U.S. Department of Labor

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

BRB No. 22-0019 BLA

GENEVIA E. JOHNSON (Widow of PATTON P. JOHNSON)	)	
Claimant-Respondent	)	
v.	)	
DOMINION COAL CORPORATION	)	
	)	DATE ISSUED: 01/18/2023
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 on Remand of Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Charity A. Barger (Street Law Firm, LLP), Grundy, Virginia, for Employer.

Steven Winkelman (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge Theodore W. Annos's Decision and Order Awarding Benefits on Remand (2013-BLA-05163) on a survivor's claim filed on September 26, 2011, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for a second time.[1]

The Board previously affirmed ALJ Morris D. Davis's finding that Claimant established sufficient qualifying coal mine employment for purposes of the Section 411(c)(4) presumption.[2] *Johnson v. Dominion Coal Corporation*, BRB No. 16-0686 BLA, slip op. at 3, n.4 (Sep. 27, 2017) (unpub.). But it vacated his findings that Claimant established a totally disabling respiratory or pulmonary impairment based on the medical opinion evidence. *Id.* at 9-10; *see* 20 C.F.R. §718.204(b)(2)(iv). The Board thus vacated his finding that Employer failed to rebut the Section 411(c)(4) presumption and remanded the case for further consideration. *Johnson v. Dominion Coal Corporation*, BRB No. 16-0686 BLA, slip op. at 11. The case was thereafter reassigned to ALJ Annos (the ALJ).[3]

[1] We incorporate the procedural history of the case as set forth in the Board's prior decision. *Johnson v. Dominion Coal Corporation*, BRB No. 16-0686 BLA, slip op. at 2 (Sep. 27, 2017) (unpub.).

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

[3] On July 10, 2018, Employer filed a motion challenging ALJ Davis's authority to adjudicate the case in light of *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). Because he took substantive action prior to the Secretary's December 21, 2017 appointment, ALJ Davis granted Employer's Motion for Reassignment and New Hearing, and the case was reassigned to ALJ Annos.

Employer filed another motion on February 1, 2019 requesting a new evidentiary hearing and that the case be held in abeyance citing *Lucia*. On February 28, 2019, the ALJ issued an Order Granting In Part, Denying In Part, and Preserving In Part Employer's Motion to Hold Claim in Abeyance and New Evidentiary Proceeding. The ALJ held a new evidentiary hearing on September 24, 2019. However, he later vacated the resulting February 28, 2019 Order as erroneous because "Appointments Clause challenges are 'non-jurisdictional' and subject to the doctrines of waiver and forfeiture, [where] Employer failed to raise its Appointments Clause challenge when the case was initially before Judge

On remand, the ALJ found the medical opinion evidence established total disability and Claimant therefore invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. He further determined Employer did not rebut the presumption and awarded benefits.

On appeal, Employer asserts the ALJ lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] It further contends the removal provisions applicable to Department of Labor (DOL) ALJs violate the separation of powers doctrine and render his appointment unconstitutional. On the merits, Employer argues the ALJ erred in finding Claimant invoked the Section 411(c)(4) presumption and that Employer did not rebut it. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging the Board to reject Employer's constitutional challenges to the ALJ's appointment as forfeited. Employer filed a reply brief arguing it did not forfeit its constitutional arguments and reiterating its arguments on the merits.

The Board's scope of review is defined by statute. We must affirm the ALJ'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 Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Davis or during its appeal to the Board, and instead waited until after the Board remanded the case." June 24, 2021 Order Vacating, In Part, February 28, 2019 Order and Denying Employer's Motion for New Evidentiary Proceeding.

[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.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in Virginia.

Appointments Clause

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[6] Employer's Brief at 9-15; Employer's Reply Brief at 2-3. Relying on the holding in *Carr v. Saul*, U.S. , 141 S.Ct. 1352 (2021),[7] Employer further argues the ALJ erred in finding it forfeited its Appointments Clause challenge. Employer's Brief at 18-19.

We agree with the Director's position that Employer forfeited its Appointments Clause argument by failing to raise it when the case was before ALJ Davis or in its initial appeal to the Board.[8] The Appointments Clause issue is "non-jurisdictional" and 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"); *Edd Potter Coal Co. v. Director, OWCP* [*Salmons*], 39 F.4th 202, 207-08

See Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[6] *Lucia* involved an Appointments Clause challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). In *Lucia*, the United States Supreme Court held that, similar to the Special Trial Judges at the Tax Court, SEC administrative law judges are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

[7] In *Carr v. Saul*, U.S. , 141 S.Ct. 1352 (2021), a case involving Social Security Administration (SSA) ALJs, the United States Supreme Court held structural constitutional issues, such as Appointments Clause issues, can be raised at any time because SSA adjudicators are not suited to address such challenges and do not have the power to grant the requested relief.

[8] Employer avers the Director waived forfeiture by not raising the defense before ALJ Annos. Employer's Reply at 3. However, while the Act provides that the Director is a party in all proceedings relating to black lung claims, 30 U.S.C. §932(k), the Director's failure to participate in an earlier stage of a case does not preclude the Director from later participation. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 574 (6th Cir. 2000) ("With respect to the Director's absence below, its absence before the Board does not preclude the Director from participating on appeal."). That the Director did not file a brief in the proceedings before the ALJ thus does not preclude him from raising Employer's forfeiture on appeal. *See id.*

(4th Cir. 2022) (affirming Board's holding that the employer forfeited its Appointments Clause challenge by waiting until after the Board had remanded the case to the ALJ to raise it); *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 588 (6th Cir. 2021); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018).

Employer failed to raise its challenge to the ALJ's appointment when the case was initially before ALJ Davis or during its first appeal to the Board, and instead waited until after the Board remanded the case to raise the issue.[9] Had Employer raised the argument before ALJ Davis, he could have addressed it and, if appropriate, taken steps to have the case assigned for a new hearing before a different ALJ. *Kiyuna v. Matson Terminals Inc.*, 53 BRBS 9, 11 (2019). Likewise, had Employer raised the issue in its first appeal to the Board, we could have addressed it and, if appropriate, included instructions in the remand order directing the case be reassigned for a new hearing before a different ALJ. *See Salmons*, 39 F.4th at 207-08.

The Supreme Court's holding in *Carr*, 141 S.Ct. 1352, does not assist Employer because, unlike DOL, the SSA does not have the same issue exhaustion regulatory scheme. See *Ramsey v. Comm'r*, 937 F.3d 537, 547 n.5 (6th Cir. 2020). Moreover, DOL ALJs are able to provide the requested relief by having the case reassigned to a different constitutionally appointed ALJ. *See Davis*, 987 F.3d at 591-92. We therefore conclude the ALJ properly held Employer forfeited its right to challenge the ALJ's appointment. Decision and Order on Remand at 4-5. Further, because Employer has not raised any basis for excusing its forfeiture, we see no reason to entertain its arguments on appeal. *See Salmons*, 39 F.4th at 207-08; *Davis*, 987 F.3d at 591-92; *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019); *Kiyuna*, 53 BRBS at 11; *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against resurrecting lapsed arguments because of the risk of sandbagging); Employer's Brief at 9-19; Employer's Reply at 2-3.

[9] Employer first raised the Appointments Clause issue in its January 23, 2018 motion to hold the case in abeyance almost sixteen months after the Board remanded the case. Before the case was reassigned, ALJ Davis denied Employer's request in a February 5, 2018 Order, stating "the Secretary of Labor … has specifically addressed Employer's Appointments Clause concerns" through the December 21, 2017 ratification of Judge Davis's prior appointment as an administrative law . . . ." February 5, 2018 Order Denying Employer's Motion to Hold Case In Abeyance And Reaffirming And Ratifying All Previous Orders In This Case.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded to DOL ALJs. Employer's Brief at 15-18; Employer's Reply at 4-5. Employer generally argues the removal provisions in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional and 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), as well as 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). Employer's Brief at 15-19; Employer's Reply at 4-5.

As the Director argues, however, the removal argument is subject to issue preservation requirements and Employer likewise forfeited this issue by not raising it before ALJ Davis or in its original appeal to the Board. *Salmons*, 39 F.4th at 208 ("The Board's [limited scope of] review on appeal reinforces the requirement of issue exhaustion in front of an ALJ."); *Davis*, 987 F.3d at 588; *see also Fleming v. USDA*, 987 F.3d 1093, 1097 (D.C. Cir. 2021) (constitutional arguments concerning §7521 removal provisions are subject to issue exhaustion). Because Employer has not identified any basis for excusing its forfeiture of the issue, we see no reason to further entertain its arguments.[10] *See Salmons*, 39 F.4th at 208; *Davis*, 987 F.3d at 588; *Jones Bros.*, 898 F.3d at 677.

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). 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 ALJ 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 ALJ found Claimant established total disability

[10] Even had Employer preserved its removal provisions argument, we would reject it. The only circuit court to squarely address this precise issue has upheld the statute's constitutionality with respect to DOL ALJs. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-38 (9th Cir. 2021).

based on the medical opinions and the evidence as a whole.[11] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Remand at 9-10.

The ALJ considered the medical opinions of Drs. Perper, Crouch, Oesterling, and Fino. Decision and Order on Remand at 7-9. He found Dr. Perper's opinion that the Miner had a totally disabling respiratory impairment to be well-documented and reasoned. *Id.* at 7; Claimant's Exhibit 3 at 42, 47. However, he found Drs. Crouch, Oesterling, and Fino did "not fully address whether the Miner had a disabling respiratory or pulmonary impairment" and thus gave their opinions little weight. Decision and Order on Remand at 8-9; Employer's Exhibits 1; 3; 10. He therefore found the medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order on Remand at 9.

Employer argues the ALJ erred in finding Dr. Perper's opinion well-documented and reasoned. Employer's Brief at 20-22. We disagree.

Dr. Perper reviewed the autopsy slides, Dr. Dennis's autopsy report, the death certificate, and the Miner's medical records and treatment notes, including the May 11 and June 28, 2010 pulmonary function studies and December 6 and December 14, 2010 blood gas studies. Claimant's Exhibit 3 at 2-38. As observed by the ALJ, based on his review of these records, Dr. Perper concluded the Miner was dyspneic at rest and with minimal exercise, had abnormal respiratory function, hypoxemia and reduced oxygen saturation, and required continuous treatment, including eventual oxygen supplementation. Decision and Order on Remand at 7-8; Claimant's Exhibit 3 at 42. Dr. Perper thus opined the Miner "[u]nquestionably" was totally disabled due to a respiratory impairment. *Id.*

Contrary to Employer's argument, the ALJ was not required to discredit Dr. Perper's opinion on the basis that the pulmonary function studies and blood gas studies do not demonstrate total disability. Employer's Brief at 20-21. Total disability may be established with a reasoned medical opinion even in the absence of qualifying pulmonary function studies or arterial blood gas studies. 20 C.F.R. §718.204(b)(2)(iv); *see also Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (Claimant can establish total disability despite non-qualifying objective tests); *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").

[11] The ALJ reiterated that the pulmonary function studies and blood gas studies do not establish total disability and there is no evidence that Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order on Remand at 7 (citing *Johnson*, BRB No. 16-0686 BLA, slip op. at 2).

We also reject Employer's argument that the ALJ erred in crediting Dr. Perper's opinion because the physician did not describe the Miner's physical limitations. Employer's Brief at 21-22. A medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer that a miner is unable to do his last coal mine job. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988). Dr. Perper reviewed the Miner's work history forms submitted to DOL and concluded he was totally disabled. Claimant's Exhibit 3 at 2-3, 42. The ALJ thus permissibly inferred from Dr. Perper's opinion that the Miner did not have the respiratory or pulmonary capacity to perform the strenuous labor required by his last coal mine employment. *See Scott*, 60 F.3d at 1142; Decision and Order on Remand at 8.

In addition, we are not persuaded by Employer's assertion that the ALJ failed to address Dr. Perper's qualifications. Employer's Brief at 22. The ALJ specifically concluded Dr. Perper was a "highly qualified forensic pathologist." Decision and Order on Remand at 10. It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012). Employer's assertion that Dr. Perper was unqualified to offer an opinion on total disability is a request to 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 we see no error in the ALJ's rationale for relying on Dr. Perper's opinion, we affirm it. *See Looney*, 678 F.3d at 316-17.

Employer also contends the ALJ failed to properly consider the opinions of its medical experts that Claimant's qualifying pulmonary function study results were attributable to non-respiratory conditions. Employer's Brief at 23. But Employer's argument conflates the issues of total disability and causation. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See* 20 C.F.R. §718.204(b), (c); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984).

We thus affirm the ALJ's determination the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 9. As Employer raises no further argument, we affirm his finding that all the relevant evidence, when weighed together, establishes total disability and Claimant invoked the Section 411(c)(4) presumption. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; 20 C.F.R. §718.305; Decision and Order at 9.

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

Because Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to Employer to establish that the Miner had neither legal nor clinical pneumoconiosis,[12] or that "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The ALJ found Employer failed to establish rebuttal under either method.[13] Decision and Order on Remand at 14.

In considering whether Employer established "no part of the [M]iner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201," 20 C.F.R. §718.305(d)(2)(ii), the ALJ considered the opinions of Drs. Crouch,[14] Oesterling,[15] and Fino[16] that the Miner's death was unrelated to coal mine dust exposure. Employer's Exhibits 1 at 2; 3 at 7; 10 at 8. Contrary to Employer's argument, Employer's Brief at 23-24, the ALJ permissibly discounted Drs. Crouch's, Oesterling's, and Fino's opinions because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer

[12] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). Clinical pneumoconiosis is defined as "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).

[13] We affirm, as unchallenged on appeal, the ALJ's finding that Employer failed to disprove legal and clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11-12.

[14] Dr. Crouch diagnosed the Miner with emphysema but opined coal mine dust did not play "a major etiological role" in his development of the disease and that "the histologically evident coal dust-related changes . . . could not have caused, significantly contributed to, or otherwise hastened [the Miner's] death." Employer's Exhibit 1 at 1-2.

[15] Dr. Oesterling diagnosed the Miner with chronic interstitial pneumonitis with related infection and pneumonia unrelated to coal mine dust exposure and opined "coal dust did not cause, contribute to or hasten [the Miner's] death." Employer's Exhibit 3 at 6-7.

[16] Dr. Fino opined the Miner had heart disease unrelated to coal mine dust exposure and that "[c]oal mine dust played absolutely no role in his death." Employer's Exhibit 10 at 8.

failed to disprove the disease.[17] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order on Remand at 13. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption by establishing no part of the Miner's death was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits on Remand.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[17] Because the ALJ provided a valid reason to discredit the opinions of Drs. Crouch, Oesterling, and Fino, we need not address the remainder of Employer's arguments regarding the additional reasons he gave for rejecting their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 23-24.