U.S. Department of Labor

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

BRB No. 19-0316 BLA

JAMES L. FIELDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 06/12/2020
	)	
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 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.

Jeffrey S. Goldberg (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, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-05584) of Administrative Law Judge Carrie Bland 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 March 31, 2014.

The administrative law judge found claimant has at least 23.39 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found he invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[1] and established a change in applicable condition of entitlement.[2] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge lacked authority to decide the case because she was not appointed consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] It also challenges the constitutionality of the Section

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[1] Under Section 411(c)(4) of the Act, claimant is presumed totally disabled due to pneumoconiosis if he has at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[2] When 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 "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 district director denied claimant's prior claim, filed on June 20, 2011, because he failed to establish any element of entitlement. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing at least one element to have his case considered on the merits. 20 C.F.R. §725.309(c).

[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

411(c)(4) presumption because it was enacted as part of the Affordable Care Act (ACA). Employer further argues the administrative law judge erred in finding claimant established total disability and invoked the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, asserting employer waived its Appointments Clause argument and urging rejection of its ACA unconstitutionality argument.[4]

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 (1965).

Appointments Clause

Employer urges the Board to vacate the administrative law judge's decision and remand the case for assignment to a different, constitutionally appointed administrative law judge for a new hearing pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[6] The Director asserts employer waived its Appointments Clause challenge by failing to timely respond to the administrative law judge's Notice and Order requiring employer to indicate

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> 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 at least 23.39 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10.

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

[6] In *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), the United States Supreme Court held that Securities and Exchange Commission administrative law judges were not appointed in accordance with the Appointments Clause of the Constitution. *Lucia*, 138 S.Ct. at 2055. The Court further held that because the petitioner timely raised his Appointments Clause challenge, he was entitled to a new hearing before a new and properly appointed administrative law judge. *Id.*

the relief it sought pursuant to *Lucia*. Director's Brief at 2-3. We agree with the Director's position.

The Appointments Clause issue is "non-jurisdictional" and thus is 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). As the Director correctly notes, employer filed a motion requesting the administrative law judge to hold the claim in abeyance pending the outcome of *Lucia*. Although he denied the motion at the time, after the Supreme Court issued its decision, the administrative law judge expressly ordered employer to "file a motion indicating what, if any, further relief it requests" within twenty days. Notice and Order dated October 2, 2018; Director's Brief at 2. The administrative law judge warned employer "[i]f no response is received, it will be reasonably assumed that no further relief is requested and the undersigned will address any outstanding evidentiary issues and issue a decision and order in due course." *Id.* Employer failed to respond. Had employer responded to the administrative law judge's order, she could have considered the issue and, if appropriate, provided the relief employer is now requesting. Based on these facts, we conclude employer waived its Appointments Clause challenge and deny the relief requested.

Constitutionality of 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 entirety of the ACA, including its provisions reinstating the Section 411(c)(4) presumption, is unconstitutional. *See* Pub. L. No. 111-148, §1556 (2010); Employer's Brief at 7-8. The Director responds that the district court stayed its ruling striking down the ACA, *Texas*, 352 F. Supp. 3d at 690; thus she argues the decision does not preclude application of the amendments to the Black Lung Benefits Act found in the ACA. Director's Brief at 3.

After the parties filed their briefs, the United States Court of Appeals for the Fifth Circuit held one aspect of the ACA unconstitutional – the requirement that individuals maintain health insurance – but vacated and remanded the district court's determination the remainder of the ACA must also be struck down as inseverable from that requirement. *Texas v. United States*, 945 F.3d 355, 393 (5th Cir. 2019) (King, J., dissenting).[7] Moreover,

[7] Furthermore, the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Mathews v. United Pocahontas Coal Co*., 24 BLR 1-193, 1-201 (2010).

the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held 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). Further, the United States Supreme Court upheld the constitutionality of the ACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). We therefore reject employer's argument the Section 411(c)(4) presumption is unconstitutional.

Invocation of the 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. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies, qualifying arterial blood gas studies,[8] 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 total disability established based on the blood gas studies and medical opinions.[9] Employer's challenges to those determinations lack merit.

The administrative law judge considered the results of five new blood gas studies dated April 23, 2014, June 29, 2015, August 23, 2016, November 4, 2016, and March 28, 2017. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 12-13; Director's Exhibits 12, 13; Claimant's Exhibits 2, 3; Employer's Exhibit 1. The April 23, 2014 blood gas study Dr. Copley conducted produced non-qualifying values at rest and qualifying values with

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[8] 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).

[9] The administrative law judge found the new pulmonary function studies do not establish total disability, as none of the studies produced qualifying values. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 12; Director's Exhibits 12, 13; Claimant's Exhibits 2, 3; Employer's Exhibit 1. Because the administrative law judge found no evidence of cor pulmonale with right-sided congestive heart failure, she also found total disability was not established under 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 13.

exercise. Director's Exhibit 12. The June 29, 2015 study Dr. McSharry conducted produced non-qualifying values both at rest and with exercise. Director's Exhibit 13. The August 23, 2016 study Dr. Habre conducted produced qualifying values at rest but non-qualifying values with exercise. Claimant's Exhibit 3. The November 4, 2016 study Dr. Raj conducted produced non-qualifying values at rest and qualifying values with exercise. Claimant's Exhibit 2. Finally, the March 28, 2017 study Dr. Sargent conducted produced non-qualifying values both at rest and with exercise. Employer's Exhibit 1. Because three of the five studies produced qualifying values, the administrative law judge found a preponderance of the blood gas studies established total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 13.

We reject employer's argument the administrative law judge erred in finding a preponderance of blood gas studies establish total disability because when the resting and exercise portions of the studies are totaled, more of them are non-qualifying, including both portions of the most recent study. Employer's Brief at 11-12. Employer essentially asks the Board to reweigh evidence, which it may not do. *Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111, 1-113 (1989). The administrative law judge considered each of claimant's five blood gas studies and correctly noted three of the five studies had qualifying values either at rest or with exercise. Decision and Order at 13. Thus, she permissibly found the blood gas study evidence as a whole established total disability. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *see* 20 C.F.R. §718.105(b).

Further, the administrative law judge was not required to give greatest weight to the non-qualifying March 28, 2017 blood gas study as the most recent, especially where less than six months separate it and the next most recent qualifying study Dr. Raj conducted on November 4, 2016. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51 (4th Cir. 1992); *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990) (administrative law judge may consider amount of time separating studies); *Conley v. Roberts and Shaefer Co.*, 7 BLR 1-309 (1984) (no requirement to credit later blood gas study simply because it is most recent evidence by six months); Claimant's Exhibit 2; Employer's Exhibit 1. We therefore affirm the administrative law judge's finding the preponderance of the blood gas studies establish total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); Decision and Order at 13.

The administrative law judge next considered the new opinions of Drs. Copley, Habre, Raj, Sargent, and McSharry.[10] Decision and Order at 13-24; Director's Exhibits 12, 13; Claimant's Exhibits 2, 3; Employer's Exhibits 1, 3, 5. Drs. Copley, Habre, and Raj opined claimant is totally disabled by hypoxemia based on his arterial blood gas results and his symptoms of dyspnea, coughing, and wheezing. Director's Exhibit 12; Claimant's Exhibits 2, 3. In contrast, based on an examination of claimant and a review of his medical records, Drs. Sargent and McSharry did not diagnose a totally disabling respiratory impairment. Director's Exhibit 13; Employer's Exhibits 1, 3, 5.

The administrative law judge gave greatest weight to the opinions of Drs. Copley, Habre, and Raj as reasoned, persuasive, and supported by the qualifying blood gas study results and claimant's symptoms. *Id*. at 22-23. In contrast, she found the opinions of Drs. Sargent and McSharry well-documented but entitled to "reduced weight" because they were contrary to her finding the blood gas study evidence overall supported total disability and because they did not adequately explain why someone with claimant's symptoms could perform the heavy manual labor his usual coal mine employment required. *Id*. at 23. Thus, she concluded the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 24. Finally, weighing all of the relevant new evidence together, the administrative law judge found claimant established total disability by a preponderance of the evidence, pursuant to 20 C.F.R. §718.204(b)(2). *Id*. at 23-24.

We reject employer's assertion the administrative law judge erred in discrediting the opinions of Drs. Sargent and McSharry. *See* Employer's Brief at 12-14. Dr. Sargent opined claimant's moderate hypoxemia at rest resolved almost completely with low-level exercise and, based on the non-qualifying test results during his examination, concluded claimant does not have any significant respiratory disability. Employer's Exhibit 1. Dr. Sargent further explained that while claimant experienced severe resting hypoxemia on Dr. Habre's August 23, 2016 qualifying blood gas study, his situation was transient, as claimant's hypoxemia improved with exercise. Employer's Exhibit 5.

After examining claimant, Dr. McSharry opined "[d]espite this claimant's many symptoms and limitations, there is no objective evidence that impairment related to lung disease is present." Director's Exhibit 13. He based his opinion on non-qualifying test results from his June 29, 2015 examination indicating "normal spirometry" and blood gas study results showing mild hypoxemia that improved with exercise. *Id*. After reviewing additional records, Dr. McSharry observed claimant's blood gas study values worsened

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[10] We affirm, as unchallenged, the administrative law judge's finding claimant's usual coal mine work required heavy labor. *See Skrack*, 6 BLR at 1-711; Decision and Order at 5.

with exercise during Dr. Raj's November 4, 2016 examination "suggest[ing] the presence of lung disease," but based on subsequent non-qualifying results on Dr. Sargent's study, concluded there was "no evidence of disability from a pulmonary perspective." Employer's Exhibit 3.

Contrary to employer's contention, the administrative law judge permissibly found Drs. Sargent's and McSharry's opinions not well-reasoned to the extent they concluded the non-qualifying blood gas studies demonstrate claimant is not totally disabled, contrary to her finding the blood gas study evidence as a whole supports a finding of total disability. *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 23.

The administrative law judge further found Drs. Sargent and McSharry failed to adequately explain their conclusions in light of claimant's symptoms of dyspnea, cough, and wheezing which he "consistently reported . . . to his reviewing physicians and in his hearing testimony."[11] Decision and Order at 23. As the administrative law judge observed, Dr. Sargent noted claimant occasionally "exhibited arterial oxygen desaturation with exertion" and had a mild obstructive and restrictive impairment. Employer's Exhibit 1. He concluded claimant had the capacity to perform "his last job as a foreman as he described that job to me" but did not state or discuss what the exertional requirements of his job were.[12] *Id.* Dr. McSharry noted claimant "is short of breath walking even a few yards[,]" "cannot climb a flight of stairs without stopping for shortness of breath[,]" and "has [a] daily cough, which goes on all day and occasionally produces sputum." Director's

[11] Dr. Copley reported claimant's increasing shortness of breath "gets worse going up an incline, worse with exertion, [and] worse with carrying heavy objects." Director's Exhibit 12. Dr. Habre noted claimant had shortness of breath for the last ten years, an exertional cough for the last five years, and exertional dyspnea. Claimant's Exhibit 3. Dr. Raj stated claimant "gets short of breath after walking thirty to fifty feet uphill and one hundred to two hundred feet on level ground with reduced physical capacity." Claimant's Exhibit 2. At the hearing, claimant testified his shortness of breath has gotten progressively worse. Hearing Transcript at 14. He stated he can walk up seven or eight steps before he has to stop due to shortness of breath. *Id.* at 13-14.

[12] At the hearing, when asked which job he performed for the longest period of time, claimant responded, "[r]un coal, bolt top, run buggies and stuff at the face [of the mine]." Hearing Transcript at 12. He stated he worked as a foreman for his last "four or five years" of coal mine employment. *Id.* In that role, he testified he spent eight to ten hours underground daily and lifted fifty pound bags of rock dust several times a day to load the rock dust feeders. *Id.* at 13, 16-17.

Exhibit 13. He acknowledged claimant has "many symptoms and limitations" and in his supplemental report stated claimant "complained of shortness of breath, cough, [and] dyspnea with exertion." *Id.*; Employer's Exhibit 3.

Given their awareness of claimant's respiratory symptoms, the administrative law judge permissibly found neither physician adequately explained how a person in claimant's condition could perform the heavy labor his previous coal mine employment required. *Looney*, 678 F.3d at 316-17; Decision and Order at 5, 23. As this credibility determination is both supported by substantial evidence and unchallenged on appeal, it is affirmed. *See Compton*, 211 F.3d at 207-208; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 23.

Finally, we reject employer's argument the opinions of Drs. Copley, Habre, and Raj are not reasoned or credible because they were "unaware" of the entirety of claimant's blood gas study results. Employer's Brief at 15-16. Dr. Copley opined claimant's objective testing reflected "mild obstructive lung disease" and "hypoxemia" based on claimant's exercise blood gas study, which was stopped after four minutes and twenty-six seconds due to claimant's dyspnea and fatigue. Director's Exhibit 12. She further explained the level of impairment claimant's objective testing revealed along with his increasing shortness of breath that "gets worse going up an incline, worse with exertion, worse with carrying heavy objects," would prevent him from returning to his prior coal mine work. *Id.* Similarly, Dr. Habre noted claimant had shortness of breath for the last ten years, an exertional cough for the last five years, and exertional dyspnea. Claimant's Exhibit 3. He opined that based on claimant's objective testing, he has "complete and total disabling lung disease due to his abnormal [blood gas studies] and presence of hypoxemia" which prevents him from performing his coal mine job or strenuous activities. *Id.* Dr. Raj opined claimant's objective testing reflected a "moderate obstructive defect with moderately reduced diffusion capacity" and "severe hypoxemia." Claimant's Exhibit 2. He also found claimant could meet the exertional demands of his last coal mine job, noting that he "gets short of breath after walking thirty to fifty feet uphill and one hundred to two hundred feet on level ground with reduced physical capacity." *Id.*

The administrative law judge permissibly determined the opinions of Drs. Copley, Habre, and Raj that claimant lacks the pulmonary capacity to perform his coal mine employment are well-reasoned and documented, as they were supported by physical examinations, an understanding of claimant's symptoms, the results of his objective studies, and were consistent with the preponderance of the qualifying blood gas study evidence. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 22-23; Director's Exhibit 12; Claimant's Exhibits 2, 3. The administrative law judge therefore provided valid rationales for her credibility determinations and did not engage in a selective analysis of the medical opinions.

Consequently, we affirm the administrative law judge's finding claimant established total disability at 20 C.F.R. §718.204(b)(2) overall, a change in applicable condition of entitlement, and invoked the Section 411(c)(4) presumption. Because claimant invoked the presumption, and employer has not challenged the administrative law judge's finding that it did not rebut it, claimant has established entitlement to benefits. *See Skrack*, 6 BLR at 1-711.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge