U.S. Department of Labor

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

BRB No. 23-0008 BLA

HARRISON B. McQUEEN (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BENHAM COAL INCORPORATED, c/o NAVISTAR INCORPORATED	)	
	)	
and	)	DATE ISSUED: 03/27/2024
	)	
Self-Insured through NAVISTAR f/k/a INTERNATIONAL TRUCK & ENGINE CORPORATION	)	
	)	
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for Claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for Employer.

Eirik Cheverud (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals),

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Awarding Benefits (2020-BLA-05924) rendered on a claim filed on June 27, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ initially found Employer is the properly designated responsible operator. He further credited the Miner[1] with 15.33 years of qualifying coal mine employment and determined he had a totally disabling respiratory or pulmonary impairment. Therefore, he found the Miner invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He concluded Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it is the responsible operator. It also argues the ALJ erred in finding the Miner established fifteen years of qualifying coal mine employment and therefore erred in finding he invoked the Section 411(c)(4) presumption. Finally, Employer argues the ALJ erred in finding it failed to rebut the

[1] Counsel for the Miner filed a Motion to Substitute Claimant, informing the Benefits Review Board that the Miner died on February 2, 2022. Counsel requested that the Miner's daughter, Sandy Cope (Claimant), be substituted as the claimant because she wishes to pursue the claim on the Miner's behalf. *Id.* The Board granted the request by Order dated February 8, 2023. *McQueen v. Benham Coal, Inc.*, BRB No. 23-0008 BLA (Order) (unpub.).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had 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.

presumption.[3] Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond in support of the award 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

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1).[5] Once the district director properly identifies a potentially liable operator, it may be relieved of liability only if it shows either that it is financially incapable of paying benefits or that another financially capable operator more recently employed the miner for at least one year. 20 C.F.R. §725.495(c). However, if the responsible operator that the district director designates is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. 20 C.F.R. §725.495(d). If the reasons include the most recent Employer's inability to assume liability for the payment of benefits, the record must include a statement that the Office of Workers' Compensation Programs has no record of insurance coverage for that operator or of its authorization to self-insure. *Id*. "Such a statement shall be prima facie evidence that the most recent employer is not financially capable of assuming its liability for a claim." *Id*.

[3] We affirm, as unchallenged on appeal, the ALJ's determination that the Miner established a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 31.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 10, 18; Claimant's Exhibit 1.

[5] The regulation at 20 C.F.R §725.494 requires that the miner's disability or death must have arisen at least in part out of employment with the operator; the operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973; the operator must have employed the miner for a cumulative period of not less than one year; the miner's employment included at least one working day after December 31, 1969; and the operator is capable of assuming liability for benefits. 20 C.F.R §725.494(a)-(e).

In the absence of such a statement, "it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim." *Id*.

Employer does not challenge that it meets the criteria of a potentially liable operator at 20 C.F.R. §725.494(a)-(e). Rather, it argues the district director did not properly investigate whether Dynamic Security, Incorporated (Dynamic), which more recently employed the Miner for more than one year, is financially capable of paying benefits as it remains in business.[6] Employer's Brief at 8-10. Thus, it argues liability should transfer to the Black Lung Disability Trust Fund. *Id.* at 10. The Director asserts the district director conducted its responsible operator investigation in accordance with the Act and Employer did not meet its burden to show a different operator is capable of paying benefits. Director's Brief at 7. We agree with the Director's argument.

The Miner most recently worked in coal mine employment for Dynamic from 2006 to 2012. Decision and Order at 8; Director's Exhibit 3; Claimant's Exhibit 1. The district director provided the required regulatory statement pursuant to 20 C.F.R. §725.495(d) indicating "the Department has no record of insurance coverage for [Dynamic], or of authorization to self-insure . . . that was effective on the date on which the miner was last employed by that operator." Director's Exhibit 18. Thus, contrary to Employer's argument, having put forward prima facie evidence that Dynamic is not financially capable of assuming liability, the district director met its obligation and the burden shifted to Employer to show that Dynamic possesses sufficient assets to pay benefits including, if necessary, by "presenting evidence" that the owner, partners, or, president, secretary, and treasurer "possess assets sufficient to secure the payment of benefits . . . ." 20 C.F.R. §725.495(c); *see Lester v. Mack Coal Co*., 21 BLR 1-126 (1999) (en banc); *see also Mitchem v. Bailey Energy, Inc*., 21 BLR 1-161, 1-169-70 (1999) (en banc).

The ALJ correctly found that Employer did not introduce any evidence to support its argument that Dynamic is financially capable of paying benefits. Decision and Order at 11. Employer therefore failed to satisfy its burden at 20 C.F.R. §725.495(c)(2). Thus, we affirm as supported by substantial evidence the ALJ's finding that the district director correctly designated Employer as the responsible operator. *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 322-23 (6th Cir. 2014).

[6] Employer argues that the district director "made no effort to investigate whether Dynamic Security has sufficient assets to secure the payment of claims, despite being informed on two occasions that Dynamic Security remains an active business." Employer's Brief at 9.

Invocation of the 411(c)(4) Presumption — Coal Mine Employment

Because the ALJ found the Miner was totally disabled, Claimant is entitled to the Section 411(c)(4) presumption if the Miner had at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. Conditions at a surface mine are "substantially similar" to those underground if the miner was "regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

Employer argues the ALJ erred in finding the Miner had more than fifteen years of qualifying coal mine employment. Employer's Brief at 4-5, 10. We disagree.

Employer initially argues that the Miner's work as a security guard for Dynamic from 2006 to 2012 did not constitute coal mine employment because it does not meet the function test to satisfy the definition of a "miner."[7] Employer therefore argues the Miner should only have been credited with 11.98 years of coal mine employment. Employer's Brief at 4-5. The Director responds that Employer forfeited this argument. Director's Brief at 4-5. We agree with the Director's position.

The ALJ accurately noted that "Employer withdrew from controversion the issue of miner," and "Employer consistently took the position at the District Director level that, under the undisputed facts in this case, [the Miner's] employment as a security guard qualified as a miner." Decision and Order at 7 n.6; Hearing Transcript at 5; Director's Exhibits 26, 29; *see also* Employer's Notice of Intent to Challenge Responsible Operator Designation. He further found that, assuming "any issue remains," the Miner's work qualifies as coal mine employment based upon his uncontradicted testimony he performed "general laborer duties essential to the extraction or preparation of coal" in addition to security-related tasks. Decision and Order at 7 n.6.

[7] A "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment." 30 U.S.C. §902(d); *see* 20 C.F.R. §§725.101(a)(19), 725.202(a). The definition of "miner" comprises a "situs" requirement (i.e., the work must take place in or around a coal mine or coal preparation facility) and a "function" requirement (i.e., the work must be integral or necessary to the extraction or preparation of coal). *Navistar, Inc. v. Forester*, 767 F.3d 638, 641 (6th Cir. 2014); *Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41 (4th Cir. 1991).

In any case referred to the Office of Administrative Law Judges for a hearing, the district director is required to provide a "statement . . . of contested and uncontested issues in the claim." 20 C.F.R. §725.421(b)(7). The "hearing shall be confined to those contested issues which have been identified by the district director . . . or any other issue raised in writing before the district director." 20 C.F.R. §725.463(a). Here, Employer did not contest whether the Miner's work for Dynamic constituted coal mine employment until it filed its closing arguments with the ALJ. Employer's Closing Arguments at 5-6. Consequently, we agree with the Director's assertion that Employer forfeited its argument. *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 588 (6th Cir. 2021); Director's Brief at 4-5. Because Employer has not set forth any basis for excusing its forfeiture, we see no reason to consider its forfeited argument.[8] *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging); *Davis*, 937 F.3d at 591; *Powell v. Serv. Emps. Int'l, Inc*., 53 BRBS 13, 15 (2019); *Nippes v. Florence Mining Co*., 12 BLR 1-108, 1-109 (1985) (party is bound by its stipulations and concessions); Decision and Order at 7 n.6.

We further reject Employer's argument that the ALJ erred in finding that the Miner performed his work for Dynamic in conditions substantially similar to those in an underground mine. Employer's Brief at 5. Contrary to Employer's argument, the ALJ found that the Miner performed his work for Dynamic at underground mine sites based on his uncontradicted affidavit and testimony. Director's Exhibit 30; Claimant's Exhibit 1. Thus, the Miner was not required to establish substantial similarity of dust conditions.[9] *See*

[8] Even had Employer not forfeited this argument, we find it unpersuasive. It is undisputed that the Miner's work with Dynamic was at an underground coal mine and involved sweeping coal mine dust out of locker room trailers, loading belts, and loading supplies on scoops to be taken into the mine as needed. Decision and Order at 7 n.6, 9; Employer's Brief at 2; Director's Exhibits 26 at 1; 30 at 10-12; 39 at 1; Claimant's Exhibit 1 at 2. The ALJ reasonably found that this work doing "additional general laborer duties" is essential to the extraction or preparation of coal to meet the function test to satisfy the definition of a "miner." *See Forester*, 767 F.3d at 641; *Krushansky*, 923 F.2d at 41; *see also Sammons v. EAS Coal Co*., 980 F.2d 731 (Table), 1992 WL 348976 (6th Cir. 1992) (unpub.) (night watchman worked as a miner because part of his shift included safety checks, repairs, and replacements that kept the mine "operational, safe, and in repair" and thus his duties were essential to the production and extraction of coal); Director's Exhibits 26 at 1-2; 39 at 1; Decision and Order at 9.

[9] Employer also argues the ALJ erred in including the Miner's work for Cumberland Mine Service in his determination that the Miner established more than fifteen years of qualifying coal mine employment. Employer's Brief at 4. However, the ALJ did not include this employment in his calculations. He found it did not constitute coal mine

Island Creek Ky. Mining v. Ramage, 737 F.3d 1050, 1058-59 (6th Cir. 2013); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). As Employer raises no other challenges to the ALJ's findings, we affirm his determination that the Miner had 15.33 years of qualifying coal mine employment. Decision and Order at 9. Consequently, we affirm his determination that the Miner invoked the Section 411(c)(4) presumption. *Id*. at 31.

Rebuttal of the 411(c)(4) Presumption

Because the Miner invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he had neither legal nor clinical pneumoconiosis,[10] 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 failed to establish rebuttal by either method.[11] Decision and Order at 32-39.

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 v. Keystone Coal Mining Co*., 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit requires Employer to establish the Miner's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust

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employment because it did not occur at a mine site and thus did not meet the situs test to satisfy the definition of a "miner." Decision and Order at 3, 8.

[10] "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 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 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).

[11] The ALJ determined Employer rebutted the existence of clinical pneumoconiosis. Decision and Order at 26.

exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id*. at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relies on the opinions of Drs. Rosenberg and Fino to disprove legal pneumoconiosis.[12] Director's Exhibit 14; Employer's Exhibits 3, 7. Dr. Rosenberg opined the Miner did not have legal pneumoconiosis but instead had a totally disabling obstructive impairment due to smoking-induced chronic bronchitis and emphysema. Director's Exhibit 14 at 3, 7, 11; Employer's Exhibit 7 at 7. Dr. Fino also opined the Miner did not have legal pneumoconiosis, and instead diagnosed him with a totally disabling obstructive impairment due to smoking-induced emphysema. Employer's Exhibit 3 at 5, 12. The ALJ discredited both opinions as not well-reasoned or well-documented. Decision and Order at 37.

Employer argues the ALJ erred in his weighing of the opinions of Drs. Rosenberg and Fino. Employer's Brief at 7-8. We disagree.

Contrary to Employer's arguments, an ALJ may evaluate expert opinions in conjunction with the preamble to the revised 2001 regulations, as it sets forth the Department's resolution of questions of scientific fact relevant to the elements of entitlement. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); Director's Brief at 7; Employer's Brief at 7-8. Moreover, as discussed below, the ALJ did not apply the preamble as a binding rule. He "simply looked to [it], in addition to the applicable regulations," to assess the credibility of the physicians' opinions. *Adams*, 694 F.3d at 801-02.

Dr. Rosenberg relied, in part, on his belief that "cigarette smoking drives the FEV1 down much farther than FVC" on pulmonary function testing, while coal mine dust "reduces the FEV1 and FVC in equal measure," to attribute the Miner's obstructive lung disease solely to cigarette smoking. Director's Exhibit 14 at 4. The ALJ noted, however, that the regulations specifically allow a miner to establish entitlement to benefits if he has a disabling impairment in which the FEV1 and the FEV1/FVC pulmonary function study results are reduced while the FVC is not. Decision and Order at 33 (citing 20 C.F.R. §718.204(b)(2)(i)(C)). Thus, the ALJ permissibly determined that Dr. Rosenberg's

[12] The ALJ also considered the opinion of Dr. Cordasco. Decision and Order at 16-17. However, his opinion did not support Employer's burden as he diagnosed the Miner with legal pneumoconiosis in the form of severe chronic obstructive pulmonary disease due to coal mine dust exposure and cigarette smoking. Director's Exhibits 10, 16.

opinion distinguishing the etiology of the Miner's obstruction based on the FEV1/FVC ratio conflicts with the Department of Labor's recognition that coal mine dust exposure can cause clinically significant obstructive disease as measured by a reduction in the FEV1/FVC ratio. 65 Fed. Reg. 79920, 79940-43 (Dec. 20, 2000); *Wilgar Land Co. v. Director, OWCP* [*Adams*], 85 F.4th 828, 840 (6th Cir. 2023); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); Decision and Order at 33.

Finally, the ALJ permissibly discredited Dr. Rosenberg's opinion because the physician did not adequately explain how he was able to exclude coal mine dust as a contributing factor to the Miner's allegedly smoking-related emphysema, chronic bronchitis, and obstructive impairment. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 33-35.

Dr. Fino opined that 92 to 94% of miners will not experience clinically significant losses in the FEV1 due to coal mine dust exposure, while cigarette smoking causes a more significant loss in the FEV1. Employer's Exhibit 3 at 10-12. He further opined that, based on the average loss in the FEV1 for miners, the Miner would still have been totally disabled if he had never entered the coal mines. *Id.* Thus, he opined that coal mine dust did not play a role in the Miner's smoking-induced obstruction. *Id.* The ALJ permissibly accorded less weight to Dr. Fino's conclusion as his calculations were based on "average" losses of FEV1 in miners and not circumstances specific to the Miner in this case. *See Young*, 947 F.3d at 408; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 312-13 (4th Cir. 2012) (substantial evidence supported ALJ's discrediting of medical opinion where doctor relied "heavily on general statistics rather than particularized facts about" the miner); *Young*, 947 F.3d at 408-09; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 35-37. Further, the ALJ permissibly found Dr. Fino's opinion unpersuasive as he failed to address the additive nature of smoking with coal mine dust exposure or explain why coal mine dust exposure could not have contributed to his alleged smoking-related obstruction. *See Adams*, 85 F. 4th at 840; *Banks*, 690 F.3d at 489; *Barrett*, 478 F.3d at 356; 65 Fed. Reg. at 79,939-42; Decision and Order at 36.

Employer's arguments amount to a request to reweigh the evidence, which the Board may not do. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ rationally discredited the opinions of Drs. Fino and Rosenberg, the only medical opinions supportive of Employer's burden,[13]

[13] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Rosenberg and Fino, and Dr. Cordasco's opinion does not support Employer's burden, we

we affirm his finding Employer did not disprove legal pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 37. We therefore affirm the ALJ's determination that Employer did not rebut the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 37.

Disability Causation

The ALJ next considered whether Employer rebutted the presumption by establishing "no part" of the Miner's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 38-39. He rationally discredited the opinions of Drs. Fino and Rosenberg because they erroneously assumed the Miner did not have legal pneumoconiosis, contrary to his finding that Employer failed to disprove the disease. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *see also Ramage*, 737 F.3d at 1062 (where chronic obstructive pulmonary disease caused the miner's total disability, the legal pneumoconiosis inquiry "completed the causation chain from coal mine employment to legal pneumoconiosis which caused [the miner's] pulmonary impairment that led to his disability"); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1070 (6th Cir. 2013); Decision and Order at 38. We therefore affirm the ALJ's determination that Employer failed to prove no part of the Miner's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

need not address Employer's assertion that Dr. Cordasco's opinion is not reasoned or documented. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 6.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge