U.S. Department of Labor

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

BRB No. 21-0645 BLA

HAYWARD PAYNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOBET MINING, INCORPORATED	)	
	)	
and	)	
	)	
ARCH RESOURCES	)	DATE ISSUED: 5/26/2023
	)	
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 Awarding Benefits of Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Employer and its Carrier.

Jeffrey S. Goldberg (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, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Patricia J. Daum's Decision and Order Awarding Benefits (2018-BLA-05999) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on October 24, 2016.[1]

The ALJ found Hobet Mining Inc. (Hobet) is the responsible operator and Arch Resources (Arch) is the responsible carrier because it self-insured Hobet on the last day of Claimant's coal mine employment with it. She credited Claimant with at least thirty years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §§718.305, 725.309(c). She further found Employer did not rebut the presumption and awarded benefits.

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[1] This is Claimant's second claim for benefits. Director's Exhibit 3. On February 16, 2005, ALJ Janice K. Bullard denied Claimant's prior claim, filed on September 12, 2001, because he did not establish the existence of pneumoconiosis and a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1.

[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); *see* 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 deny the subsequent claim unless she 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); *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 the existence of pneumoconiosis or total disability in his previous claim, he had to submit evidence establishing at least one of these elements to

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because the removal provisions applicable to ALJs violate the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] It also argues the ALJ erred in finding Arch is the liable carrier. On the merits of entitlement, it contends she erred in finding it did not rebut the Section 411(c)(4) presumption.[5] 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 challenge. Further, the Director urges the Board to affirm the ALJ's determination that Hobet is the responsible operator and Arch is liable for the payment of benefits. Employer has filed reply briefs to both Claimant and the Director, reiterating its 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.[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).

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obtain review of the merits of his current claim. *Id.*; *see White*, 23 BLR at 1-3; Director's Exhibit 1.

[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 findings that Claimant established at least thirty years of underground coal mine employment, total disability, a change in an applicable condition of entitlement, and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.305, 725.309(c); Decision and Order at 4-5, 37, 44-45.

[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

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 13-18; Employer's Reply to the Director at 22. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[7] Employer's Brief at 13-18. In addition, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). *Id*. For the reasons set forth in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022), we reject Employer's arguments.

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Hobet is the correct responsible operator, and it was self-insured by Arch on the last day Hobet employed Claimant; thus we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 9. 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). Employer's Brief at 18-46; Employer's Reply Brief to the Director at 4-21.

In 2005, after Claimant ceased his coal mine employment with Hobet, Arch sold Hobet to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot. Director's Exhibit 35. In 2011, the Department of Labor (DOL) authorized Patriot to insure itself and its subsidiaries, retroactive to 1973. Director's Exhibit 35; Employer's Brief at 42-43; Director's Closing Brief at 2, 7. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Hobet, Patriot later went

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Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Tr. at 55.

[7] *Lucia* involved an Appointments Clause challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held, similar to Special Trial Judges at the United States Tax Court, that SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

bankrupt and can no longer provide for those benefits. Director's Exhibit 35. Nothing, however, relieved Arch of liability for paying benefits to miners last employed by Hobet when Arch owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 12-14.

Employer raises several arguments to support its contention that Arch was improperly designated the responsible carrier in this claim and thus the Trust Fund, not Arch, is responsible for the payment of benefits following Patriot's bankruptcy:[8] (1) the district director is an inferior officer not properly appointed under the Appointments Clause;[9] (2) 20 C.F.R. §725.495(a)(4) precludes Arch's liability; (3) the ALJ erroneously excluded its liability evidence;[10] (4) she evaluated Arch's liability for the claim as a

[8] 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), 5 U.S.C. §556(d), because it divests the ALJ of authority under those Acts to receive evidence and adjudicate issues de novo. Employer's Brief at 20-22. We reject this argument because 30 U.S.C. §932(a) incorporates the provisions of the Longshore Act and the APA into the Black Lung Benefits Act (BLBA) "except as otherwise provided . . . by regulations of the Secretary." 30 U.S.C. §932(a). Thus, even if we were to accept Employer's interpretation of the regulation, the Secretary of Labor has the authority to adopt regulations that differ from the APA and the Longshore Act. *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).

[9] Employer first contested the district director's appointment before the ALJ in its May 28, 2019 Motion to Compel. Employer's May 28, 2019 Motion to Compel at 4, 7-8.

[10] On June 22, 2018, Employer submitted a request for subpoenas to obtain deposition testimony and documents from Department of Labor (DOL) employees Michael Chance and Kim Kasmeier related to various liability-related topics, including BLBA Bulletin No. 16-01 and the DOL authorization of Arch Resources to self-insure. *See* June 22, 2018 Subpoena Requests. The ALJ denied Employer's request, finding it failed to establish extraordinary circumstances for excusing its failure to timely designate liability witnesses or submit liability evidence to the district director. March 12, 2019 Order Denying Employer's Request for Issuance of Subpoenas Ad Testificandum and Duces Tecum; *see* 20 C.F.R. §§725.414(c), 725.456(b)(1). On May 28, 2019, Employer filed a motion to compel discovery responses related, in part, to BLBA Bulletin No. 16-01. The ALJ denied Employer's motion. June 7, 2019 Order Granting Director's Motion for Protective Order and Order Denying Employer's Motion to Compel. For the reasons set forth in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 11-13 (Oct. 25, 2022) (en banc); *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA,

responsible operator or commercial insurance carrier rather than as a self-insurer; (5) the district director improperly "attempt[ed] to pierce Arch's corporate veil to hold it responsible" for the benefits of Hobet's employee, Claimant; (6) the Director did not prove that Arch's self-insurance covered Hobet for this claim; (7) the sale of Hobet to Magnum released Arch from liability for the claims of miners who worked for Hobet, and the DOL authorized Patriot to retroactively self-insure Hobet's liabilities; (8) the DOL's issuance of Black Lung Benefits Act (BLBA) Bulletin No. 16-01[11] reflects a change in policy where the DOL began to retroactively impose new liability on self-insured mine operators that bypasses traditional rulemaking in violation of the APA;[12] (9) the United States Court of Appeals for the District of Columbia Circuit permitted discovery to challenge BLBA Bulletin No. 16-01 in *Arch Coal, Inc. v. Acosta*, 888 F.3d 493 (D.C. Cir. 2018), and the ALJ's failure to allow discovery was a violation of its due process rights;[13] and (10) the Director is equitably estopped from imposing liability on Arch. Employer's Brief at 18-46; Employer's Reply Brief to the Director at 4-21.

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slip op. at 10-12 (Oct. 18, 2022); and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-294-95 (2022), we affirm the ALJ's evidentiary rulings.

[11] 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 Coal Corporation's bankruptcy.

[12] Employer argues the DOL's policy is a retroactive change that amounts to an unlawful taking of its property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 45-46. As the Director correctly points out, a private contract cannot release Employer from liability and requiring Employer to pay benefits under the Act does not constitute an unconstitutional taking of property. Director's Brief at 16, 18 (citing *W. Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011) ("the mere imposition of an obligation to pay money does not give rise to a claim under the Takings Clause")).

[13] Employer asserts the ALJ did not fully address all of its challenges to BLBA Bulletin No. 16-01. Employer's Brief at 30-38; Employer's Reply Brief to the Director at 5-6; *see* March 12, 2019 Order Denying Employer's Request for Issuance of Subpoenas Ad Testificandum and Duces Tecum. Even if true, we consider any error to be harmless because the Board rejected similar challenges to the bulletin in *Howard*, BRB No. 20-0229 BLA, slip op. at 10-12, 15-16. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

The Board has previously considered and rejected these and similar arguments under the same determinative facts related to the Patriot bankruptcy in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022) (en banc), *Howard*, BLR , BRB No. 20-0229 BLA, slip op. at 5-17, and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-295-99 (2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments. Thus we affirm the ALJ's determination that Hobet and Arch 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 of total disability due to pneumoconiosis, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis, [14] 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 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149 (2015). The ALJ found Employer did not establish rebuttal by either method.

Pneumoconiosis

We affirm the ALJ's finding that Employer failed to disprove clinical pneumoconiosis as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 50, 51. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[15] *See* 20 C.F.R. §718.305(d)(1)(i).

[14] "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).

[15] Because Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis, we need not address its

Disability Causation

To disprove disability causation, Employer must establish "no part of the miner'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). The ALJ discredited the disability causation opinions of Drs. Tuteur and Rosenberg because they did not diagnose clinical pneumoconiosis, contrary to her finding that Employer failed to disprove the existence of the disease. 20 C.F.R. §718.305(d)(1)(i); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (where a physician failed to properly diagnose pneumoconiosis, an ALJ "may not credit" that physician's opinion on causation absent "specific and persuasive reasons," in which case the opinion is entitled to at most "little weight"); Decision and Order at 55; Employer's Exhibits 2 at 35, 3 at 8. Because Employer does not contest this finding, we affirm it. *See Skrack*, 6 BLR at 1-711. Thus, we affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory disability is due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 56. Because Employer did not rebut the Section 411(c)(4) presumption, we affirm the award of benefits.

arguments regarding the ALJ's findings on legal pneumoconiosis. *See Larioni*, 6 BLR at 1-1278.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge