U.S. Department of Labor

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

BRB No. 19-0276 BLA

CHARLIE W. PRESLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 04/30/2020
	)	
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 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 A. Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for employer.

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: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-05933) of Administrative Law Judge Larry S. Merck rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on June 9, 2014.[1]

The administrative law judge accepted employer's concessions that claimant has twenty-three years of underground coal mine employment[2] and a totally disabling respiratory or pulmonary impairment. He therefore found claimant invoked the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). He further found that 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.[4] In addition, it challenges the

[1] On his application for benefits, claimant indicated he filed a prior claim which was denied. Director's Exhibit 2. While there is no record of this prior claim, employer indicated it was withdrawn. Decision and Order at 2 n.1. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] Because claimant's last coal mine employment occurred in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 18.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[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

constitutionality of the Section 411(c)(4) presumption. Alternatively, employer contends the administrative law judge erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting employer waived its Appointment's Clause challenge. The Director also urges the Board to reject employer's contention that the Section 411(c)(4) presumption is unconstitutional.[5]

The Board's scope of review is defined by statute. We must affirm the Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 361-62 (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).[6] Employer's Brief at 8-11. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor administrative law judges on December 21, 2017, but maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment. *Id.*

In response, the Director asserts employer waived its Appointments Clause challenge. Director's Response Brief at 2-3. We agree.

> of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Art. II, § 2, cl. 2.

[5] 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).

[6] *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)).

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 February 28, 2018 motion requesting the administrative law judge hold this case in abeyance pending a decision in *Lucia*. After the administrative law judge denied its request, the Supreme Court decided *Lucia* on June 21, 2018. Thereafter the administrative law judge issued an October 9, 2018 Notice and Order directing employer to file a statement within twenty-days indicating whether it sought to have the case reassigned. October 9, 2018 Notice and Order. The administrative law judge indicated that if employer did not file a response, the remedy of reassignment and a new hearing would "be deemed waived and the case will proceed before the undersigned." *Id.* Employer did not respond to the Notice and Order.

Had employer responded to the Notice and Order and requested reassignment, the administrative law judge could have referred the case for assignment to a different, properly appointed administrative law judge to hold a new hearing and issue a decision. *Powell v. Service Employees Intnl, Inc.*, BRBS , BRB No. 18-0557, slip op. at 4 (Aug. 8, 2019); *Kiyuna v. Matson Terminal Inc.*, BRBS , BRB No. 19-0103, slip op. at 4-5 (June 25, 2019). Based on these facts, we conclude employer waived its Appointments Clause challenge.[7] *Id.* We therefore deny the relief requested.[8]

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 Board should hold this appeal in abeyance because the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 17-18. Employer cites the district court's rationale in *Texas* that the

[7] "[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 Housing Services of Chicago*, 138 S.Ct. 13, 17 n.1 (2017), *citing United States v. Olano*, 507 U. S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938)).

[8] Employer also waived its related argument that the Secretary of Labor's December 21, 2017 ratification of the administrative law judge's appointment was invalid because it had the opportunity to also raise this issue in response to the administrative law judge's Notice and Order but failed to do so.

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, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214-15 (2010), *aff'd sub nom. W.Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010).[9] We, therefore, reject employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case and deny its request to hold this case in abeyance.

Rebuttal of Section 411(c)(4)

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[10] or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 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.

We affirm as unchallenged the administrative law judge's finding that employer failed to disprove clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711; Decision and Order at 40-41. Although employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that claimant does not have

[9] Further, the United States Court of Appeals for the Fourth Circuit has held that the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative as a law. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012).

[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).

pneumoconiosis, we will address the issue of legal pneumoconiosis because it is relevant to the second method of rebuttal. 20 C.F.R. §718.305(d)(1)(i). To disprove legal pneumoconiosis, employer must establish that 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 Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

The administrative law judge considered the opinions of Drs. McSharry and Sargent that claimant does not have legal pneumoconiosis, but has an obstructive impairment due solely to cigarette smoking.[11] Director's Exhibit 12; Employer's Exhibits 1, 1a, 25. The administrative law judge found their opinions not well-reasoned because they did not credibly explain how they determined claimant's years of coal mine dust exposure did not contribute, along with his smoking, to his obstructive impairment. Decision and Order at 34-38.

Employer argues the administrative law judge erred in discrediting the opinions of Drs. McSharry and Sargent. Employer's Brief at 11-18. We disagree. The administrative law judge accurately found Dr. McSharry relied on the absence of radiographic evidence of pneumoconiosis in opining that claimant's pulmonary condition is not related to his coal mine dust exposure. Decision and Order at 34-35. The administrative law judge permissibly found this reasoning to be 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).

The administrative law judge accurately noted Dr. Sargent excluded coal mine dust exposure as a cause of the miner's emphysema based on the partial reversibility of claimant's impairment after the administration of a bronchodilator. Decision and Order at 37. The administrative law judge found Dr. Sargent did not adequately explain why claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of, or contributor to, his remaining disabling impairment[12] and permissibly

[11] The administrative law judge also considered the opinions of Drs. Agarwal, Green, and Nader, but accurately found their opinions do not assist employer in rebutting the existence of legal pneumoconiosis. Decision and Order at 33 n.28; Director's Exhibit 10; Claimant's Exhibits 1, 2.

[12] The administrative law judge accurately noted claimant's pulmonary function studies conducted on August 8, 2014, October 9, 2015, May 22, 2017, June 1, 2017, and July 3, 2017 produced qualifying results even after the administration of a bronchodilator.

accorded less weight to his opinion. *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); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 37.

The administrative law judge also permissibly discredited the opinions of Drs. McSharry and Sargent because the physicians failed to adequately explain how they eliminated claimant's over twenty years of coal mine dust exposure as a substantial contributor to his disabling obstructive impairment.[13] *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 674 (4th Cir. 2017); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); Decision and Order at 38.

Because the administrative law judge permissibly discredited the opinions of Drs. McSharry and Sargent,[14] the only opinions supportive of a finding that claimant does not have legal pneumoconiosis, we affirm his determination employer failed to rebut the Section 411(c)(4) presumption by establishing claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether employer established that "no part of [claimant'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 rationally discounted Drs. McSharry's and Sargent's disability causation opinions because

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Decision and Order at 10; Director's Exhibits 10, 12; Claimant's Exhibits 1, 2; Employer's Exhibit 1. A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[13] The administrative law judge found Dr. McSharry did not adequately explain why claimant's smoking history had an impact that necessarily eliminated coal dust exposure as a significant contributing or substantially aggravating factor to his obstructive pulmonary impairment. Decision and Order at 35. The administrative law judge found Dr. Sargent failed to adequately explain why, even if claimant's emphysema had a certain characteristic associated with smoke-induced emphysema, this necessarily ruled out a significant contribution from coal dust exposure, another known cause of emphysema. *Id.* at 37.

[14] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. McSharry and Sargent, we need not address employer's remaining arguments regarding the weight accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

they did not diagnose legal pneumoconiosis, contrary to his finding that employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 41. Therefore, we affirm the administrative law judge's determination that employer failed to rebut legal pneumoconiosis as a cause of claimant's total disability. *See* 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge