U.S. Department of Labor

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

BRB No. 21-0001 BLA

LARRY A. HOWERTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL, LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 01/20/2023
	)	
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 Granting Modification of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (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.

Olgamaris Fernandez (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: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Granting Modification (2018-BLA-06140) rendered on a subsequent claim filed on September 24, 2014, pursuant the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

In her Decision and Order, the ALJ credited Claimant with more than fifteen years of underground coal mine employment. She found Claimant established complicated pneumoconiosis and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §§718.304, 725.309.[2] Further, she found Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203. Finally, she determined Claimant established modification based on a change in conditions and concluded granting modification would render justice under the Act. 20 C.F.R. §725.310. Thus, she awarded benefits.

On appeal, Employer limits its arguments solely to those addressing its liability. It contends 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 U.S. Constitution, art. II § 2, cl. 2.[3] In addition, it contends

[1] Claimant filed two prior claims for benefits. Director's Exhibits 1, 2. He filed his initial claim on April 13, 2000, which the district director denied on August 29, 2000, because Claimant failed to establish any element of entitlement. Director's Exhibit 1. He then filed a claim on June 22, 2012, but later withdrew it. Director's Exhibit 2. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[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 she finds "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 the Miner's prior claim was denied for failure to establish any element of entitlement, Claimant had to submit evidence establishing at least one element of entitlement to obtain review of the merits of the Miner's current claim. *Id*.

[3] 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,

the duties that the district director performs create an inherent conflict of interest that violates its due process rights. Finally, it argues the ALJ erred in failing to address its argument that it is not the responsible operator and is not liable for the payment of benefits.[4]

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 urges the Board to reject Employer's arguments regarding discovery and BLBA Bulletin No. 16-01, but agrees with Employer that the ALJ erred in failing to address Employer's liability arguments.[5]

> 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.

[4] We affirm, as unchallenged, the ALJ's findings that Claimant established entitlement to benefits, and that granting modification would render justice under the Act. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); Decision and Order at 8-9.

[5] 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, on the basis that they "were not relevant to the issue of whether Larry Howerton is totally disabled due to pneumoconiosis," without addressing Employer's arguments about their relevance to its liability arguments. Employer's Brief at 5-14. The Director asserts the ALJ erred in failing to adequately explain the reasoning behind her exclusion of the depositions. Director's Brief at 7. Nevertheless, in *Bailey*, the same depositions were admitted and the Board held they do not support the liability arguments Employer puts forth in the instant case, 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 v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 15 n. 17 (Oct. 25, 2022). Given that the Board has previously held the depositions do not support Employer's liability arguments, 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 (1984).

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.[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, 362 (1965).

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Employer does not assert Eastern Associated Coal (Eastern) is the incorrect responsible operator in this case because another potentially liable operator more recently employed Claimant; nor does it dispute that Eastern was self-insured by Peabody Energy on the last day Eastern employed Claimant. 20 C.F.R. §§725.494(e), 725.495, 726.203(a). 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 (Trust Fund).

Patriot was initially another Peabody Energy subsidiary. Director's Exhibit 23. In 2007, after the 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 29. 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. *Id*.; *see* 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. *See generally* Decision and Order.

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.[7] Employer's Brief at 15-54. It argues the ALJ erred in finding Peabody

[6] 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); Decision and Order at 2 n.2; Director's Exhibit 5.

[7] Employer argues 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act and the Administrative Procedure Act (APA). Employer's Brief at 46-47. That regulation specifies "[d]ocumentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances." 20 C.F.R. §725.456(b)(1). As the Director correctly points out, Employer was able to submit liability evidence to the district director

Energy liable for benefits because: (1) the district director is an inferior officer not properly appointed under the Appointments Clause;[8] (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 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 Peabody Energy; 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.[9] *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.*

Remand is not required because the Board has previously considered and rejected identical arguments in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (October 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). *Bailey*, *Howard*, and *Graham*

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and the ALJ did not rely on 20 C.F.R. §725.456(b)(1) to exclude any evidence in this case. Director's Brief at 8. Further, although ALJ Applewhite rendered the decision at issue in the present appeal, Employer asserts "ALJ [John P. Sellers, III] and the Director's actions in this matter ultimately devest [sic] the ALJ of any control over the discovery and development of the record on the liability issue which is inconsistent with the Act." Employer's Brief at 46-47. Employer has failed to identify any action or finding by either ALJ Sellers or "the Director" pertinent to this case which implicates the issue raised in its argument. Thus, we decline to address this argument. *See Cox v. Director*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

[8] Employer raised this argument for the first time in this claim in its post-hearing brief to the ALJ. Employer's Post-Hearing Brief at 11-19.

[9] 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 52-53. But Employer neither asks the Board to address this issue nor sets forth any argument that would enable our review. *See Cox*, 791 F.2d at 446-47; *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b).

control this case and establish -- as a matter of law -- that Eastern and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim[10]

Accordingly, the ALJ's Decision and Order Granting Modification is affirmed.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[10] 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 45-46. 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 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).