U.S. Department of Labor

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

BRB No. 19-0492 BLA

DEE ANN NOECKER (o/b/o TOMMY V. NOECKER)	)	
Claimant-Respondent	)	
v.	)	
DECKER COAL COMPANY	)	DATE ISSUED: 12/15/2020
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

John S. Lopatto III, Washington, D.C., for Employer.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge John P. Sellers, III's Decision and Order Awarding Benefits (2014-BLA-05646) rendered on a claim filed on May 8, 2013, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited the Miner with 12.82 years of coal mine employment and found Claimant[1] could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, the administrative law judge found Claimant established the Miner had clinical pneumoconiosis arising out of coal mine employment, 20 C.F.R. §§718.202(a), 718.203(b), and legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) significantly related to, or substantially aggravated by, coal mine dust exposure. *Id*. He further found the Miner was totally disabled due to clinical and legal pneumoconiosis, and awarded benefits. 20 C.F.R. §718.204(b), (c).

On appeal, Employer argues the administrative law judge lacked the authority to preside over the case because the Administrative Procedure Act's provisions for removing administrative law judges, 5 U.S.C. §7521, are inconsistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] Alternatively, Employer challenges the administrative law judge's finding that Claimant established legal pneumoconiosis, total disability, and total disability due to pneumoconiosis.[4] Claimant has not filed a response

[1] The Miner died on February 4, 2019, while his claim was pending. Decision and Order at 2 n.2. Claimant, the Miner's widow, is pursuing the claim on behalf of his estate. *Id*.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[4] We affirm, as unchallenged, the administrative law judge's finding that Claimant established clinical pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R.

brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing the administrative law judge had the authority to decide the case.

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.[5] 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).

Removal Provisions

On July 18, 2019, Employer filed with the Board a motion to remand the claim for a new hearing. It argued the administrative law judge lacked authority to adjudicate this case because the provisions that govern the removal of Department of Labor (DOL) administrative law judges are unconstitutional. It cited the United States Supreme Court's decisions in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018) and *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010),[6] and the decision of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *cert. granted*, U.S. , 2020 WL 6037208 (U.S. Oct. 13,

§§718.202(a), 718.203(b); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10, 12-13.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because the Miner's coal mine employment occurred in Montana. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2; Hearing Transcript at 21.

[6] *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. Comm'r*, 501 U.S. 868 (1991)). In *Free Enterprise,* the Supreme Court held that a statute providing the Public Company Accounting Oversight Board with two levels of "for cause" removal protection interfered with the President's duty to ensure the faithful execution of the law. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

2020) (No. 19-1458)[7] to support its argument. The Director responded, urging the Board to deny Employer's motion.

On April 30, 2020, the Board held Employer had not specified or adequately explained how the removal provisions are unconstitutional. *Noecker v. Decker Coal Co.*, BRB No. 19-0492 BLA., slip op. at 3-4 (Apr. 30, 2020) (Order) (unpub.), *citing Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b). The Board further held the cases Employer cited do not support its argument. *Noecker,* BRB No. 19-0492 BLA, slip op. at n.4. Thus the Board denied Employer's request to remand this case to the Office of Administrative Law Judges for reassignment to a different administrative law judge. *Id*. at 4.

In its appeal brief, Employer again argues the administrative law judge's appointment is not valid because he is not subject to discretionary removal by the President or the Secretary of Labor. Employer's Brief at 4-11. It asserts the statute governing the removal of administrative law judges, 5 U.S.C. § 7521, is unconstitutional. *Id*. Employer again cites the Supreme Court's decisions in *Lucia*, *Free Enterprise*, and the Federal Circuit's decision in *Arthrex* to support its argument. Employer's Brief at 4-11. We again reject Employer's arguments. *Noecker,* BRB No. 19-0492 BLA. slip op. at 4.

First, we agree with the Director's contention that Employer has forfeited this argument. Director's Brief at 2-3. 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). Before the administrative law judge, Employer did not raise any specific challenge to his authority to decide the case in light of the removal provisions contained in 5 U.S.C. §7521[8] and raises

[7] In *Arthrex*, the United States Court of Appeals for the Federal Circuit determined that Administrative Patent Judges (APJs) who comprise the Patent Trial and Appeal Board (PTAB) are principal officers who must be appointed and removed by the President. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *cert. granted,* U.S. , 2020 WL 6037208 (U.S. Oct. 13, 2020) (No. 19-1458). The court held that because APJs are subject to removal for cause under 5 U.S.C. §7513, "the current structure of the [PTAB] violates the Appointments Clause." *Id*. at 1335. To preserve the constitutionality of the statute that created the PTAB, the court severed application of 5 U.S.C. §7513 to APJs, making them properly appointed inferior officers. *Id*. at 1337-38.

[8] During the hearing, Employer asserted it would reserve its right to challenge the administrative law judge's appointment in light of the Supreme Court's decision in *Lucia*,

this argument for the first time on appeal. *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging).

Employer asserts it was unable to preserve its argument because the Supreme Court's decision in *Lucia*, declining to address "for cause" removal protections for administrative law judges at the Securities and Exchange Commission (SEC), was issued "too close" in time to the hearing in this claim. Employer's Brief at 5-6. This argument is unavailing for several reasons. First, it implies Employer could not have raised its argument until the Supreme Court issued its decision in *Lucia*. Yet, the propriety of "for cause" removal protections was the subject of judicial decisions issued long before the hearing in this claim, including one of the cases on which Employer now relies. *See Free Enter. Fund*, 561 U.S. at 495-498 (addressing the constitutionality of "for cause" removal protections for inferior officers at the Public Company Accounting Oversight Board). Second, Employer's counsel's discussion of *Lucia* at the hearing belies its argument and indicates he had time to review the holding in *Lucia* but simply failed to identify "for cause" removal protections as an issue affecting the administrative law judge's authority to decide this case. Hearing Transcript at 12-16. Finally, even accepting Employer's assertion that it could not fully develop its arguments prior to the hearing, Employer does not explain why it failed to raise the issue in the thirteen months between the hearing and the issuance of the administrative law judge's Decision and Order awarding benefits. *Kiyuna v. Matson Terminals Inc.*, 53 BRBS 9 (2019) (Appointments Clause argument forfeited where claimant had "sufficient time after the decision in *Lucia* to raise an Appointments Clause challenge but did not do so until after an adverse decision was issued"). Because Employer has not identified any basis for excusing its forfeiture of the issue,[9] we reject its argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different administrative law judge. *See Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018) (recognizing exception for considering a forfeited argument due to extraordinary circumstances).

Furthermore, Employer has failed to persuasively explain its reliance on *Free Enterprise Fund*, *Lucia*, and *Arthrex*. For the reasons identified in the Board's April 30, 2020 Order, we continue to reject Employer's assertion that *Free Enterprise Fund* and

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but nonetheless stated "it appears" the administrative law judge "certainly has the authority to conduct this hearing." Hearing Transcript at 14-15.

[9] Employer's argument that administrative law judges cannot resolve constitutional issues is not a valid basis for excusing its forfeiture. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962); *Kiyuna v. Matson Terminals Inc.*, 53 BRBS 9, 11 (2019) (Appointments Clause argument is an "as-applied" challenge that the administrative law judge can address and thus can be waived or forfeited); Employer's Brief at 6.

Lucia support its remand request. *Noecker*, BRB No. 19-0492 BLA, slip op. at 4 n.4. We also decline Employer's invitation to interpret the holding in *Arthrex* as applying to DOL administrative law judges. First, as the Board's prior Order noted, *Arthrex* is not binding on this claim which arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. *Noecker*, BRB No. 19-0492 BLA, slip op. at 4 n.4. Second, the new arguments Employer raises in its brief do not persuasively explain why its holding should apply to DOL administrative law judges.[10] In *Arthrex*, the Federal Circuit did not hold that administrative law judges can never have "for cause" removal protections; rather, it held that such removal protections for the Administrative Patent Judges (APJs) who comprise the Patent Trial and Appeal Board (PTAB) are unconstitutional because they are "principal officers" who must be appointed and removed by the President. *Arthrex*, 941 F.3d at 1329-35. Aside from identifying some similarities between APJs and DOL administrative law judges, Employer's argument appears based primarily on an incorrect assumption that because the APJs in *Arthrex* were deemed "principal officers" rather than "inferior officers," so too are DOL administrative law judges.[11] *See Lucia*, 138 S.Ct. at 2051 n.3 ("Both the Government and Lucia view the SEC's ALJs as inferior officers and acknowledge that the Commission, as a head of department, can constitutionally appoint them."). We therefore reject Employer's contention that remand is required in light of the Federal Circuit's decision in *Arthrex*.

Entitlement Under 20 C.F.R. Part 718

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish

[10] In *Arthrex*, the Federal Circuit interpreted 5 U.S.C. §7513, which sets forth removal provisions applying to federal employees in the competitive service and certain federal employees in the excepted service, but not 5 U.S.C. §7521, which contains the removal provisions that apply specifically to DOL administrative law judges.

[11] Employer's arguments on this point are contradictory. It acknowledges DOL administrative law judges are "inferior officers," but then alleges they "suffer from the same Appointments Clause infirmity condemned for APJs." Employer's Brief at 10. It further implies DOL administrative law judges are "principal officers" by alleging that the Board must deem their removal protections unconstitutional to avoid "the anomaly of this Board [comprised of inferior officers] ruling on orders of ALJ officers with superior Constitutional status." *Id.*

any of them precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence."[12] 20 C.F.R. §718.204(b)(2).

The administrative law judge found Claimant established total disability based on the pulmonary function testing because studies conducted on April 21, 2010 and September 10, 2013 are qualifying,[13] and the record does not include any non-qualifying study. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 13-14. He also found Claimant established total disability based on the arterial blood gas studies because a September 10, 2013 study is qualifying, and the record does not include any non-qualifying study.[14] 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 14. Finally, he found the medical opinions of Drs. Akshay Sood and Cecile Rose that the Miner was totally disabled well-

[12] The administrative law judge found no evidence that the Miner suffered from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 13 n.6.

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

[14] The administrative law judge recognized that the record includes arterial blood gas testing taken between 2010 and 2012, but permissibly declined to consider this evidence because this testing was "administered while [Claimant] was being hospitalized for pneumonia and COPD exacerbation." *See* Appendix C to 20 C.F.R. Part 718 (blood gas studies "must not be performed during or soon after an acute respiratory or cardiac illness"); Decision and Order at 14.

reasoned and documented. Decision and Order at 15. As the record does not include any contrary medical opinions, he found Claimant established total disability based on the medical opinions. 20 C.F.R. §718.204(b)(2)(iv).

Employer does not challenge the administrative law judge's findings that the April 21, 2010 and September 10, 2013 pulmonary function studies and September 10, 2013 arterial blood gas study are qualifying. Nor does it challenge his finding that Dr. Rose's opinion that the Miner was totally disabled was well-reasoned and documented. Thus we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer argues the administrative law judge erred in failing to address its request to strike Dr. Sood's opinion because Dr. Sood did not respond to its subpoena for the medical records he relied on. Employer's Brief at 1-2. It also argues Dr. Sood cited to pulmonary function and arterial blood gas testing that was not admitted into the record. *Id*. As we have affirmed the administrative law judge's findings that Claimant established total disability based on the April 21, 2010 and September 10, 2013 pulmonary function studies, the September 10, 2013 arterial blood gas study, and Dr. Rose's medical opinion, we need not address Employer's argument with respect to Dr. Sood. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding Claimant established total disability based on the uncontradicted pulmonary function studies, arterial blood gas study, and medical opinion from Dr. Rose. 20 C.F.R. §718.204(b)(2)(i)-(ii), (iv). We further affirm the administrative law judge's conclusion that the evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 16.

Disability Causation

A miner is totally disabled due to pneumoconiosis if the disease is a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a "substantially contributing cause" if it:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

Dr. Rose considered the Miner's fourteen years of "substantial" coal mine dust exposure as a surface coal miner. Director's Exhibit 12 at 5. She also noted he had a "long history of cigarette smoking, totaling approximately 45 pack-years." *Id*. Based on the Miner's pulmonary function testing, arterial blood gas testing, and x-rays, she opined "coal workers' pneumoconiosis due to his previous occupational exposure to coal mine dust" substantially contributed to his total disability. *Id*. at 5-6.

The administrative law judge found the record supports a finding that the Miner smoked cigarettes for forty-five pack-years. Decision and Order 5-6. In weighing Dr. Rose's opinion, he found she "considered accurate coal mine employment and smoking histories" and "had an accurate understanding of the dust conditions to which the [Miner] was exposed." Decision and Order at 11, 16. He permissibly found Dr. Rose's opinion credible and sufficient to establish the Miner's total disability was due to clinical pneumoconiosis. Decision and Order at 16-17; *see Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 1127 (9th Cir. 2014).

Employer argues Dr. Rose did not adequately address the nature of the Miner's coal mine employment or his cigarette smoking history. Employer's Brief at 3-4. We consider Employer's arguments to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. As it is supported by substantial evidence, we affirm the administrative law judge's finding Dr. Rose's opinion establishes the Miner's clinical pneumoconiosis substantially contributed to his disability. We thus affirm his finding Claimant established disability causation, 20 C.F.R. §718.204(c),[15] and the award of benefits.

[15] Because Claimant established total disability due to clinical pneumoconiosis based on Dr. Rose's opinion, we need not address Employer's arguments that the administrative law judge erred in considering Dr. Sood's opinion on disability causation and erred in finding the Miner had legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 1-2.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge