U.S. Department of Labor

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

BRB No. 19-0430 BLA

JACKIE F. COLLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
A & G COAL CORPORATION	)	DATE ISSUED: 08/27/2020
	)	
and	)	
	)	
NEW HAMPSHIRE INSURANCE COMPANY	)	
	)	
	)	
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 Carrie Bland, Administrative Law Judge, United States Department of Labor.

Sarah Y. M. Himmel (Two Rivers Law Group P.C.), Christiansburg, Virginia, for Employer.

Cynthia Liao (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 and its Carrier (Employer) appeal Administrative Law Judge Carrie Bland's Decision and Order Awarding Benefits (2016-BLA-05855) rendered on a claim filed on May 8, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with 34.47 years of surface coal mine employment in conditions substantially similar to those in an underground coal mine and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She thus found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2012). She 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 she was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[2] It contends the administrative law judge improperly invoked the Section 411(c)(4) presumption based on erroneously

[1] 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.

[2] 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.

finding Claimant totally disabled and erred in finding it did not rebut the presumption.[3] Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, asserting Employer waived its Appointments Clause challenge.

The Benefits Review 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.[4] 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 (1965).

Appointments Clause

Employer urges the Board to vacate the Decision and Order 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 27-28. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) 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 Brief at 1-2. We agree with the Director's contention.

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

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding 34.47 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-6.

[4] Because Claimant's last coal mine employment occurred in Virginia, Hearing Transcript at 26, 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).

[5] *Lucia* involved a challenge to the appointment 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)).

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 27, 2018 motion requesting the administrative law judge hold the case in abeyance pending a decision in *Lucia*. The Director opposed the motion. *Lucia* was decided on June 21, 2018. In a Notice and Order dated September 20, 2018, the administrative law judge advised the parties of the *Lucia* ruling. Notice and Order at 2. Because she had not issued a final decision, she noted Employer's abeyance request was "effectively granted." *Id*. She directed Employer to file a motion indicating what relief, if any, it requested in view of *Lucia*. *Id*. She advised if Employer did not respond, "it will be reasonably assumed that no further relief is requested." *Id*. Employer did not respond to the administrative law judge's Notice and Order, and she issued her Decision and Order Awarding Benefits on May 31, 2019.

Had Employer responded to the Notice and Order and requested reassignment, the administrative law judge could have addressed its contentions and, if appropriate, referred the case for assignment to a different, properly appointed administrative law judge to hold a new hearing and issue a decision. Based on these facts, Employer waived its Appointments Clause challenge.[6] *In re DBC*, 545 F.3d 1373, 1380 (Fed. Cir. 2008) (declining to excuse waived Appointments Clause challenge to discourage "sandbagging"); *Powell v. Service Employees Int'l, Inc.*, 53 BRBS 13 (2019); *Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9 (2019). We therefore deny the relief requested.

Section 411(c)(4) Presumption - Total Disability

A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical

[6] "[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)). 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.

opinions.[7] 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

Employer argues the administrative law judge erred in finding total disability based on the pulmonary function studies and medical opinions. Employer's Brief at 8-17.

Pulmonary Function Study Evidence

The administrative law judge considered five pulmonary function studies conducted on April 22, 2014, June 25, 2014, November 5, 2014, September 17, 2015, and October 21, 2015. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 8. The April 22, 2014, June 25, 2014 and November 5, 2014 studies produced qualifying values pre-bronchodilator, whereas the September 17, 2015 and October 21, 2015 studies produced non-qualifying values pre-bronchodilator.[8] Director's Exhibits 4, 7, 9; Employer's Exhibits 4, 5. The June 25, 2014 study produced qualifying values post-bronchodilator, whereas the November 5, 2014 and October 21, 2015 studies produced non-qualifying values post-bronchodilator.[9] Director's Exhibits 4, 7; Employer's Exhibit 4.

The administrative law judge rejected Employer's argument that the April 22, 2014, June 25, 2014 and November 5, 2014 studies are invalid. Decision and Order at 16-17; Employer's Brief at 22-24. She found "Claimant has demonstrated total disability by a preponderance" of the qualifying pulmonary function study evidence. Decision and Order at 8; *see* 20 C.F.R. §718.204(b)(2)(i).

Employer argues the administrative law judge erred in weighing the pulmonary function studies because she conducted a "cursory" assessment of whether they establish

[7] The administrative law judge found Claimant did not establish total disability based on the arterial blood gas studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 8-9.

[8] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[9] The April 22, 2014 and September 17, 2015 studies did not include any post-bronchodilator testing. Director's Exhibit 16; Employer's Exhibit 5.

total disability. Employer's Brief at 9-12. It asserts the June 25, 2014 and November 5, 2014 pulmonary function studies are invalid.[10] Employer's argument has merit.

When considering pulmonary function study evidence, the administrative law judge must determine whether the studies substantially comply with the quality standards. 20 C.F.R. §718.103(c); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, the administrative law judge must determine whether it constitutes credible evidence of the miner's pulmonary function. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987) (Levin, J., concurring). Moreover, the administrative law judge is required to consider all relevant evidence, including the physicians' opinions, in determining whether Claimant has established total disability. *See Defore*, 12 BLR at 1-28-29; *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

As part of his DOL-sponsored pulmonary evaluation, Claimant performed the June 25, 2014 pulmonary function study, and the technician who administered the study indicated Claimant's degree of cooperation and ability to understand instructions were good. Director's Exhibit 7. Dr. Ranavaya reviewed the study results, however, and indicated it is not acceptable because Claimant provided less than optimal effort, cooperation, and comprehension. Director's Exhibit 6. Dr. Ajjarapu opined the study is invalid due to poor effort. Director's Exhibits 3, 11. Dr. Rosenberg opined Claimant's effort was "not maximal" and the study is not valid based on "the shape of the flow-volume and volume-time curves." Employer's Exhibit 7 at 2. Dr. Fino opined the study is invalid due to poor effort. Employer's Exhibit 6 at 10.

The district director ordered a repeat study, which Claimant performed on November 5, 2014. Director's Exhibit 4. Dr. Ajjarapu indicated Claimant's effort for this study "was good and it was a much better test." Director's Exhibit 3, 11. Dr. Michos also reviewed the results for this study and stated the "[v]ents are acceptable." Director's Exhibit 5. Dr. Rosenberg opined, however, that this study is not valid because it produced results that are "not maximal based on the shape of the volume-time curves" and because Claimant's effort was incomplete. Employer's Exhibit 7 at 2. Dr. Fino opined the study is invalid due to poor effort. Employer's Exhibit 6 at 10.

The administrative law judge rejected the opinions of Drs. Rosenberg and Fino that the June 25, 2014 and November 5, 2014 studies are invalid. Decision and Order at 16-17.

[10] Because Employer does not challenge the finding that the April 22, 2014 qualifying pulmonary function study is valid, it is affirmed. *See Skrack*, 6 BLR at 1-711; Decision and Order at 16-17.

She found the technicians who conducted each study "indicate[d] that Claimant's effort on the [respective] test was '[g]ood'" and none of the studies include a technician's statement "indicating that the study was invalid." *Id*. Therefore she found "no basis" to credit the opinions of Drs. Rosenberg and Fino that the pulmonary function studies taken in 2014 are invalid. *Id*.

We cannot affirm the administrative law judge's findings. She did not adequately set forth her basis for rejecting the opinions of Drs. Rosenberg and Fino that the studies are invalid in light of the reasoning the doctors provided. Thus her analysis fails to satisfy the explanatory requirements of the Administrative Procedure Act[11] (APA). *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). She erred in crediting the notations of the technicians who conducted the studies over the opinions of Drs. Rosenberg and Fino. A technician's notations of good effort and cooperation do not amount to substantial evidence that a study is valid in the face of competent medical opinions showing the contrary. *See Peabody Coal Co. v. Director, OWCP* [*Brinkley*], 972 F.2d 880, 885 (7th Cir. 1992) (assuming a technician was equally qualified as a reviewing doctor to assess the validity of pulmonary function studies without supporting evidence was error). She also did not discuss all relevant evidence by evaluating the opinions of Drs. Ranavaya and Ajjarapu that the June 25, 2014 study is invalid, as well as the opinions of Drs. Michos and Ajjarapu that the November 5, 2014 study is valid. *See* 30 U.S.C. §923(b); *Walker v. Director, OWCP*, 927 F.2d 181, 184 (4th Cir. 1991); *McCune*, 6 BLR at 1-998. Thus, we vacate the administrative law judge's finding the June 25, 2014 and November 5, 2014 pulmonary function studies valid. Decision and Order at 16-17.

The administrative law judge also did not adequately set forth her rationale for resolving the conflict in the pulmonary function study evidence by failing to explain why the qualifying pulmonary function studies outweigh the non-qualifying studies. *See Wojtowicz*, 12 BLR at 1-165. Where the record contains mixed pre-bronchodilator and post-bronchodilator results as in this case, the administrative law judge must weigh all of the pulmonary function study values and explain which results she credits and why she credits them. *Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454, 1-459 (1983). The

[11] The Administrative Procedure Act (APA) provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

administrative law judge set forth no such analysis as the APA requires.[12] *See Wojtowicz*, 12 BLR at 1-165.

Based on the foregoing errors, we vacate the administrative law judge's finding the pulmonary function study evidence established total disability and remand the case for further consideration. 20 C.F.R. §718.204(b)(2)(i). The administrative law judge must reconsider the validity of the June 25, 2014 and November 5, 2014 pulmonary function studies.[13] In weighing the medical opinions that address the validity of these studies, the administrative law judge must fully explain the reasons for her credibility determinations in light of the physicians' explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 531-33; *Akers*, 131 F.3d at 439-40. Moreover, when reconsidering whether the pulmonary function study evidence establishes total disability, she must fully explain her basis for resolving the conflict in this evidence. *See* 20 C.F.R. §718.204(b)(2)(i); *Wojtowicz*, 12 BLR at 1-165.

Medical Opinions

The administrative law judge weighed Dr. Ajjarapu's opinion that Claimant is totally disabled, and the opinions of Drs. Rosenberg and Fino that he is not. Decision and Order at 9-17; Director's Exhibits 7, 11, 13; Employer's Exhibits 6, 7. She found the opinions of Drs. Rosenberg and Fino are not reasoned or documented, and Dr. Ajjarapu's opinion is well-reasoned and documented. Decision and Order at 15-17. Because the administrative law judge's improper assessment of the pulmonary function study evidence affected the weight she accorded the conflicting medical opinions, we vacate her findings at 20 C.F.R. §718.204(b)(2)(iv).

Because we have vacated the administrative law judge's findings that the pulmonary function studies and medical opinions establish total disability, we vacate her finding

[12] Contrary to Employer's argument, the administrative law judge was not required to assign the most weight to the September 17, 2015 and October 21, 2015 non-qualifying studies because they were taken more recently. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); Employer's Brief at 11-12.

[13] On remand, the administrative law judge should also address the validity of the September 17, 2015 and October 21, 2015 pulmonary function studies. Dr. Fino opined the September 17, 2015 study is invalid due to poor effort. Employer's Exhibit 6 at 10. Dr. Rosenberg opined the October 21, 2015 is invalid "based on the shape of the flow-volume curves." Employer's Exhibit 7 at 2.

Claimant invoked the Section 411(c)(4) presumption and is entitled to benefits. 30 U.S.C. §921(c)(4). On remand, the administrative law judge must reconsider whether the pulmonary function study and medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(i), (iv). If the administrative law judge finds total disability established based on either type of evidence or both, considered in isolation, she must determine whether Claimant is totally disabled taking into account the contrary probative evidence. *See Shedlock*, 9 BLR at 1-198.

If Claimant fails to establish total disability, an essential element of entitlement, benefits are precluded. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). However, if the administrative law judge finds Claimant is totally disabled, then he is entitled to invocation of the Section 411(c)(4) presumption.[14]

[14] We decline to address, at this time, Employer's challenge to the administrative law judge's determination that it failed to rebut the Section 411(c)(4) presumption. On remand, should the administrative law judge again find Claimant has invoked the Section 411(c)(4) presumption, Employer may challenge the administrative law judge's rebuttal findings.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge