U.S. Department of Labor

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

BRB No. 19-0341 BLA

JOSEPH C. FREEMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
REGENT ALLIED CARBON ENERGY	)	
	)	DATE ISSUED: 07/31/2020
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Carrie Bland, Administrative Law Judge, United States Department of Labor.

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

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for Employer/Carrier.

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

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Carrie Bland's Decision and Order Awarding Benefits (2016-BLA-05887) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (Act). This case involves Claimant's subsequent claim filed on December 16, 2014.[1]

The administrative law judge credited Claimant with forty years of underground coal mine employment and found he is totally disabled. 20 C.F.R. §718.204(b)(2). She therefore found he invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] and established a change in an applicable condition of entitlement.[3] 30 U.S.C. §921(c)(4); 20 C.F.R. §725.309. The administrative law judge further determined Employer did not rebut the presumption and awarded benefits.

On appeal, Employer contends the administrative law judge lacked the authority to hear and decide the case because she was not appointed consistent with the Appointments

[1] Claimant's prior claim, filed on June 21, 1973, was denied because he did not establish any element of entitlement. Director's Exhibit 1.

[2] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption he 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he did not establish any element of entitlement. Director's Exhibit 1. Consequently, Claimant had to submit new evidence establishing any element of entitlement in order for his subsequent claim to be reviewed on the merits. *See* 20 C.F.R. §725.309(c).

Clause of the Constitution, Art. II §2, cl. 2.[4] In addition, it challenges the validity of the Section 411(c)(4) presumption and asks that the case be held in abeyance pending resolution of this issue. Alternatively, Employer argues the administrative law judge erred in finding Claimant established total disability and thereby invoked the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, asserting Employer waived its Appointments Clause challenge. The Director also urges rejection of Employer's arguments that the Section 411(c)(4) presumption is invalid and that the case should be held in abeyance.[5]

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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer urges the Board to vacate the award and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*,

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[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] We affirm, as unchallenged, the administrative law judge's finding that Claimant established forty 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.

[6] Claimant's most recent coal mine employment occurred in Virginia. Director's Exhibits 7, 8; Hearing Transcript at 18. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

585 U.S. , 138 S.Ct. 2044 (2018).[7] Employer's Brief at 8-11. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor administrative law judges on December 21, 2017, but maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment. *Id*. In response, the Director asserts Employer waived its Appointments Clause challenge. Director's Brief at 2. We agree with the Director's contention.

Appointments Clause issues are "non-jurisdictional" and thus subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S.Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted).

Employer filed a February 28, 2018 motion requesting the administrative law judge hold the case in abeyance pending a decision in *Lucia*. The Director opposed the motion. *Lucia* was decided on June 21, 2018. In a Notice and Order dated September 18, 2018, the administrative law judge advised the parties of the *Lucia* ruling. Notice and Order at 2. Because she had not issued a final decision, she noted that Employer's abeyance request was "in effect" granted. *Id*. She directed Employer to file a motion indicating what relief, if any, it requested in view of *Lucia*. *Id*. She advised if Employer did not respond "it will be reasonably assumed that no further relief is requested." *Id*. Employer did not respond to the administrative law judge's Notice and Order, and she issued her Decision and Order Awarding Benefits on March 22, 2019.

Had Employer responded to the Notice and Order and requested reassignment, the administrative law judge could have addressed employer's contentions and, if appropriate, referred the case for assignment to a different, properly appointed administrative law judge to hold a new hearing and issue a decision. Based on these facts, Employer waived its Appointments Clause challenge.[8] *In re DBC*, 545 F.3d 1373, 1380 (Fed. Cir. 2008)

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[7] *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. Commissioner*, 501 U.S. 868 (1991)).

[8] "[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.'" *Hamer v. Neighborhood Housing Services of Chicago*, 138 S.Ct. 13, 17 n.1 (2017), citing *United States v. Olano*, 507 U. S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938)).

(declining to excuse waived Appointments Clause challenge to discourage "sandbagging"); *Powell v. Service Employees Int'l, Inc.*, 53 BRBS 13 (2019); *Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9 (2019); Decision and Order at 2-3. We therefore deny the relief requested.

Constitutionality of the Affordable Care Act and 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 Board should hold this appeal in abeyance because the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, is unconstitutional. Employer's Brief at 11-12. 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*.

After the parties submitted their briefs, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Further, the United States Court of Appeals for the Fourth Circuit, whose law applies to this claim, has held that the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative as a law. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Moreover, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214-15 (2010), *aff'd sub nom. W.Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011); *Mathews v. United Pocahontas Coal Co*., 24 BLR 1-193, 1-201 (2010). We, therefore, reject Employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case and deny its request to hold this case in abeyance.

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. *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 did not establish total disability based on the pulmonary function or arterial blood gas studies, and that there was no evidence of cor pulmonale with right-sided congested heart-failure. Decision and Order at 7. In considering the medical opinion evidence, she gave greatest weight to Dr. Green's opinion that Claimant is totally disabled over the contrary opinions of Drs. McSharry and Sargent. Employer challenges the administrative law judge's weighing of the conflicting medical opinions.

Dr. Green conducted the Department of Labor's complete pulmonary evaluation on December 20, 2014. He obtained qualifying pulmonary function studies showing "severe chronic airflow limitation" and qualifying blood gas studies showing "severe hypoxemia." Director's Exhibit 13. Dr. Green opined that Claimant is totally disabled from his usual coal mine employment.

In a supplemental report dated April 13, 2016, Dr. Green outlined in detail Claimant's specific work duties and indicated that he could not perform them given his severe symptoms of shortness of breath on exertion. Director's Exhibit 17 at 1. Dr. Green also reviewed Dr. McSharry's June 16, 2015 objective tests. *Id*. Although Dr. McSharry's pulmonary function studies were non-qualifying under the regulatory criteria, Dr. Green described the FEV1 of 2.05, "which is 67 [percent] of predicted," and the FVC of 2.85, "which is 69 [percent] of predicted," as "significantly abnormal." *Id*. at 2. He also noted that Claimant's flow volume loops on the December 2014 and June 2015 studies showed "a pattern of significant airflow obstruction." *Id*. Dr. Green opined Claimant has "significant ventilatory insufficiency" and could not meet the exertional demands of his previous coal mine employment, which required him to lift fifty pounds "at any given time during the work day." *Id*. at 2-3. He also indicated that the blood gas studies obtained by Dr. McSharry showed significant hypoxemia and further supported his conclusion Claimant is totally disabled. *Id*. at 3.

The administrative law judge gave little weight to Dr. Green's initial report because she found the weight of the pulmonary function and blood gas study evidence non-qualifying for total disability. Decision and Order at 10. However, she found reasoned and persuasive Dr. Green's supplemental opinion that Claimant is totally disabled from performing his usual coal mine employment. *Id*.

Employer argues the administrative law judge erred in crediting Dr. Green's opinion because he did not review "Dr. Sargent's medical testing." Employer's Brief at 8, *citing* Employer's Exhibit 1. However, Dr. Sargent was unable to obtain a valid pulmonary function study and stated he instead relied on the study Dr. McSharry conducted. Employer's Exhibit 1 at 2. Employer does not adequately explain why the administrative law judge erred in crediting Dr. Green's opinion that Claimant is totally disabled based on the valid pulmonary function study results he and Dr. McSharry conducted, and thus we decline to address the argument as it is inadequately briefed. *See* 20 C.F.R. §§802.211(b),

802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

There also is no merit in Employer's assertion the administrative law judge erred in crediting Dr. Green's opinion because it is based "solely" on Claimant's symptoms of shortness of breath. Employer's Brief at 19. The administrative law judge permissibly relied on Dr. Green's opinion because she found it based on the totality of information from his examination, including relevant work and social histories, Claimant's symptoms, physical findings, the objective tests he obtained, as well as the objective tests from Dr. McSharry's examination. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 10. Because the administrative law judge acted within her discretion in finding Dr. Green's opinion reasoned and documented, we affirm her determination. *See Compton*, 211 F.3d at 212; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

We also reject employer's contention the administrative law judge erred in finding the opinions of Drs. McSharry and Sargent not well-reasoned. Decision and Order at 10-11. Dr. McSharry examined Claimant on June 16, 2015, and noted his "limiting factor to exertion" is his shortness of breath. Director's Exhibit 15 at 4. He indicated the pulmonary function study showed "mild to moderate airflow obstruction" but opined that Claimant is not totally disabled because the obstructive impairment is "well outside the [Department of Labor] standard for disability." *Id*. He also noted Claimant's blood gas study was non-qualifying for total disability. *Id*.

Dr. Sargent examined Claimant on July 17, 2017, and indicated he was unable to obtain a valid pulmonary function test because Claimant was "unable or unwilling" to fully cooperate with the testing. Employer's Exhibit 1 at 1. He reported normal lung volumes and a normal blood gas study. *Id*. He reviewed Dr. McSharry's pulmonary function studies and stated Claimant "may be suffering from a mild ventilatory impairment without evidence of gas exchange abnormality due to simple coal workers' pneumoconiosis." *Id*. at 2. Dr. Sargent concluded that "any impairment that is present and is due to coal workers' pneumoconiosis is minimal." *Id*.

Contrary to Employer's contention, the administrative law judge permissibly found unpersuasive the opinions of Drs. McSharry and Sargent that Claimant is not totally disabled because, unlike Dr. Green, neither physician addressed Claimant's ability to perform the "heavy exertional" requirements of his usual coal mine employment in view of his respiratory impairment. Decision and Order at 10-11; *see Hicks*, 138 F.3d at 532-34 (4th Cir. 1998); *Akers*, 131 F.3d at 441. We therefore affirm her determination to give their opinions less weight. Decision and Order at 11.

We consider Employer's arguments on appeal to be a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp Coal 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 that Claimant established total disability based on Dr. Green's opinion and in consideration of the relevant contrary evidence. 20 C.F.R. §718.204(b)(2); Decision and Order at 11; *see Rafferty*, 9 BLR at 1-232. We therefore affirm the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4); 20 C.F.R. §725.309; Decision and Order at 11. We further affirm, as unchallenged, the administrative law judge's finding that Employer did not rebut the presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11-15.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge