U.S. Department of Labor

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

BRB No. 19-0228 BLA

EARL F. PARSONS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RYDER ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
TRAVELERS INDEMNITY COMPANY	)	DATE ISSUED: 06/25/2020
	)	
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 of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Catherine Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for employer.

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 appeals the Decision and Order (2016-BLA-05614) of Administrative Law Judge Morris D. Davis rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on June 4, 2013.[1]

The administrative law judge credited claimant with over fifteen years of underground coal mine employment and found he established a totally disabling respiratory 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, 30 U.S.C. §921(c)(4)[2] and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).[3] 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 decide the case because he was not appointed consistent with the Appointments Clause of the Constitution, Art. II §2, cl. 2.[4] In addition, it challenges the constitutionality of the

[1] Claimant filed two prior claims, both of which were finally denied. Director's Exhibits 1, 2. An administrative law judge denied the second claim because claimant did not establish the existence of pneumoconiosis and the district director denied claimant's request for modification of that determination. Director's Exhibit 2.

[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 coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 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 subsequent claim must also be denied unless the administrative law judge 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). The Section 411(c)(4) presumption can be used to establish a change in an applicable condition of entitlement. *E. Associated Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-15 (4th Cir. 2015).

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

Section 411(c)(4) presumption. Alternatively, it contends the administrative law judge erred in finding claimant established at least fifteen years of underground coal mine employment and total disability to invoke the presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing employer waived its Appointments Clause challenge.

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.[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, 361-62 (1965).

Appointments Clause Challenge

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*, 585 U.S. , 138 S.Ct. 2044 (2018).[6] Employer's Brief at 5-7. 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

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> [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] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment occurred in Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

[6] *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)).

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 Response Brief at 2-3. We agree.

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 16, 2018 motion requesting the administrative law judge hold this case in abeyance pending a decision in *Lucia.* After the administrative law judge denied its request, the Supreme Court decided *Lucia* on June 21, 2018. Thereafter the administrative law judge issued a September 11, 2018 Notice and Order directing employer to file a statement within fourteen days indicating whether it sought to have the case reassigned. Sept. 11, 2018 Notice and Order at 2. The administrative law judge indicated that if employer did not file a response, the remedy of reassignment and a new hearing would "be deemed waived and the case will proceed before the undersigned." *Id.* Employer did not respond to the Notice and Order. Decision and Order at 3.

Had employer responded to the Notice and Order and requested reassignment, the administrative law judge could have referred the case for assignment to a different, properly appointed administrative law judge to hold a new hearing and issue a decision. *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019); *Kiyuna v. Matson Terminals Inc.*, 53 BRBS 9, 11 (2019). Based on these facts, we conclude employer waived its Appointments Clause challenge.[7] *Id.* Employer offers no reason why the Board should excuse its waiver. *In re DBC*, 545 F.3d 1373, 1380 (Fed. Cir. 2008) (declining to excuse waived Appointments Clause challenge to discourage "sandbagging"). We therefore deny the relief requested.[8]

[7] "[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 Hous. Servs. of Chi.*, 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)).

[8] Employer also waived its related argument that the Secretary of Labor's December 21, 2017 ratification of the administrative law judge's appointment was invalid

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), Pub. L. No. 111-148 (2010), which reinstated the Section 411(c)(4) presumption, is unconstitutional. Employer's Brief at 3-4. Employer cites the district court's rationale in *Texas* that the ACA requirement that individuals 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). 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 United States Court of Appeals for the Fourth Circuit has held that the ACA amendments to the 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). Further, 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*, *Stacy*, 671 F.3d at 383 n.2, 391; *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

Length of Coal Mine Employment

Claimant bears the burden of proof to establish the number of years worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). The Board will uphold an administrative law judge's determination on length of coal mine employment if it is based on a reasonable method and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

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because it had the opportunity to also raise this issue in response to the administrative law judge's Notice and Order but failed to do so.

Claimant alleged approximately twenty-eight years of underground coal mine employment. Because the administrative law judge could not determine the beginning and ending dates of claimant's coal mine employment he used several alternative calculation methods to find claimant had more than fifteen years of qualifying employment. Decision and Order at 6-11. In one method, he accepted as correct employer's calculation that claimant's earnings from work as a miner between 1958 and 1989 established 13.69 years of coal mine employment. He then added another 1.5 years of coal mine employment he found established by claimant's testimony that he worked for Ezra Cooper at an underground mine in the early to mid-1950s where he was paid in cash. Decision and Order at 10.

Focusing on the administrative law judge's other calculation methods, employer argues he erred by crediting claimant with too many quarters of coal mine employment between 1958 and 1989 based on his reported earnings. Employer's Brief at 7. It contends that for the years before 1978, the administrative law judge erred in crediting claimant with each quarter in which his earnings from coal mine operators exceeded $50.00 as reflected in his Social Security Administration (SSA) earnings record without accounting for variation in claimant's quarterly earnings. *Id*. at 8-10. Employer asserts an accurate calculation based on claimant's SSA earnings record shows at most 13.69 years of coal mine employment. *Id*. at 12.

We need not resolve this issue. Employer has not challenged the administrative law judge's finding that claimant had "at least" 1.5 years of coal mine employment in the early to mid-1950s that was not reported to SSA. Decision and Order at 10. That finding is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Adding those 1.5 years to the 13.69 years employer calculated using claimant's earnings reported to SSA from 1958 to 1989, the administrative law judge credited claimant with more than fifteen years of coal mine employment.[9] Decision and Order at 10. Thus any error in his alternative calculation methods would be harmless. *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). We therefore affirm the administrative law judge's determination that claimant had more than fifteen years of underground coal mine employment.[10]

[9] The administrative law judge did not specify the total, which is 15.19 years.

[10] Employer does not dispute that all of claimant's coal mine employment took place underground. Decision and Order at 4.

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). 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).

Employer contends the administrative law judge erred in finding claimant established total disability based on qualifying[11] pulmonary function studies and erred in failing to weigh the conflicting medical opinions regarding disability.[12] Employer's Brief at 15-19. We agree.

The administrative law judge considered five new pulmonary function studies.[13] The November 15, 2013 pulmonary function study was qualifying both before and after the administration of a bronchodilator. Director's Exhibit 21. The October 27, 2014 pulmonary function study was non-qualifying both before and after the administration of a bronchodilator. Director's Exhibit 38. The next two studies, dated November 19, 2015, and November 7, 2016, were both qualifying before the administration of a bronchodilator and neither study included post-bronchodilator results. Claimant's Exhibits 6, 7. Finally,

[11] A "qualifying" pulmonary function 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, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

[12] The administrative law judge found the blood gas studies were non-qualifying for total disability and did not address whether there was any evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 15, 22.

[13] The administrative law judge also considered but gave "no weight" to an August 7, 2013 pulmonary function study conducted as part of claimant's Department of Labor (DOL) sponsored pulmonary evaluation that was invalidated. Decision and Order at 22; Director's Exhibit 19. The DOL physician, Dr. Habre, conducted a second pulmonary function study on November 15, 2013.

the December 8, 2016 study was non-qualifying both before and after the administration of a bronchodilator. Employer's Exhibit 1.

The administrative law judge noted that Dr. Michos validated the November 15, 2013 qualifying pulmonary function study while also pointing out claimant's suboptimal effort on the post-bronchodilator MVV test. Because the post-bronchodilator part of the November 15, 2013 study was qualifying based only on its FEV1 and MVV values, the administrative law judge declined to consider it. However, he gave "full weight" to the study's qualifying pre-bronchodilator results. Decision and Order at 23.

Next, the administrative law judge gave "reduced weight" to the October 27, 2014 non-qualifying pulmonary function study Dr. McSharry conducted because a notation on the first page stated claimant was unable to produce acceptable and reproducible spirometry data. *Id*. Although Dr. McSharry stated the diffusion capacity portion of the study was not fully reproducible, but the rest of the study was apparently performed with good effort and results, the administrative law judge found he did not adequately address the notation that the spirometry data was not acceptable or reproducible.

The administrative law judge gave the November 19, 2015 qualifying pulmonary function study Dr. Ajjarapu conducted "full weight," noting Dr. McSharry's deposition testimony that the study was valid. *Id*. However, because Dr. McSharry questioned whether Dr. Ajjarapu's November 7, 2016 qualifying pulmonary function study was valid, the administrative law judge gave it "reduced weight." *Id*. Lastly, finding Dr. McSharry opined that the December 8, 2016 non-qualifying study Dr. Sargent conducted was invalid, the administrative law judge gave it "reduced weight." *Id*.

Weighing the pulmonary function studies together, the administrative law judge found they established total disability by a preponderance of the evidence. He noted the "qualifying November 2013 and November 2015 [pulmonary function studies] were not disputed while all of the other [studies], qualifying and non-qualifying, were either clearly invalid or of questionable validity." Decision and Order at 23. Without weighing any of the other types of evidence submitted pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found claimant established total disability and invoked the Section 411(c)(4) presumption. *Id*. at 24.

Employer argues the administrative law judge did not adequately explain why he discredited the October 27, 2014 non-qualifying pulmonary function study and did not consider all the relevant evidence before finding the December 8, 2016 non-qualifying study invalid. Employer's Brief at 15-17. Employer's arguments have merit.

The report of the October 27, 2014 pulmonary function study performed at Bristol Medical Center bore a notation stating in part "Patient was unable to produce Acceptable

and Reproducible Spirometry data, best effort reported. . . . VC DLCO may[ ]be underestimated. DESPITE 4 ATTEMPTS AND GOOD PT EFFORTS[,] THE PT WAS UNABLE TO GIVE REPORDUCIBILITY [sic] ON DLCO." Director's Exhibit 38. Dr. McSharry's narrative report explained: "The patient's efforts were not fully reproducible for diffusion, although the rest of the test apparently was performed with good effort and results." *Id.* The administrative law judge found Dr. McSharry did not adequately address the statement, for while Dr. McSharry discussed the DLCO test, that test differs from the FEV1, FVC, MVV, and FEV1/FVC tests "covered by the regulation." Decision and Order at 23.

It is not clear, however, how the administrative law judge found ambiguity between the pulmonary function study report and Dr. McSharry's narrative report of the study. The first sentence of the pulmonary function study report notation does not specify which value of the spirometry data is not acceptable or reproducible, but both the pulmonary function study report and Dr. McSharry's narrative report state claimant's efforts were not reproducible on the "DLCO" or "diffusion." *Id.* Because the administrative law judge did not adequately set forth the basis for his finding, his decision does not comply with the explanatory requirements of the Administrative Procedure Act (APA).[14] We must therefore vacate his finding the October 27, 2014 non-qualifying pulmonary function study of questionable validity and entitled to reduced weight.

With respect to the December 8, 2016 non-qualifying pulmonary function study, Dr. McSharry testified the study was invalid. Decision and Order at 23. But as employer notes, although Dr. McSharry initially indicated the study was invalid, he further explained that only its pre-bronchodilator values were invalid, while the post-bronchodilator values were adequate and reproducible.[15] Employer's Exhibit 2 at 10. The administrative law judge must consider all relevant evidence. 30 U.S.C. §923(b); *see 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). Because he did not consider Dr. McSharry's deposition testimony in its entirety when assessing the reliability of the December 8, 2016 pulmonary function study, we must vacate his finding the study is invalid. We therefore also vacate his finding

[14] The Administrative Procedure Act provides that every adjudicatory decision must include "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).

[15] Dr. McSharry testified the three pre-bronchodilator FEV1 values were "pretty far off" from each other, while the post-bronchodilator values with the best FEV1 result of 1.90 were adequate and reproducible. Employer's Exhibit 2 at 10-11.

the preponderance of the pulmonary function studies established total disability. 20 C.F.R. §718.204(b)(2)(i).

On remand, the administrative law judge must reconsider the October 27, 2014 and the December 8, 2016 pulmonary function studies, reweigh the new pulmonary function studies under 20 C.F.R. §718.204(b)(2)(i), and explain the bases for his credibility determinations as the APA requires. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Additionally, employer correctly argues the administrative law judge failed to analyze the relevant conflicting medical opinions. 20 C.F.R. §718.204(b)(2)(iv); Employer's Brief at 18-19. The administrative law judge summarized Dr. Ajjarapu's opinion that claimant is totally disabled and the opinions of Drs. Habre, McSharry, and Sargent that he is not disabled, but did not resolve the conflicting evidence and make appropriate findings. Decision and Order at 15-20, 24.

Because of the these errors, we must vacate the administrative law judge's findings that claimant established total disability, invoked the Section 411(c)(4) presumption, and established a change in an applicable condition of entitlement. On remand, the administrative law judge must consider the medical opinions and determine whether they establish total disability. 20 C.F.R. §718.204(b)(2)(iv). He must then weigh all relevant supporting evidence against all relevant contrary evidence to determine whether claimant has established total disability. 20 C.F.R §718.204(b)(2); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

Because we have affirmed the administrative law judge's finding of more than fifteen years of underground coal mine employment, if claimant establishes total disability he will invoke the Section 411(c)(4) presumption and establish a change in an applicable condition of entitlement. If so, the administrative law judge may reinstate the award of benefits, as employer does not challenge the administrative law judge's finding that it failed to rebut the presumption.[16] If claimant does not establish total disability, a requisite element of entitlement, an award of benefits is precluded under 20 C.F.R. Part 718. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

[16] We affirm, as unchallenged, the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 26-29.

Accordingly, the administrative law judge's Decision and Order 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.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge