November 23, 2004, for failure to establish any element of entitlement. Director's Exhibit 2.

[2] 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); 20 C.F.R. §718.305.

[3] 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); *see 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's prior claim was denied for failure to establish any element of entitlement, Claimant had to establish at least one element to obtain review of

On appeal, Employer argues the ALJ erred in finding Peabody Energy is the liable carrier. It also contends the ALJ erred in concluding it did not rebut the Section 411(c)(4) presumption.[4] 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 affirm the ALJ's determination that Employer is liable for 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.[5] 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 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 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 41-48. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Black Lung Disability Trust Fund (the Trust Fund).

Patriot was initially another Peabody Energy subsidiary. Director's Exhibit 40. In 2007, after Claimant ceased his coal mine employment with Eastern, Peabody Energy transferred a number of its other subsidiaries, including Peabody Coal, 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 Eastern, Patriot later went bankrupt and can no longer provide for those

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the merits of the current claim. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309; Director's Exhibit 2.

[4] We affirm, as unchallenged on appeal, the ALJ's determinations that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *White*, 23 BLR at 1-3; Decision and Order at 28.

[5] 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); Hearing Transcript at 31; Director's Exhibit 5.

benefits. Director's Exhibit 58. 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 40-48.

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 Trust Fund, not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 20-28. It argues the ALJ erred in finding Peabody Energy liable for benefits because: 1) the DOL released Peabody Energy from liability; (2) the ALJ erroneously excluded its liability evidence; (3) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) the Director is equitably estopped from imposing liability on Peabody Energy; and (5) because Patriot cannot pay benefits, Black Lung Benefits Act Bulletin Nos. 12-07 and 14-02 place liability on the Trust Fund. *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 arguments (1) and (3) through (5) 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. We also reject Employer's argument (2) with respect to the exclusion of its liability evidence for the reasons set forth in those decisions; to establish the relevant factual context, we describe the relevant procedural history in this case below.

Procedural History--Exclusion of Liability Evidence

The district director initially identified Eastern, self-insured through Peabody Energy, as the "potentially liable operator" in a December 15, 2016 Notice of Claim. Director's Exhibit 41. This notice gave Employer ninety days to submit evidence disputing its designation as a potentially liable operator or carrier. *Id.* On January 12, 2017, Employer responded and denied liability, requesting that Peabody Energy be dismissed as the liable carrier. Director's Exhibit 43. On April 12, 2017, liability evidence relating to Patriot's bankruptcy and an October 4, 2013 report to the Security Exchange Commission filed by Peabody Energy was received into the record. Director's Exhibits 38-40.

On May 9, 2017, the district director issued a Schedule for the Submission of Additional Evidence (SSAE), identifying Eastern as the responsible operator and Peabody Energy as its insurer. Director's Exhibit 45. The district director informed Eastern and

Peabody Energy that they had until July 8, 2017, to submit additional documentary evidence relevant to liability and identify any liability witnesses they intended to rely on if the case were referred to the Office of Administrative Law Judges (OALJ) for a hearing. *Id.* The district director advised that, "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability, or testimony of a witness not identified at this stage of the proceedings, may be admitted into the record once a case is referred to the [OALJ]." *Id.* at 3 (citing 20 C.F.R. §725.456(b)(1)).

Employer responded to the SSAE on May 11, 2017, and contested liability. Director's Exhibit 46. Thereafter, it requested two extensions of time to submit medical evidence. Director's Exhibits 48, 50. The district director granted Employer's request and gave it until April 9, 2018, to submit evidence. Director's Exhibits 49, 51. However, Employer did not submit additional evidence to support its controversion of liability or identify any liability witnesses.

The district director issued a Proposed Decision and Order (PDO) on May 16, 2018, awarding benefits and designating Eastern as the responsible operator and Peabody Energy as the responsible carrier. Director's Exhibit 52. In a May 31, 2018, response to the PDO, Employer denied liability and requested reconsideration of the PDO or a hearing before an ALJ. Director's Exhibit 58. At that time, Employer also untimely submitted documentary evidence relevant to its liability. *Id.*

At the hearing, Employer again submitted documentary evidence pertaining to its liability. Specifically, it submitted the depositions of Steven Breeskin (the former head of the DOL Division of Coal Mine Workers' Compensation (DCMWC)) and David Benedict (a former DCMWC employee), as well as "copies of various DOL documents relevant to self-insurance." Employer's Exhibits 12-16. The ALJ reserved her ruling on the admissibility of these exhibits and granted Employer two weeks to submit a written argument justifying their admission. Hearing Transcript at 22; Feb. 7, 2020 Order at 1. Employer did not submit written arguments on this issue. Feb. 7, 2020 Order at 1. The ALJ excluded the deposition testimony at Employer's Exhibits 12-15 as Employer failed to identify Mr. Breeskin and Mr. Benedict as liability witnesses before the district director and failed to argue extraordinary circumstances exist for failing to do so. *Id.* at 4. Similarly, the ALJ excluded the documentary evidence at Employer's Exhibit 16, as Employer did not timely submit it and failed to argue extraordinary circumstances existed for its admission. *Id.*

For the reasons set forth in *Bailey*, BRB No. 20-0094 BLA, slip op. at 11-13; *Howard*, BRB No. 20-0229 BLA, slip op. at 10-12; and *Graham*, BRB No. 20-0221 BLA, slip op. at 6-7, we affirm the ALJ's determination that Employer's failure to timely submit its liability evidence, identify its liability witnesses, or establish extraordinary

circumstances justifying its failure precluded its admission of the evidence before the ALJ. Thus, we affirm the ALJ's determination that Eastern 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 Claimant has neither legal nor clinical pneumoconiosis,[6] 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). The ALJ found Employer did not establish rebuttal by either method.[7]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the opinions of Drs. Zaldivar and Tuteur.[8] Decision and Order at 33-36. Dr. Zaldivar opined Claimant does not have legal pneumoconiosis, but instead has chronic obstructive pulmonary disease (COPD) due to cigarette smoking. Director's Exhibit 31; Employer's Exhibit 10. Similarly, Dr. Tuteur opined Claimant does not have legal pneumoconiosis, but instead has hypoxemia and COPD due to cigarette smoking.

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[6] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the condition 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). "Legal pneumoconiosis" refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[7] The ALJ found Employer rebutted the existence of clinical pneumoconiosis. Decision and Order at 40.

[8] The ALJ also considered the medical opinions of Drs. Nader and Raj, but accurately found they do not assist Employer in rebutting the presumption. Decision and Order at 37; Director's Exhibits 23, 35; Claimant's Exhibits 1, 2.

Employer's Exhibits 5, 11. The ALJ found neither opinion sufficiently reasoned to rebut the presumption of legal pneumoconiosis. Decision and Order at 34-36.

Employer contends the ALJ erred in her weighing of the medical opinion evidence. Employer's Brief at 6-18. We disagree.

In opining that Claimant's emphysema is due solely to cigarette smoking, Dr. Zaldivar relied on his opinion that smoking is statistically more likely to cause emphysema than coal mine dust exposure. Director's Exhibit 31; Employer's Exhibit 10. Similarly, Dr. Tuteur opined Claimant's COPD was unrelated to his coal mine dust exposure based on a relative risk assessment between smoking and coal mine dust exposure.[9] Employer's Exhibits 5, 11. Contrary to Employer's arguments, the ALJ permissibly found their opinions entitled to less weight as they were based on statistical generalities rather than the specific facts of Claimant's case. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); Decision and Order at 34; Employer's Brief at 5-7, 9-13.

Dr. Zaldivar also excluded coal mine dust exposure as a significant contributing cause of Claimant's COPD based on his opinion that cigarette smoking and coal mine dust exposure cause different forms of emphysema and do not "synergize each other." Decision and Order at 34; Employer's Exhibit 10 at 12-13. The ALJ permissibly found this opinion inadequately explained as Dr. Zaldivar did not address the possible additive effects from Claimant's coal mine dust exposure. *See Owens*, 724 F.3d at 558; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Decision and Order at 34; Employer's Brief at 7-8.

The ALJ also considered several medical treatment records Employer submitted, which she found did not support its burden because they do not specifically address the existence of pneumoconiosis. Decision and Order at 38-40; Employer's Exhibit 6-9. Employer contends the ALJ erred in dismissing these records, as they support the opinions of Drs. Zaldivar and Tuteur. Employer's Brief at 18-19. We disagree. While an ALJ may conclude that evidence not diagnosing pneumoconiosis is probative of its absence, the ALJ is not required to do so. *See Marra v. Consolidation Coal*, 7 BLR 1-216, 1-218-19 (1984). Moreover, as the ALJ permissibly discredited the opinions of Drs. Zaldivar and Tuteur, Employer has not explained how these treatment records would make any difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to

[9] Dr. Tuteur stated that coal miners who never smoke develop COPD about 1% of the time while smokers who do not work as coal miners develop COPD about 20% of the time. Employer's Exhibit 5.

which [it] points could have made any difference"). Therefore, we reject Employer's arguments. *See Marra*, 7 BLR at 1-218-19.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012). Employer's arguments amount to a request for the Board to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ permissibly discredited the opinions of Drs. Zaldivar and Tuteur, we affirm her determination that Employer failed to establish Claimant does not have legal pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order 36. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[11] 20 C.F.R. §718.305(d)(1)(i)

Disability Causation

The ALJ next considered whether Employer established that pneumoconiosis caused "no part" of Claimant's respiratory total disability. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 40. Because Drs. Zaldivar and Tuteur did not diagnose Claimant with legal pneumoconiosis, contrary to the ALJ's findings, and they tied their disability causation analyses to their pneumoconiosis analyses, the ALJ discounted their opinions on the issue of disability causation. Decision and Order at 40.

Employer contends the ALJ erred in discrediting their opinions for this reason because she found Claimant totally disabled based solely on the arterial blood gas studies and credited Dr. Tuteur's opinion that Claimant's variable blood gas impairment was not due to coal mine dust exposure when she considered legal pneumoconiosis. Employer's Brief at 3-5. Contrary to Employer's argument, the ALJ found total disability established

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[10] Because Employer bears the burden of proof on rebuttal and we affirm the ALJ's rejection of its experts' opinions, we need not address Employer's arguments concerning the ALJ's weighing of Drs. Raj's and Nader's opinions that Claimant has legal pneumoconiosis. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); Employer's Brief at 13-18.

[11] We affirm, as unchallenged on appeal, the ALJ's determination that the evidence submitted with Claimant's prior claims is entitled to little weight as pneumoconiosis is a latent and progressive disease. *See Skrack,* 6 BLR at 1-711; *see also Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc) (more recent medical evidence may be accorded greater probative value than that submitted with a prior claim because of the progressive nature of pneumoconiosis); Decision and Order at 37.

by both the arterial blood gas studies and the unanimous medical opinions diagnosing Claimant with disabling obstructive and diffusion capacity impairments based on pulmonary function studies and diffusion capacity tests. Decision and Order at 15-26; Director's Exhibits 23, 31, 35; Claimant's Exhibit 1; Employer's Exhibits 10; 11 at 12.

Consequently, the ALJ rationally discredited Drs. Zaldivar's and Tuteur's opinions that Claimant's totally disabling COPD is not due to legal pneumoconiosis, because they failed to diagnose legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (such an opinion "may not be credited at all" on disability causation absent "specific and persuasive reasons" for concluding the physician's view on disability

causation is independent of his or her erroneous opinion on pneumoconiosis); Decision and Order at 40. We thus affirm the ALJ's finding that Employer failed to establish that no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 40. Therefore, we affirm the ALJ's determination that Employer did not rebut the Section 411(c)(4) presumption.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge