U.S. Department of Labor

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

BRB No. 19-0275 BLA

HENRY D. STEVENSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY c/o HEALTHSMART CASUALTY CLAIM	)	
	)	DATE ISSUED: 05/27/2020
Employer-Petitioner	)	
	)	
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 in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Catherine Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for employer.

Edward Waldman (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits in an Initial Claim (2016-BLA-05970) of Administrative Law Judge Larry S. Merck rendered on a claim filed on May 15, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with at least thirty-three years of underground coal mine employment[1] and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore 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) (2012). He further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] In addition, it challenges the constitutionality of the Section 411(c)(4) presumption and alternatively contends the

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 21; Director's Exhibit 3.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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) (2012); *see* 20 C.F.R. §718.305.

[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, 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.

administrative law judge erred in finding it did not rebut the presumption.[4] Claimant responds in support of the awards of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response asserting employer waived its Appointments Clause challenge and urging the Board to reject employer's contention that the Section 411(c)(4) presumption is unconstitutional.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's decision and order if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965).

Appointments Clause Challenge

Employer urges the Board to vacate the award and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[5] Employer's Brief at 8-10. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[6] but maintains the ratification was

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked 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(b).

[5] *Lucia* involved an Appointments Clause challenge to the selection of a Securities and Exchange Commission (SEC) administrative law judge. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC administrative law judges are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

[6] The Secretary of Labor issued a letter to the administrative law judge on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to Administrative Law Judge Merck.

insufficient to cure the constitutional defect in the administrative law judge's prior appointment.[7] *Id*. In response, the Director asserts employer waived its Appointments Clause challenge. Director's Response Brief at 2. We agree with the Director.

Appointments Clause issues are "non-jurisdictional" and thus subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted).

Employer filed a March 8, 2018 motion requesting the administrative law judge hold this case in abeyance pending the decision in *Lucia*. After the administrative law judge denied the motion, the Supreme Court decided *Lucia* on June 21, 2018. Thereafter he issued an October 9, 2018 Notice and Order directing employer to indicate whether it wanted the claim to be assigned to a different administrative law judge. Employer filed a response affirmatively requesting the claim remain with the assigned administrative law judge.

Employer therefore waived its Appointments Clause challenge.[8] *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962); *Kiyuna v. Matson Terminals Inc.*, __ BRBS __, BRB No. 19-0103, slip op. at 4 (June 25, 2019). Had employer requested reassignment, the administrative law judge could have, if appropriate, referred the case for reassignment to a different, properly appointed administrative law judge to hold a new hearing and issue a decision. *Powell v. Serv. Employees Int'l, Inc.*, __ BRBS __, BRB No. 18-0557, slip op. at 4 (Aug. 8, 2019); *Kiyuna*, BRB No. 19-0103, slip op. at 4-5. We therefore deny the relief requested.[9]

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[7] On July 20, 2018, the Department of Labor (DOL) conceded the Supreme Court's holding in *Lucia* applies to the DOL's administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[8] "[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.'" *Hamer v. Neighborhood Hous. Servs. of Chicago*, 583 U.S. , 138 S. Ct. 13, 17 n.1 (2017), *quoting United States v. Olano*, 507 U. S. 725, 733 (1993).

[9] Employer also waived its related argument that the Secretary's ratification of the administrative law judge's appointment on December 21, 2017, was invalid because it had

Constitutionality of the Affordable Care Act and the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), employer contends the Affordable Care Act (ACA), Public Law No. 111-148, which reinstated the Section 411(c)(4) presumption, is unconstitutional. Employer's Brief at 6-7. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*.

After the parties submitted their briefs, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, __ (5th Cir. 2019) (King, J., dissenting). Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the United States Supreme Court upheld the constitutionality of the ACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). We therefore reject employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case. We also decline to hold this case in abeyance pending further resolution of the legal challenges to the ACA. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010).

Section 411(c)(4) Rebuttal

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish claimant has neither legal nor clinical pneumoconiosis[10] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined

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the opportunity to obtain reassignment in response to the administrative law judge's Notice and Order but declined to do so.

[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). "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).

in [20 C.F.R] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found employer failed to establish rebuttal by either method.[11]

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 Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting). The administrative law judge weighed the opinions of Drs. McSharry and Sargent.

Dr. McSharry initially opined claimant does not have legal pneumoconiosis because his pulmonary function testing between 2014 and 2017 was either normal or invalid. Employer's Exhibit 2. In his supplemental report, he acknowledged pulmonary function testing showed "very mild spirometric limitations," but opined claimant would not develop obstructive or restrictive lung disease "without radiographic changes or other explanations." Employer's Exhibit 3 at 2. The administrative law judge permissibly found Dr. McSharry's opinion unpersuasive because he "did not review [pulmonary function] results" Dr. Raj obtained on July 1, 2017 and July 7, 2017 "demonstrating a moderate obstructive defect." Decision and Order at 29; *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). The administrative law judge also permissibly found Dr. McSharry's reliance on the absence of radiographic evidence of pneumoconiosis inconsistent with the definition of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12 (4th Cir. 2012); *see also* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000) (recognizing that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of x-ray evidence of clinical pneumoconiosis).

Dr. McSharry also acknowledged claimant has resting hypoxemia with exertional desaturation on arterial blood gas testing, but opined this impairment does not "necessarily indicate a chronic lung disease." Employer's Exhibit 2 at 2. He noted "[c]ommon etiologies for the disabling exertional desaturation include intracardiac shunts, pulmonary hypertension from sleep apnea, or other causes for pulmonary hypertension," and if any of these were the cause of the impairment, he would exclude coal mine dust exposure as a cause. *Id*. The administrative law judge permissibly found this rationale speculative and equivocal because there is "no evidence in the record that [claimant] suffers from

[11] The administrative law judge determined employer rebutted the presumption of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 37.

pulmonary hypertension as a result of his sleep apnea" or has an "intracardiac shunt." Decision and Order at 30; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Dr. Sargent noted claimant left coal mining in 2013, had normal pulmonary function testing in 2014, and developed an obstructive respiratory impairment in 2017. Employer's Exhibit 1. He excluded legal pneumoconiosis because it "is not conceivable that [claimant] had normal ventilatory studies after 35 years of mining" and then "developed significant ventilatory impairment after cessation of coal dust exposure." *Id*. at 2. The administrative law judge permissibly found this reasoning contrary to the principle that pneumoconiosis can be a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (a medical opinion that is not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); 20 C.F.R. §718.201(c); 65 Fed. Reg. at 79,971; Decision and Order at 31.

Dr. Sargent also opined claimant's hypoxemia on blood gas testing is not significantly related to, or substantially aggravated by, coal mine dust exposure because the impairment waxed and waned between qualifying and non-qualifying results. Claimant's Exhibit 1 at 2. He excluded legal pneumoconiosis because pneumoconiosis is a progressive and irreversible disease. *Id*. The administrative law judge found, however, that the physicians who obtained non-qualifying studies still "flagged" the results "as below the expected reference range." Employer's Exhibits 2, 6. The administrative law judge permissibly found "even if other features of [c]laimant's health affected" blood gas testing as Dr. Sargent opined, he did not address that the testing "still remained below the expected reference range" indicating "an underlying persistent" gas exchange impairment that could be due to coal mine dust exposure. Decision and Order at 30; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Employer's arguments are a request that the Board reweigh the evidence, which we are not empowered to do.[12] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to rebut the presumed existence of legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 28-33.

[12] Contrary to employer's argument, the administrative law judge did not err by failing to weigh the opinions of Drs. Marantz and Raj that claimant has legal pneumoconiosis. Employer's Brief at 11-12. Rather, he accurately found their opinions "do not aid [e]mployer in rebuttal" because they "support a diagnosis of legal pneumoconiosis." Decision and Order at 28; 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether employer established "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). He permissibly discredited the disability causation opinions of Drs. McSharry and Sargent because neither diagnosed legal pneumoconiosis, contrary to his finding that employer failed to disprove claimant has the disease. *See Epling*, 783 F.3d at 504-05; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 38. We therefore affirm the administrative law judge's finding employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in an Initial Claim is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge