U.S. Department of Labor

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

BRB No. 20-0060 BLA

RALPH NAPIER (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
R & R MINING, LLC	)	
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	DATE ISSUED: 08/31/2021
	)	
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 on Remand Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus[1] (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

[1] After Ms. Klaus filed her brief on October 29, 2020, Anne Rife, Esquire, with Midkiff, Muncie & Ross, P.C., in Bristol, Tennessee, filed a Motion for Substitution of Counsel. Ms. Rife is now representing Employer and its Carrier.

Kathleen H. Kim (Elena S. Goldstein, Deputy 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, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Theresa C. Timlin's Decision and Order on Remand Awarding Benefits (2015-BLA-05568) rendered on a claim filed on November 13, 2012, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

On May 26, 2017, Administrative Law Judge Adele Higgins Odegard awarded benefits. Employer appealed, and the Benefits Review Board remanded the case for proceedings consistent with *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018).[2] *Napier v. R & R Mining, LLC*, BRB No. 17-0490 BLA (May 17, 2018) (Order) (unpub.). The Board directed Judge Odegard to "reconsider the substantive and procedural actions previously taken and to issue a decision on the merits." *Id.* On remand, because Judge Odegard was no longer with the Office of Administrative Law Judges (OALJ), the case was reassigned to Judge Timlin (the administrative law judge), who decided the case based on the record evidence.

The administrative law judge initially found Employer is the responsible operator liable for the payment of benefits. Based on the parties' stipulation, she credited Claimant with at least twenty-nine years of coal mine employment, of which twenty-four years were underground. She also found Claimant was totally disabled and, thus, invoked the

[2] *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. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor has conceded that the Supreme Court's holding applies to its administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.204(b)(2). The administrative law judge further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge lacked authority to hear and decide the case because she was not appointed in a manner consistent with the Appointments Clause of the Constitution.[4] It further asserts the removal provisions applicable to the administrative law judge rendered her appointment unconstitutional. Additionally, Employer contends that liability for benefits must transfer to the Black Lung Disability Trust Fund (the Trust Fund) because it did not properly receive a new hearing when the case was reassigned on remand. On the merits, Employer argues it is not the responsible operator and challenges the validity of the Section 411(c)(4) presumption as part of the Affordable Care Act (ACA). Further, Employer contends the administrative law judge erred in finding that Claimant was totally disabled, thereby invoking the Section 411(c)(4) presumption, and that it did not rebut the presumption.

Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging rejection of Employer's constitutional challenges to the administrative law judge's appointment and its assertion the Section 411(c)(4) presumption is invalid. The Director concedes, however, that the administrative law judge did not properly address whether Employer established

[3] Under Section 411(c)(4) of the Act, Claimant is presumed to have been totally disabled due to pneumoconiosis if he established 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); 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 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.

that Kentucky Darby is the responsible operator and therefore her liability finding must be vacated and remanded for additional consideration.[5]

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.[6] 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

Employer urges the Board to vacate the administrative law judge's Decision and Order and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia*, 585 U.S. at , 138 S. Ct. at 2055. Employer's Brief at 14-18. Employer acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[7] but maintains that ratification was insufficient to cure the defect in the administrative law judge's prior appointment. *Id.*

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[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established at least twenty-nine years of coal mine employment, including twenty-four years underground. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 3.

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order on Remand at 3 n.6; Director's Exhibits 7, 13, 15; Hearing Transcript at 50-54.

[7] The Secretary 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.

The Director argues the administrative law judge had the authority to decide this case because the Secretary's ratification, which occurred prior to her assignment to the case, brought her appointment into compliance with the Appointments Clause.[8] Director's Brief at 6. We agree with the Director's position.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 6, *quoting Marbury v. Madison*, 5 U.S. 137, 157 (1803). Further, ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). Ratification is permissible so long as the agency head: 1) had at the time of ratification the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Moreover, under the "presumption of regularity," courts presume that public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

Congress authorized the Secretary to appoint administrative law judges to hear and decide cases under the Act. 30 U.S.C. §932(a); *see also* 5 U.S.C. §3105. Under the presumption of regularity, we presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all administrative law judges in a single letter. Rather, he specifically identified Administrative Law Judge Timlin and gave "due consideration" to her appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Timlin. The Secretary further acted in his "capacity as head of [DOL]" when ratifying the appointment of Judge Timlin "as an Administrative Law Judge." *Id*. Having put forth no contrary evidence, Employer has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the administrative law judge's appointment. *See Edmond v. United States*, 520

[8] As the Director points out, the Secretary of Labor ratified appointments of all incumbent administrative law judges on December 21, 2017. The current administrative law judge's appointment was in compliance prior to the Board's May 17, 2018 remand order and her assignment to the case.

U.S. 651, 654-66 (1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" its earlier invalid actions was proper).

We further reject Employer's argument that Executive Order 13843, which removes administrative law judges from the competitive civil service, supports its Appointments Clause argument because incumbent administrative law judges remain in the competitive service. Employer's Brief at 14-15. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's ratification of Judge Timlin's appointment, which we have held constituted a valid exercise of his authority that brought her appointment into compliance with the Appointments Clause.

Thus, we reject Employer's argument that this case should be remanded to the OALJ for a new hearing before a different administrative law judge.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL administrative law judges. Employer's Brief at 17-18. Employer generally argues the removal provisions 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*. *Id*. Employer also 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), and 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*.

In *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as administrative law judges" who, "unlike members of the [PCAOB] . . . perform adjudicative rather than enforcement or policymaking functions." *Id*. at 507 n.10. Further,

the majority in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[9] 140 S. Ct. at 2201. It did not address administrative law judges.

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. 1970. The Court explained "the *unreviewable authority* wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id.* (emphasis added). In contrast, DOL administrative law judges' decisions are subject to further executive agency review by this Board.

Employer has not explained how or why these legal authorities should apply to DOL administrative law judges or otherwise undermine the administrative law judge's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized that "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not even attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Moreover, the only circuit to squarely address the issue has upheld the statute's constitutionality with respect to DOL administrative law judges. *Decker Coal Co. v. Pehringer*, F.4th , No. 20-71449, 2021 WL 3612787 (9th Cir. Aug. 16, 2021) (holding that 5 U.S.C. §7521 is constitutional as applied to DOL administrative law judges). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional.

[9] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

Employer's Right to De Novo Adjudication

Employer argues liability for benefits should transfer to the Trust Fund because it did not receive a de novo hearing on remand before a constitutionally appointed administrative law judge. Employer's Brief at 19-20. Employer notes that it requested a new hearing on remand but the case was decided on the record. *Id.* It maintains there is no remedy but to transfer liability for benefits to the Trust Fund as Claimant is now deceased and no hearing can be held.[10] *Id.* The Director contends that Employer waived its right to a new hearing because it did not timely respond to the administrative law judge's January 2, 2019 Order. Director's Brief at 8. We agree with the Director's position.

After the Board remanded the case, Administrative Law Judge Scott R. Morris issued an Order dated August 28, 2018, informing the parties that the case had been initially reassigned to Administrative Law Judge Lystra A. Harris due to the unavailability of Judge Odegard. That Order gave the parties thirty days to submit briefs on remand or to object to the decision being based on the existing record. August 28, 2018 Order at 2. In response, Employer objected to Judge Harris' reassignment on the grounds she was not constitutionally appointed and requested the case be remanded to the district director. Employer's September 26, 2018 Motion for Remand and Reassignment at 2-8. Judge Harris denied Employer's motion on November 13, 2018. The case was subsequently reassigned a second time, however, to Judge Timlin. On January 2, 2019, Judge Timlin advised the parties she would decide the case on the existing record, absent objection, and gave the parties thirty days to respond. Although the record includes a brief from the Director dated January 24, 2019, there is no indication that Employer responded to Judge Timlin's January 2, 2019 Order. Thus, by failing to take the required affirmative action of responding to the Order, we conclude Employer forfeited its right to a new hearing on remand and reject its contention the administrative law judge erred in issuing a decision on the record. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc) (administrative law judge exercises broad discretion in resolving procedural and evidentiary matters). Moreover, while Employer forfeited its right to a new in-person hearing before Judge Timlin, we note that Judge Timlin issued de novo findings on the disputed questions of law and fact.

[10] Claimant died on January 26, 2018, before the Board remanded the case to the administrative law judge. Director's Brief at 1 n.1.

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[11] The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director identifies a responsible operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or that another "potentially liable operator" that is financially capably of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c). If the operator finally designated as responsible is not the operator that most recently employed the miner, the regulations require the district director to explain the reason for such designation. 20 C.F.R. §725.495(d).

Claimant's Social Security Administration (SSA) earnings records indicate he worked for Employer, R&R Mining, LLC (R&R Mining), with Claimant listed as General Partner, from 1998 to 2000; Kentucky Darby LLC (Kentucky Darby) from 2001 to 2008; and Mill Branch Mining, Inc. (Mill Branch) from 2009 to 2011.[12] Decision and Order on Remand at 7-8; Director's Exhibit 15 at 3-4. The record also contains Claimant's 2012 W-2 form from Mill Branch, and three check stubs from K&D Mining for May and June 2012. Director's Exhibits 13, 14. There is also a statement completed on Claimant's behalf by Sharon Warner, R&R Mining's former bookkeeper, that Claimant last worked for the company on March 16, 2000, the company's "sale date." Director's Exhibit 12.

[11] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

[12] As discussed, *infra*, K&D Mining is the same company as Mill Branch. Claimant testified that he was Vice President of Mill Branch and K&D Mining, which were owned by Mr. Jack Ealey. Hearing Transcript at 52; Director's Exhibit 28 at 14.

On May 16, 2013, the district director issued a Primary Notice of Claim to Mill Branch, a Secondary Notice of Claim to Kentucky Darby, and a Tertiary Notice of Claim to R&R Mining. Director's Exhibits 31, 33, 34. On August 20, 2013, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) identifying R&R Mining as the responsible operator because neither Kentucky Darby nor Mill Branch was financially capable of paying benefits. Director's Exhibit 51. In a Proposed Decision and Order Awarding Benefits issued on March 3, 2015, the district director determined R&R Mining was liable for benefits as the responsible operator. Director's Exhibit 86. Employer requested a hearing, which Judge Odegard held on June 2, 2016. Director's Exhibits 88, 91. In her Decision and Order on Remand, which is the subject of this appeal, Administrative Law Judge Timlin, to whom the case had been assigned after Judge Odegard's retirement, also determined R&R Mining was the responsible operator.

Employer (herein also referred to as R&R Mining) challenges its designation as the responsible operator on three grounds. Employer's Brief at 20-24. First, it argues it did not have insurance coverage on Claimant's last day of employment with it. Employer's Brief at 21. Second, it argues either Mill Branch or Kentucky Darby qualifies as a potentially liable operator because each employed Claimant for over one year after R&R Mining and each had insurance coverage when Claimant last worked for it. *Id*. at 21-23. Third, it contends that because Claimant was "self-employed" as a coal operator, the Director failed to properly investigate whether he can be held liable for his own payment of benefits. *Id*. at 23-24.

Employer's Insurance Coverage

Employer asserts its insurance policy was cancelled on March 17, 2000, but because Claimant worked for it in coal mine employment beyond that date, it is financially incapable of paying for benefits. Employer's Brief at 21; *see* Director's Exhibits 29 at 41-44; 87. Employer suggests Claimant may have worked for R&R Mining until the company dissolved on November 1, 2000. Employer's Brief at 21.

During his July 16, 2013 deposition, Claimant testified he stopped working for Employer in 1999. Director's Exhibit 29 at 14-16. However, Claimant testified at the hearing that he last worked for Employer in 2000, and although the SSA earnings records show Claimant's annual earnings with Employer in 2000, they do not list his earnings by quarter. Director's Exhibit 15 at 3; Hearing Transcript at 49-50. Because the administrative law judge was unable to determine the exact date of Claimant's last employment with R&R Mining, she found Employer failed to prove he worked beyond the March 17, 2000 termination of its insurance policy, and thus failed to establish it was financially incapable of paying benefits. Decision and Order on Remand at 8.

Employer argues the administrative law judge did not properly consider that Claimant's hospital records from March 11-13, 2000 and March 14-17, 2000 describe him as actively working. Employer's Brief at 21. It also alleges she did not consider R&R Mining was not dissolved administratively until November 2000. *Id*. We agree with the Director, however that Employer has failed to explain "how this evidence is relevant or how it contradicts the [administrative law judge's] findings." Director's Brief at 10. The alleged fact that Claimant was actively working when he was admitted for his second hospitalization on March 14, 2000 does not prove he continued to work after March 16, 2000 when the bookkeeper confirmed Claimant ended his employment or March 17, 2000 when the insurance policy expired. *See* Decision and Order on Remand at 8; Director's Exhibits 21 at 69; 29 at 41-44; 87; Hearing Transcript at 49-50. Further, the date R&R Mining was administratively dissolved does not show Claimant worked beyond the termination of its insurance policy. *See* Director's Exhibit 10.

We conclude the administrative law judge permissibly found Claimant's testimony unclear as to whether he worked beyond March 17, 2000.[13] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (administrative law judge has broad discretion in evaluating the credibility of evidence, including witness testimony); Decision and Order on Remand at 8; Hearing Transcript at 49-50. As Employer raises no other contentions or error, we affirm the administrative law judge's finding that R&R Mining did not establish it was uninsured as of Claimant's last day of work and did not prove it is financially incapable of assuming liability for benefits.

Liability of Other Operators

Mill Branch

Employer may also avoid liability for benefits by establishing another operator more recently employed Claimant for at least one year and that operator is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c). Although the administrative law judge found the record establishes Claimant worked for Mill Branch for more than one

[13] The Director asserts Claimant "made clear at the hearing that he did not work past March 16, 2000" and therefore disagrees with the administrative law judge's finding that his testimony is unclear. However, the Director also urges the Board to affirm the administrative law judge's finding that Employer did not establish it is financially incapable of paying benefits because "[w]hen these circumstances are viewed in their totality, there cannot be any reasonable doubt that [Claimant] did not work past R&R's coverage period." Director's Brief at 10 n.7.

year after R&R Mining, he properly noted that Employer was required to establish that Mill Branch was financially capable of paying benefits. Decision and Order on Remand at 7, 8-9; Hearing Transcript at 52-56; Director's Exhibits 5, 8. The record establishes Mill Branch's insurance policy was terminated on May 22, 2012. Director's Exhibit 42 at 1, 5. Thus, the administrative law judge considered whether Employer proved that Claimant's last day of work for Mill Branch was before May 22, 2012 such that his claim would be covered under Mill Branch's insurance policy. Decision and Order on Remand at 8-9.

Claimant first stated in a questionnaire that he last worked for Mill Branch on June 24, 2012. Director's Exhibit 8. He later testified in his February 14, 2013 deposition that he last worked for Mill Branch in July 2012; during his July 16, 2013 deposition he said he stopped working in June 2012; and at the hearing he indicated he was not sure when he last worked there. Director's Exhibits 28 at 13; 29 at 28; Hearing Transcript at 54. Based on Claimant's conflicting and "ambiguous" statements, the administrative law judge found there was no credible evidence to establish the actual date Claimant stopped working for Mill Branch or whether it was insured through the end of Claimant's employment.[14] Decision and Order on Remand at 8-9. Thus, the administrative law judge found Employer did not satisfy its burden to show Mill Branch is the responsible operator.

Employer argues that the paystubs from K&D Mining show Claimant received wages for the weeks ending May 4, 2012, May 18, 2012, and June 26, 2012, thereby establishing that he stopped working for Mill Branch by May 4, before the expiration of its insurance policy on May 22, 2012. Employer's Brief at 22-23; Director's Exhibit 14. Employer also relies on Claimant's testimony that Mill Branch always had workers' compensation insurance while he worked there. Employer's Brief at 22-23; Director's Exhibit 29 at 27, 30; Hearing Transcript at 52-53. Employer's arguments are without merit.

Employer's reliance on the pay stubs is misplaced. The administrative law judge observed that Mill Branch was previously known as K&D Mining, yet the SSA earnings records do not reflect any employment with K&D Mining. Decision and Order on Remand at 7; Director's Exhibit 15. She also noted Claimant described working "on the job [site] for K&D Mining, but Mill Branch Mining was the payroll company." Decision and Order on Remand at 7; Director's Exhibit 5 at 1. The administrative law judge specifically found that K&D Mining and Mill Branch are the same company. *Id*. at 7. As such, the paystubs actually support a finding that Claimant worked beyond the termination of Mill Branch's insurance policy.

[14] None of the dates mentioned by Claimant is prior to the May 22, 2012 termination date of Mill Branch's insurance policy.

The Director also correctly notes that merely "[c]asting doubt regarding the date the Miner ceased work" for Mill Branch does not satisfy Employer's burden to prove Mill Branch had insurance coverage on the last day Claimant worked for it. Director's Brief at 11. We see no error in the administrative law judge's determination that Claimant's overall testimony was unreliable regarding when he last worked for Mill Branch and was insufficient to prove Mill Branch had insurance coverage during the time he worked there. *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 323 (6th Cir. 2014) (administrative law judge correctly assessed a witness's testimony as "fall[ing] . . . short of carrying the [e]mployer's burden" to establish that another employer "had sufficient assets to cover the benefits"); *Rowe*, 710 F.2d at 255 (administrative law judge has broad discretion in evaluating the credibility of evidence, including witness testimony); Decision and Order on Remand at 9; Director's Exhibits 28 at 13, 29 at 28; Hearing Transcript at 54-56. Consequently, we affirm the administrative law judge's finding that Employer failed to establish that Mill Branch is financially capable of assuming liability for the payment of benefits.

Self-Employment

Employer asserts Claimant's "self-employment falls within the definition of an operator." Employer's Brief at 23-24. We decline to address this issue as Employer did not raise it before the administrative law judge on remand. *Taylor v. 3D Coal Co.*, 3 BLR 1-350 (1981). Moreover, Employer has presented no argument or evidence to establish that Claimant satisfies the definition of a potentially liable operator under 20 C.F.R. §725.495(c), or that he is capable of assuming liability for the payment of benefits pursuant to 20 C.F.R. §725.495(e).

Kentucky Darby

Lastly, Employer contends the administrative law judge erred in failing to address its argument that Kentucky Darby should be the responsible operator because it more recently employed Claimant and is financially capable of paying benefits. Employer's Brief at 23. The Director notes that because "the record contains the requisite [20 C.F.R. §] 725.495(d) statement" from the Office of Workers' Compensation Programs that it has "no record of insurance coverage for [Kentucky Darby], or of authorization to self-insure," Employer must "prove that the company has the financial resources to assume liability for the claim." Director's Brief at 12. The Director asserts the case must be remanded because the administrative law judge "did not address directly" whether Kentucky Darby has the financial ability to pay benefits. *Id*. We agree.

The administrative law judge acknowledged Claimant worked for Kentucky Darby after Employer, from 2001-2008, but she did not address Employer's argument that Kentucky Darby was financially capable of assuming liability for benefits because

Claimant's coal mine employment with Kentucky Darby ended when it was still insured for liability.[15] Decision and Order on Remand at 7-9. The record includes DOL's statement that Claimant worked for Kentucky Darby from 2001 to 2008, and that Kentucky Darby's insurance policy was canceled on September 29, 2006. Director's Exhibit 34 at 8. However, the record contains conflicting evidence regarding Claimant's last day of employment with the company. He indicated he worked for Kentucky Darby until 2006, Director's Exhibit 3, while the SSA earnings records indicate Claimant may have worked there until 2008, Director's Exhibit 15 at 3, well after the expiration of its insurance policy.

Although the Director maintains the SSA earnings records are the most credible evidence as to when Claimant worked for Kentucky Darby, the Director acknowledges the administrative law judge's decision does not satisfy the Administrative Procedure Act[16] because it fails to adequately address a relevant issue in the case. Director's Brief at 12; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). As the administrative law judge did not adequately address the issue, we vacate her determination that Employer is the responsible operator and remand the case for further consideration of whether Employer has established that Kentucky Darby is a more recent employer who has the

[15] Employer notes the administrative law judge "apparently relied on the fact that Kentucky Darby did not respond to DOL's correspondence concerning [this] claim and DOL's undated determination that Kentucky Darby was uninsured at the time [Claimant] last worked there." Employer's Brief at 23, citing Director's Exhibit 34 at 8 (stating that Kentucky Darby's policy was cancelled on September 29, 2006). Employer asserts the administrative law judge's analysis is incomplete because:

> [Claimant] represented that he worked for Kentucky Darby until 2006. [Director's Exhibit 3]. That would be consistent with DOL's findings as to Kentucky Darby's insurance and it would not be inconsistent with Kentucky Darby's continued operation even though [Claimant] was not actually working there. [Hearing Transcript at 51] (stating that he continued to receive "draws" from Kentucky Darby).

Employer's Brief at 23.

[16] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must include a statement of "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).

financial ability to secure the payment of benefits. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Merits of Entitlement – Section 411(c)(4) Presumption

As questions pertaining to Claimant's entitlement to benefits are independent of the resolution of the responsible operator issue, we also consider Employer's challenge to the administrative law judge's findings that Claimant invoked the Section 411(c)(4) presumption and that Employer failed to rebut it.

Constitutionality of 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), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 19. 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*. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, ___ U.S. ___, No. 19-840, 2021 WL 2459255 at *10 (Jun. 17, 2021.).

Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is totally disabled if he has a pulmonary or respiratory impairment that, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A miner 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 opinions. 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 Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge found Claimant established total disability based on the blood gas studies, the medical opinions, and the weight of the evidence as a whole. Decision and Order on Remand at 11-23; *see* 20 C.F.R. §718.204(b)(2)(ii), (iv). Employer contends that the administrative law judge erred in determining the exertional requirements of Claimant's usual coal mine work and further erred in finding the medical opinion evidence sufficient to establish total disability. Employer's Brief at 24-28. We disagree.

Initially, we reject Employer's contention that the administrative law judge erred in finding Claimant's usual coal mine work required heavy manual labor. Employer's Brief at 26. Claimant testified that his usual coal mine work involved running the continuous miner, shoveling the belt, supervising, and doing whatever had to be done. Hearing Transcript at 54. On his Form CM-913, "Description of Coal Mine Work and Other Employment," Claimant described his daily usual coal mine work as a foreman-general inside laborer as requiring two hours of sitting, three hours of standing, one hour of crawling 400-500 feet, and varying amounts of time lifting eighty to ninety pounds and carrying fifteen to thirty pounds seventy to eighty feet. Director's Exhibit 4 at 1-2. Based on Claimant's hearing testimony and Form CM-913, the administrative law judge found "Claimant was required to sit for two hours per day, stand for three hours per day, crawl a considerable distance one hour each day, and lift and carry heavy objects various times per day." Decision and Order on Remand at 10; *see* Hearing Transcript at 54; Director's Exhibit 4. Because Employer has not shown any error committed by the administrative law judge in determining that Claimant's usual coal mine work required heavy manual labor, we affirm it.[17] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996); Decision and Order on Remand at 10; Director's Exhibit 4 at 1-2; Hearing Transcript at 54.

[17] Employer alleges that the administrative law judge did not explain how she defined "heavy labor" and if "she was borrowing from the Social Security Administration (SSA) regulations, the work does not satisfy the definition of heavy labor." Employer's Brief at 26. Contrary to Employer's contention that the administrative law judge failed to set forth the definition of "heavy work" she applied, the parties were advised that, if necessary, the administrative law judge would take notice of the physical exertional requirements in the Dictionary of Occupational Titles (DOT). *See* Judge Adele H. Odegard's Notice of Hearing and Pre-Hearing Order at 4 dated December 17, 2015 ("If necessary, this tribunal will take official notice of [the] occupational exertion[al] requirements described in the *Dictionary of Occupational Titles, ...*)." On remand from the Board, Administrative Law Judge Theresa C. Timlin was reassigned the case. She based her decision upon the "analysis of the [existing] record, the pleadings of the parties, and the applicable law," including the Notice of Hearing issued on December 17, 2015. Decision and Order on Remand at 2-6. The DOT defines heavy physical exertion as "Exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Medium Work." Furthermore, the DOT defines occasionally as "Occasionally; activity or condition exists up to 1/3 of the time." Employer does not identify any error committed by the administrative law judge in finding that Claimant's work was "heavy work" under the DOT definition.

We also reject Employer's contention that the administrative law judge erred in crediting the opinions of Drs. Habre and Rosenberg that Claimant was totally disabled over Dr. Tuteur's contrary opinion. Decision and Order on Remand at 19-20. The administrative law judge permissibly found Drs. Habre's and Rosenberg's opinions were reasoned and documented, because they relied on Claimant's qualifying blood gas studies and each had an accurate understanding that Claimant's job duties required heavy manual labor.[18] *See Rowe*, 710 F.2d at 255; *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); Decision and Order on Remand at 19-20; Director's Exhibits 19 at 59-67; 21; Employer's Exhibit 5. In contrast, the administrative law judge permissibly found that while Dr. Tuteur knew Claimant worked as a mine superintendent, it was unclear if he understood that Claimant had to perform heavy manual labor in that job. *See Cornett*, 227 F.3d at 577-78; Decision and Order on Remand at 20; Employer's Exhibit 4 at 2, 9.

Further, although Employer contends that Drs. Rosenberg and Tuteur explained why Claimant's obesity caused his qualifying blood gas study results, Employer conflates the issues of total disability and disability causation. The relevant issue at 20 C.F.R. §718.204(b)(2)(i) is whether Claimant has a disabling respiratory impairment, while the cause of that impairment is addressed at 20 C.F.R. §718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption. *See* 20 C.F.R. §§718.204(a),(c), 718.305(d).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant established total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv). We further affirm the administrative law judge's overall finding that Claimant had a totally disabling respiratory or pulmonary impairment and invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[18] Employer asserts Dr. Habre did not understand the exertional requirements of Claimant's usual coal mine employment. *See* Employer's Brief at 27. However, Dr. Habre identified Claimant's usual coal mine work as a superintendent and stated that Claimant could not perform the duties of that job or "strenuous activity" related to coal mining. *See* Director's Exhibit 19 at 59, 65-66. Thus, the administrative law judge acted within her discretion in considering Dr. Habre's opinion of total disability based on inability to perform strenuous work consistent with her finding that Claimant's usual coal mine employment required "heavy" work. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); *see Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-303 (2003); Decision and Order on Remand at 19-20; Director's Exhibit 19 at 59, 65-66.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he had neither legal nor clinical pneumoconiosis,[19] or "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). The administrative law judge found Employer failed to establish rebuttal by either method.[20]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant 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).

Employer argues the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Tuteur that Claimant did not have legal pneumoconiosis. Employer's Brief at 30-31. We disagree. The administrative law judge permissibly found that because Dr. Rosenberg failed to adequately explain why he excluded a diagnosis of COPD, despite record evidence showing Claimant had COPD,[21] his opinion on legal pneumoconiosis and

[19] "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).

[20] The administrative law judge found Employer disproved clinical pneumoconiosis. Decision and Order on Remand at 23-28, 29.

[21] Dr. Tuteur diagnosed COPD. Employer's Exhibit 4 at 6. The administrative law judge also noted Claimant's medical records from Dr. Dahhan documented his treatment for COPD; the x-rays showed that Claimant had emphysema, a recognized form of COPD; and Claimant used medication including inhalers and nebulizers ordinarily prescribed for COPD. Decision and Order on Remand at 28; Claimant's Exhibits 8, 9; Employer's Exhibits 2, 3. Dr. Rosenberg's explanation was that Claimant's obesity accounted for all of his impairment. The administrative law judge in essence found this explanation

the etiology of Claimant's respiratory impairment lacked credibility. *See Rowe*, 710 F.2d at 255; Decision and Order on Remand at 28; Director's Exhibit 21; Claimant's Exhibits 8, 9 at 1; Employer's Exhibits 2 at 36, 81; 3; 5 at 5.

Additionally, we see no error in the administrative law judge's analysis of Dr. Tuteur's opinion. Dr. Tuteur opined Claimant had COPD due entirely to smoking. Employer's Exhibit 4 at 6-7. Citing several studies, he explained:

> One must recognize that it is extremely well established that 20% of persons smoking at the estimated low level that [Claimant] has reported developed COPD about 15% of the time. In contrast, non-mining [sic] coal miners who were exposed to coal mine dust for four decades such as [Claimant] has [sic] developed COPD about 1% of the time.

Id. at 7. The administrative law judge permissibly found Dr. Tuteur's opinion unpersuasive because, even accepting his premise that miners rarely develop COPD from coal dust, "he does not explain how he determined that [Claimant did] not fall into the cohort [of miners] that developed a respiratory disorder from exposure to coal mine dust one-to-two percent of the time." Decision and Order on Remand at 29; *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); Employer's Exhibit 4 at 7-8. Further, noting the effects of smoking and coal mine dust exposure may be additive, the administrative law judge also permissibly found Dr. Tuteur did not adequately explain why Claimant's at least twenty-nine years of coal mine dust exposure did not also significantly contribute to, or substantially aggravate, his respiratory impairment. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order on Remand at 28-29; Employer's Exhibit 4 at 7-8.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255. Employer's arguments are a request to

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inadequate in light of the Department's acceptance of science showing that COPD can be caused by coal dust exposure and the evidence indicating Claimant had COPD. This determination was within her discretion. *See Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co., v. Young*, 947 F.3d 399, 407 (6th Cir. 2020); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (determination as to whether medical opinion is sufficiently documented and reasoned is a credibility matter for the factfinder to decide).

reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Lastly, because Employer has the burden of proof and we affirm the administrative law judge's rejection of its medical experts, we need not address Employer's contention the administrative law judge erred in crediting Dr. Habre's opinion that Claimant had legal pneumoconiosis. Employer's Brief at 28-31. Thus, we affirm the administrative law judge's finding Employer did not disprove that Claimant had legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A).

Disability Causation

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). She permissibly discredited the disability causation opinions of Drs. Rosenberg and Tuteur because neither diagnosed legal pneumoconiosis, contrary to her finding Employer failed to disprove Claimant had the disease.[22] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order on Remand at 30. 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), and the award of benefits.

Remand Instructions

The administrative law judge is instructed to address Employer's argument that Kentucky Darby is financially capable of assuming liability for benefits. If the administrative law judge determines Employer is the responsible operator, she may direct Employer to pay benefits based on our affirmance of the award. However, if the administrative law judge finds that Employer is not the responsible operator, liability for benefits must transfer to the Trust Fund. In rendering all determinations on remand, the administrative law judge must comply with the APA. *See Wojtowicz*, 12 BLR at 1-165.

[22] Neither physician offered an explanation with respect to whether legal pneumoconiosis caused Claimant's disability independent of his conclusion that Claimant did not have the disease.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed in part and 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

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge