U.S. Department of Labor

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

BRB Nos. 19-0244 BLA
and 19-0309 BLA

ESTHER D. ROYCE (o/b/o and Widow of PAUL L. ROYCE)	)	
Claimant-Respondent	)	
v.	)	
LONE MOUNTAIN PROCESSING, INCORPORATED	)	
and	)	DATE ISSUED: 04/23/2020
ARCH COAL, INCORPORATED, c/o UNDERWRITERS SAFETY & CLAIMS	)	
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 Miner's Benefits and Awarding Survivor's Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass (Johnnie L. Turner, P.S.C.), Harlan, Kentucky, for claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer/carrier.

Jeffrey S. Goldberg (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: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Miner's Benefits and Awarding Survivor's Benefits (2016-BLA-05615, 2016-BLA-05616) of Administrative Law Judge Theresa C. Timlin issued on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on November 15, 2014, and a survivor's claim filed on June 26, 2015.[1]

The administrative law judge found the miner had 27.5 years of underground coal mine employment[2] and was totally disabled. She thus found claimant established a change in an applicable condition of entitlement and invoked the presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §§718.204(b)(2), 725.309. The administrative law judge further found employer did not rebut the presumption and awarded benefits in the miner's

[1] The miner filed a prior claim on October 8, 2002, which the district director denied because the miner failed to establish any element of entitlement. Director's Exhibit 1. The miner died on May 3, 2015, while his current claim was pending. Director's Exhibit 42. Claimant, the miner's widow, is pursuing the miner's claim on his behalf as well as her own survivor's claim.

[2] The miner's coal mine employment occurred in Kentucky. Director's Exhibit 4; Hearing Transcript at 31-32. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption the miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground coal mine employment, or substantially similar surface coal mine employment, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

claim. Based on that award, she found claimant automatically entitled to benefits in the survivor's claim pursuant to Section 422(*l*) of the Act.[4] 30 U.S.C. §932(*l*) (2012).

On appeal, employer argues the administrative law judge lacked the authority to preside over the case because she was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[5] In addition, it challenges the constitutionality of the Section 411(c)(4) presumption, or alternatively contends the administrative law judge erred in finding it did not rebut the presumption. 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. Employer has filed a reply brief reiterating its arguments.[6]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Miner's Benefits and Awarding Survivor's Benefits if it is rational, supported by substantial evidence, and in accordance

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[4] Under Section 422(*l*) of the Act, the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

[5] 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.

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established a change in an applicable condition of entitlement and 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), 725.309(c); Decision and Order at 9, 18-19.

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).[7] Employer's Brief at 2 n.1. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[8] but maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment.[9] *Id*. In response, the Director asserts employer waived its Appointments Clause challenge. Director's Response Brief at 2-3. We find employer waived its Appointments Clause challenge.

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

[7] *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)).

[8] 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 Timlin.

[9] On July 20, 2018, the Department of Labor (DOL) expressly 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.

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 January 16, 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 she issued a September 26, 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 Response to Notice and Order at 1-2.

Employer's assertion in its Reply Brief at 2 n.1 that administrative law judges cannot resolve constitutional issues is not a valid basis for excusing its affirmative waiver. *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) (Appointments Clause argument is an "as-applied" challenge the administrative law judge can address and thus it can be waived or forfeited). 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.

Based on these facts, we conclude employer waived its Appointments Clause challenge.[10] *See Powell*, BRB No. 18-0557 BLA, slip op. at 4; *Kiyuna*, BRB No. 19-0103, slip op. at 4. We therefore deny the relief requested.[11]

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

[10] "[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).

[11] Employer also waived its related argument that the Secretary of Labor's ratification of the administrative law judge's appointment on December 21, 2017, was invalid since it had the opportunity to obtain reassignment in response to the administrative law judge's Notice and Order but declined to do so.

(ACA), Public Law No. 111-148, which reinstated the Section 411(c)(4) presumption, is unconstitutional. Employer's Brief at 5-7. 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*, No. 19-10011, 2019 WL 6888446, at *27-28 (5th Cir. Dec. 18, 2019) (King, J., dissenting). Moreover, the United States Court of Appeals for the Fourth Circuit has held the ACA amendments to the Black Lung Benefits Act[12] 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 also reject employer's argument that the Director and the Board are bound by the Department of Justice's briefing in *Texas v. United States*, as it points to no authority for such a proposition. Employer's Reply Brief at 5-7. We therefore reject employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case. Furthermore, we 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).

Miner's Claim – Section 411(c)(4) Rebuttal

Because claimant invoked the Section 411(c)(4) presumption, the burden of proof shifted to employer to establish the miner had neither legal nor clinical pneumoconiosis,[13] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis

[12] Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(*l*)).

[13] 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).

as defined 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.

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." 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) (Boggs, J., concurring and dissenting).

The administrative law judge considered Dr. Dahhan's opinion that the miner had a disabling obstructive ventilatory impairment with associated hypoxemia due to cigarette smoking, but it was unrelated to his coal mine dust exposure.[14] Decision and Order at 23; Employer's Exhibit 4. Dr. Dahhan acknowledged coal mine dust exposure can cause obstructive lung impairments. Employer's Exhibit 4. He explained, however, the "amount of loss in the FEV1 secondary to inhalation of coal [mine] dust is estimated to be 5-9cc per year of exposure" compared to "90cc per [pack-year]" cigarette smoking causes in a susceptible host. *Id*. at 3. Because Dr. Dahhan characterized the miner's cigarette smoking history as "much more significant" than his coal mine dust exposure, he excluded legal pneumoconiosis. *Id*. at 3-4. Contrary to employer's argument, the administrative law judge permissibly found Dr. Dahhan did not adequately explain why the miner "was a 'susceptible host,' and not part of the cohort of individuals who did not experience a 90cc per pack-year loss" of FEV1 cigarette smoking causes. Decision and Order at 23; *see Island Creek Coal Co. v. Young*, 947 F.3d 399, 408-09 (6th Cir. 2020); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

Further, the administrative law judge correctly noted the preamble to the 2001 revised regulations cites studies, which the DOL found credible, concluding the risks of smoking and coal mine dust exposure may be additive. 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000) (concluding that the risk of clinically significant airways obstruction and chronic bronchitis associated with coal mine dust exposure can be additive with cigarette smoking); Decision and Order at 23. In light of the preamble language, she permissibly found Dr. Dahhan did not adequately explain why the miner's coal mine dust exposure was not a contributing or additive factor, along with his cigarette smoking, to his pulmonary impairment. *See* 20 C.F.R. §718.201(a)(2), (b); *Young*, 947 F.3d at 403-07; *Collieries, Inc.*

[14] The administrative law judge also considered the opinions of Drs. Alam and Chavda, but found that they do not assist employer in rebutting the presumption as both physicians opined the miner suffered from legal pneumoconiosis. Decision and Order at 23; Director's Exhibits 11, 12; Claimant's Exhibit 1.

v. Barrett, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 23. Thus we affirm the administrative law judge's determination that employer did not disprove legal pneumoconiosis[15] and therefore did not rebut the presumption by establishing the miner did not have pneumoconiosis.[16] 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether employer rebutted the Section 411(c)(4) presumption by establishing that "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). She permissibly discredited Dr. Dahhan's opinion because he did not diagnose legal pneumoconiosis, contrary to her determination that employer failed to disprove the miner had the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 29. We therefore affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii). Consequently, we affirm the administrative law judge's award of benefits in the miner's claim.

Survivor's Claim

Because we have affirmed the administrative law judge's award of benefits in the miner's claim and employer raises no specific challenge to her award of benefits in the survivor's claim, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*) (2012); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 30.

[15] Because the administrative law judge provided valid rationales for discrediting Dr. Dahhan's opinion, we need not address employer's additional arguments concerning the administrative law judge's weighing of his opinion. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[16] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore, we need not address employer's contentions of error regarding the administrative law judge's finding that employer did not disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 9-16.

Accordingly, the administrative law judge's Decision and Order Awarding Miner's Benefits and Awarding Survivor's Benefits is affirmed.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge