U.S. Department of Labor

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

BRB No. 20-0058 BLA

AUDIE EFREN CHILDRESS Claimant-Respondent v. REDHAWK MINING LLC and NEW HAMPSHIRE INSURANCE/AIG Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/27/2021 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for Claimant.

Cameron Blair and John W. Beauchamp (Fogle Keller Walker, PLLC), Lexington, Kentucky, for Employer and its Carrier.

Edward Waldman (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Joseph E. Kane's Decision and Order Awarding Benefits (2017-BLA-05955) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on May 2, 2016.[1]

The administrative law judge credited Claimant with thirty-two years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked 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), and thereby established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). He 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 he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] Alternatively, it contends he

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[1] This is Claimant's second claim for benefits. The district director denied Claimant's initial claim, filed on December 14, 2012, as abandoned. Director's Exhibit 1. A denial by reason of abandonment is "deemed a finding the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409; *see* Decision and Order at 10.

[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

erred in finding Claimant is totally disabled and, therefore, invoked the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response in this appeal, but argues the administrative law judge had 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).

Appointments Clause

On November 25, 2019, Employer filed a Motion to Remand with the Board based on the United States Supreme Court's decision in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[6] In its motion, Employer asserted the administrative law judge's issuance of a Notice of Hearing prior to the ratification of his appointment on December 21, 2017,[7]

> 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 on appeal, the administrative law judge's finding Claimant established thirty-two years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[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)).

[7] The Secretary of Labor issued a letter to the administrative law judge on December 21, 2017, stating:

constituted an Appointments Clause violation. Claimant and the Director responded, urging the Board to deny Employer's motion, and Employer replied.

On March 31, 2020, the Board denied Employer's Motion to Remand because the administrative law judge issued only the Notice of Hearing prior to his ratification. *Childress v. Redhawk Mining, LLC*, BRB No. 20-0058 BLA (Mar. 31, 2020) (Order) (unpub.). The Board held this would not be expected to affect the administrative law judge's ability "to consider the matter as though he had not adjudicated it before" and did not taint the adjudication with an Appointments Clause violation requiring remand. *Id*.

Employer again argues in this appeal that *Lucia* precludes the administrative law judge from hearing this case because he issued a Notice of Hearing prior to the ratification of his appointment. Employer's Brief at 9-11. As we previously rejected this contention, we decline to address it again. *Childress v. Redhawk Mining, LLC*, BRB No. 20-0058 BLA (Mar. 31, 2020) (Order) (unpub.); *see also Noble v. B & W Res., Inc*., 25 BLR 1-267 (2020).

Further, assuming arguendo Employer properly raised the issue, we similarly reject Employer's argument that this case should be remanded because the Chief Administrative Law Judge was not properly appointed when he assigned this case to the administrative law judge. Employer's Brief at 9-11. The Chief Administrative Law Judge's assignment of the case to the administrative law judge was clerical and did not involve considering the merits of this case. Thus it did not taint the assignment of the case or its adjudication with an Appointments Clause violation requiring remand. *Lucia,* 138 S.Ct. at 2055; *see also Noble v. B & W Res., Inc*., 25 BLR 1-267 (2020). Furthermore, his assignment of this case to the administrative law judge did not affect the administrative law judge's ability "to consider the matter as though he had not adjudicated it before" and therefore also did not taint the adjudication with an Appointments Clause violation requiring remand. *Id.*

> 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 Kane.

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.[8] *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).

The administrative law judge found Claimant established total disability based on the medical opinions.[9] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 7-10. Specifically, he credited the opinions of Drs. Alam and Dahhan that Claimant is totally disabled over Dr. Westerfield's opinion that he is not. Decision and Order at 7-10. He further found all the relevant evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 10.

Employer first argues the administrative law judge did not apply the same level of scrutiny to Dr. Westerfield's opinion as compared to Dr. Alam's opinion. Employer's

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[8] The administrative law judge found Claimant's usual coal mine employment was working as a scoop operator. Decision and Order at 4, 10. Claimant described the scoop as a "piece of underground equipment that [has] a big, flat bucket on the front." Hearing Tr. at 11. He would load supplies on the scoop by hand, move them to another location with the machine, and then unload them. *Id*. at 11-12, 18. The heaviest thing he carried were bags of rock dust that weighed seventy pounds. *Id*. at 12, 19. He also loaded cinder blocks by hand to build brattices. *Id*. at 19. In his scoop operator job, he had to regularly move mining equipment, supplies, rock dust bags, and roof bolts back and forth in the mines. *Id*. at 12-13. Further, he engaged in rock dusting by hand and would go through twelve to fifteen bags of rock dust a day. *Id*. The administrative law judge found Claimant's usual coal mine employment required "some heavy work." Decision and Order at 10. We affirm these findings as they are not challenged by the parties. *Skrack*, 6 BLR at 1-711.

[9] The administrative law judge found Claimant did not establish total disability based on the pulmonary function studies, arterial blood gas studies, or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 5-7.

Brief at 13-15. It contends he faulted Dr. Westerfield for failing to address all the qualifying objective testing of record, but did not fault Dr. Alam for failing to discuss the non-qualifying testing of record.[10] *Id*.

Contrary to Employer's argument, the administrative law judge did not discredit Dr. Westerfield's opinion because the doctor did not address all the objective testing. Rather, he rejected it because he found unpersuasive the explanation Dr. Westerfield provided for the variation in Claimant's pulmonary function testing that the doctor reviewed. Decision and Order at 7.

In his initial report, Dr. Westerfield diagnosed Claimant with a mild non-disabling respiratory impairment based on the non-qualifying October 24, 2017 pulmonary function study he conducted. Employer's Exhibit 4. During his deposition, however, Dr. Westerfield reviewed additional medical evidence, including pulmonary function studies that Dr. Dahhan conducted on December 12, 2016, and October 27, 2017. Employer's Exhibit 6 at 13-14. Dr. Westerfield conceded that both of the studies Dr. Dahhan conducted are qualifying for total disability, and the level of airway obstruction indicated on the October 27, 2017 study is "much more severe" than the level of obstruction revealed on the October 24, 2017 study he conducted. *Id*. He also concluded both studies still evidence "a reversible airway obstruction." *Id*.

When asked by Employer's counsel to address the discrepancies in the pulmonary function testing, Dr. Westerfield attributed the variation to Claimant's asthma. Employer's Exhibit 6 at 13-14. He explained that with asthma, one "can see variation in performance" in that an individual can be "breathing fine or even normal some days, then a short time later they have breathing problems." *Id*. He "suspected" Claimant was not breathing well the day he performed pulmonary function testing for Dr. Dahhan. *Id*. When asked to address whether Claimant is totally disabled "based on the entirety of the evidence," Dr. Westerfield stated he would make a "judgment based on [his] own evaluation" of Claimant, and opined Claimant is not totally disabled. *Id*.

The administrative law judge did not fault Dr. Westerfield for failing to review all the objective testing of record. Employer's Brief at 13-15. He permissibly found Dr. Westerfield's explanation that Claimant's asthma "could wax and wane" unpersuasive because "it does not explain how [Claimant] would be able to perform his last coal mine

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

job on a regular basis under such circumstances."[11] Decision and Order at 10; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *see also Greer v. Director, OWCP*, 940 F.2d 88, 91 (4th Cir. 1991) (explaining pneumoconiosis is a chronic condition and on any given day, it is possible to do better, and exert more effort, than one's typical condition would permit).

With respect to Dr. Alam, there is no merit to Employer's argument that the administrative law judge should have rejected his opinion because he did not have an adequate understanding of Claimant's usual coal mine employment. Employer's Brief at 14-15. Dr. Alam recognized Claimant's usual coal mine employment involved working as a scoop operator. Director's Exhibit 12 at 2. He noted this required Claimant to build brattices, haul supplies, clean up rock dust by hand, shovel belts, and act as a general laborer. *Id*. As discussed above, the administrative law judge found Claimant's usual coal mine employment was working as a scoop operator, Decision and Order at 4, 10, and Claimant testified this required him to carry cinder blocks by hand to build brattices and haul heavy equipment and bags of rock dust. Hearing Tr. at 11-13, 18-19. Moreover, Claimant testified he engaged in rock dusting by hand and would go through twelve to fifteen bags of rock dust a day. *Id*. The administrative law judge permissibly found Dr. Alam "took into consideration Claimant's last position" as a scoop operator when opining he is totally disabled. Decision and Order at 7-8; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185.

We also reject Employer's argument that the administrative law judge was required to discredit Dr. Alam's opinion because the pulmonary function and arterial blood gas study evidence did not establish total disability. Employer's Brief at 22. The regulations set forth total disability can be established with reasoned medical opinions even "where total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i) [or] (ii) . . . of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests).

[11] Contrary to Employer's argument, the administrative law judge was not required to credit Dr. Westerfield's opinion because he is a "third-party evaluator with no affiliation" to either party. Employer's Brief at 20-21; *see Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-36 (1991) (en banc).

Although the administrative law judge found the pulmonary function studies do not establish total disability, he stated "it is worth noting" three of the four FEV1 results are qualifying pre-bronchodilator. Decision and Order at 6. The administrative law judge further noted Dr. Alam based his total disability opinion on his examination of Claimant, a "low FEV1" value on pulmonary function testing, and symptoms of shortness of breath with dyspnea on exertion. *Id*. at 7, 9-10. He permissibly found Dr. Alam's opinion well-reasoned and documented. *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 7-8.

We further reject Employer's argument that the administrative law judge erred in crediting Dr. Dahhan's total disability opinion. Employer's Brief at 15-16, 18-19. There is no merit to Employer's contention that Dr. Dahhan was equivocal about whether Claimant is totally disabled. *Id*.

Dr. Dahhan diagnosed a "severe, significantly reversible, obstructive ventilatory impairment." Employer's Exhibit 3 at 3-4. He opined Claimant is totally disabled by this impairment. *Id*. He stated, however, that Claimant's pulmonary capacity would improve significantly with aggressive bronchodilator treatment, as evidenced by the reversible nature of the obstructive impairment revealed after administering bronchodilators. *Id*. In his deposition, Dr. Dahhan reviewed additional medical records, including Dr. Westerfield's October 24, 2017 pulmonary function study. Employer's Exhibit 5 at 15-16. Employer's counsel inquired whether Dr. Dahhan found Claimant totally disabled based on a review of the "pulmonary function study evidence as a whole." *Id*. Dr. Dahhan again stated Claimant is totally disabled before the administration of bronchodilators, but is not totally disabled with bronchodilator therapy. *Id*. He reiterated on cross-examination that Claimant does not retain the physical capacity to return to his usual coal mine employment. *Id*. at 28.

Contrary to Employer's argument, the administrative law judge permissibly found "Dr. Dahhan's opinion supports a finding of total disability" because the doctor "unequivocally stated that, without the use of bronchodilators, Claimant would be incapable of performing his" usual coal mine employment. Decision and Order at 8-9; *see Napier*, 301 F.3d at 713-14; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); 45 Fed. Reg. 13,678, 13,682 (Feb 29, 1980) (The Department of Labor has cautioned against reliance on post-bronchodilator results in determining total disability, stating "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis."). Moreover, the administrative law judge permissibly credited Dr. Dahhan's opinion that Claimant is totally disabled based on pre-bronchodilator testing. *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185. He explained Dr. Dahhan "had the advantage of reviewing essentially all of the relevant medical data relating to the disability issue, and particularly

the reduced FEV1 values, and he opined that Claimant [is] totally disabled from a pulmonary or respiratory standpoint."[12] Decision and Order at 10; *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185.

Finally, Employer argues the administrative law judge should have credited Dr. Westerfield's opinion over the opinions of Drs. Alam and Dahhan because Dr. Westerfield reviewed more objective testing, had a better understanding of Claimant's usual coal mine employment, and better explained his opinion that Claimant is not totally disabled. Employer's Brief at 22-24. We consider Employer's arguments on appeal to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding the medical opinions establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 10. We further affirm the administrative law judge's conclusion that the evidence, when weighed together, establishes total disability and, therefore, Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305(b)(1); *Rafferty*, 9 BLR at 1-232; Decision and Order at 10. Moreover, because Employer does not challenge the administrative law judge's finding that it failed to establish rebuttal of the presumption, we affirm the award of benefits. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10-17.

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[12] The administrative law judge rationally found Dr. Dahhan's statements that Claimant's respiratory condition would improve with aggressive bronchodilator therapy speculative and insufficient to undermine his diagnosis of total disability based on pre-bronchodilator testing. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 10.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge