U.S. Department of Labor

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

BRB No. 20-0303 BLA

CHRISTOPHER J. LANE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	
	)	DATE ISSUED: 06/30/2021
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 Granting Benefits of Francine L. Applewhite, 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.

Michelle S. Gerdano (Elena S. Goldstein, Deputy Solicitor; 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, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge Francine L. Applewhite's Decision and Order Granting Benefits (2018-BLA-06129) rendered on a claim filed on July 20, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with at least ten years of coal mine employment and found he established complicated pneumoconiosis. Thus Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018). She also found Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203. Thus she awarded benefits.

On appeal, Employer argues the administrative law judge lacked the authority to hear and decide the case because she was not appointed in a manner consistent with the Appointments Clause of the Constitution.[1] It further asserts the removal provisions applicable to the administrative law judge render her appointment unconstitutional. Employer also asserts she erred in finding Claimant established complicated pneumoconiosis.[2] Claimant filed a response in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing the administrative law judge had the authority to decide the case.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial

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[1] 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.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding of at least ten years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

evidence, and in accordance with applicable law.[3] 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 Challenge

Employer requests the Board vacate the administrative law judge's Decision and Order and remand this case to be heard by a constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[4] Employer's Brief at 5-9; Employer's Reply Brief at 1-2.[5] It notes the United States Supreme Court held in *Lucia* that Securities and Exchange Commission administrative law judges were not properly appointed in accordance with the Appointments Clause of the Constitution. Employer's Brief at 5-7. It argues the administrative law judge in this case was similarly appointed improperly. Employer's Brief at 7-8.

The Director argues the Secretary of Labor's September 12, 2018 appointment of Administrative Law Judge Applewhite[6] conforms to the Appointments Clause and is

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[3] We will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 12.

[4] *Lucia* involved a challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to the 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). The Department of Labor has conceded that the Supreme Court's holding applies to its administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[5] Employer raised this issue before the administrative law judge in a June 11, 2019 Response to Notice of Hearing and at the September 19, 2019 hearing.

[6] The Secretary of Labor issued a letter to the administrative law judge on September 12, 2018, stating:

> Pursuant to my authority as Secretary of Labor, I hereby appoint you as an Administrative Law Judge in the U.S. Department of Labor, authorized to execute and fulfill the duties of that office according to law and regulation and to hold all the powers and privileges pertaining to that office. U.S. Cons.

presumptively valid, and Employer has failed to demonstrate otherwise. Director's Brief at 2. We agree with the Director's argument.

The Secretary specifically appointed Judge Applewhite as an administrative law judge in the Department of Labor to "execute and fulfill the duties of that office according to law and regulation and to hold all the powers and privileges pertaining to that office. U.S. Cons. Art. II, § 2, cl. 2; 5 U.S.C. §3105." Secretary's September 12, 2018 Letter to Administrative Law Judge Applewhite. Congress authorized the Secretary to appoint administrative law judges to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 4, *quoting Marbury v. Madison*, 5 U.S. 137, 157 (1803).

Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016), *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001). Employer has failed to demonstrate that the Secretary's action was not open or unequivocal, or otherwise explain how it was improper. Thus Employer has failed to meet its burden to overcome the presumption of regularity. *Butler*, 244 F.3d at 1340.

We further reject Employer's argument that Executive Order 13843, which removes administrative law judges from the competitive civil service, "confirms" its Appointments Clause argument because incumbent administrative law judges remain in the competitive civil service pending promulgation of implementing regulations. Employer's Brief at 8. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's appointment of the administrative law judge, which we have held constituted a valid exercise of his authority.

Thus we reject Employer's argument that this case should be remanded for a new hearing before a different administrative law judge.

> Art. II, § 2, cl. 2; 5 U.S.C. §3105. This action is effective upon transfer to the U.S. Department of Labor.

Secretary's September 12, 2018 Letter to Administrative Law Judge Applewhite. Her appointment became effective on October 28, 2018. *Id.*

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded administrative law judges. Employer's Brief at 8-10. Employer generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 13-15. It also relies on the Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). *Id.*

In *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as administrative law judges" who, "unlike members of the [PCAOB] . . . perform adjudicative rather than enforcement or policymaking functions." *Id*. at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S. Ct. at 2050 n.1.

Although Employer generally summarizes *Free Enterprise Fund*, it has not explained how or why this legal authority should apply to administrative law judges or otherwise undermine the administrative law judge's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized that "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988), *quoting Hooper v. California*, 155 U.S. 648, 657 (1895). Here, Employer does not even attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (a reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional either facially or as applied.

Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. In determining whether Claimant has invoked the irrebuttable presumption, the administrative law judge must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56 (4th Cir. 2000).

The administrative law judge found the x-rays, medical opinions, and computed tomography (CT) scans establish complicated pneumoconiosis.[7] 20 C.F.R. §718.304(a), (c); Decision and Order at 6, 9-10. Weighing all the evidence together, she concluded the evidence establishes complicated pneumoconiosis. *Id*. at 10.

X-Rays

Employer first argues the administrative law judge failed to adequately explain her rationale for resolving the conflict in the x-rays. 20 C.F.R. §718.304(a); Employer's Brief at 13. Employer's argument has merit.

The administrative law judge stated the record contains ten interpretations of five x-rays dated October 9, 2017, August 22, 2018, October 10, 2018, October 18, 2018, and November 16, 2018. Decision and Order at 5-6. She indicated all the physicians who read these x-rays are dually-qualified as B readers and Board-certified radiologists. *Id*. Drs. DePonte and Crum interpreted the October 9, 2017 x-ray as positive for complicated pneumoconiosis, whereas Drs. Adcock and Tarver read it negative for the disease. Director's Exhibits 12, 16; Claimant's Exhibit 5; Employer's Exhibit 9. Dr. Crum interpreted the August 22, 2018 x-ray as positive for complicated pneumoconiosis, while Dr. Adcock read it as negative. Claimant's Exhibit 7; Employer's Exhibit 3. Dr. Adcock read the October 10, 2018 x-ray as negative for complicated pneumoconiosis. Employer's Exhibit 8. Dr. Crum read the October 18, 2018 x-ray as positive for complicated pneumoconiosis. Claimant's Exhibit 1. Dr. Crum read the November 16, 2018 x-ray as

[7] The administrative law judge found the record contains no biopsy evidence. 20 C.F.R. §718.304(b); Decision and Order at 3.

positive for complicated pneumoconiosis, whereas Dr. Adcock read it as negative for the disease. Claimant's Exhibit 2; Employer's Exhibit 7.

The administrative law judge determined that "[a]ll the physicians of record found the x-rays to be positive for simple pneumoconiosis." Decision and Order at 6. She also observed: "four out of five of the x-rays were interpreted as having large A opacities, indicative of complicated pneumoconiosis. Notably, four x-rays had both large A opacities and simple pneumoconiosis interpretations." *Id.* Finding that "all of the interpretations are from equally qualified doctors," she summarily stated "the preponderance of x-ray evidence supports a finding of complicated pneumoconiosis." *Id.*

We agree with Employer's argument that the administrative law judge did not adequately explain her rationale for finding the x-rays established complicated pneumoconiosis. Employer's Brief at 13. Specifically, she did not set forth a valid basis for finding the preponderance of the x-ray evidence supports a finding of complicated pneumoconiosis or resolve the conflict between the positive and negative readings of record. Although she indicated the record includes a radiologist's reading identifying a Category A large opacity on four of the five x-rays, a radiologist also excluded complicated pneumoconiosis on four of the five x-rays. Because the administrative law judge did not provide a basis for why she credited the positive readings over the negative readings on these x-rays, her credibility finding is not adequately explained and fails to comply with the APA.[8] *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We therefore vacate the administrative law judge's finding that the x-rays establish complicated pneumoconiosis. 20 C.F.R. §718.304(a).

CT Scans

We further agree with Employer's argument that the administrative law judge did not adequately explain her rationale for resolving the conflict in the CT scans. Employer's Brief at 17. The administrative law judge considered four interpretations by Drs. Crum and Adcock of two CT scans dated December 4, 2017 and October 5, 2018. Decision and Order at 10. She found both doctors are dually-qualified radiologists. *Id.* Dr. Crum interpreted the December 4, 2017 CT scan as showing a 1.6 centimeter large opacity within the right mid-lung which he stated is "most consistent with complicated pneumoconiosis," whereas Dr. Adcock interpreted the scan as negative for complicated pneumoconiosis.

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[8] The Administrative Procedure Act provides 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).

Claimant's Exhibit 3, Employer's Exhibit 5. The administrative law judge noted "these findings were duplicated on the October 5, 2018 CT scan." Decision and Order at 10; *see* Claimant's Exhibit 4; Employer's Exhibit 4. She addressed the conflicting CT scan evidence in the following way: "Noting that equally qualified physician[s] had similar contradictory findings one year apart and the findings are in line with their x-ray interpretations, I give greater weight to the CT scan findings consistent with complicated pneumoconiosis." Decision and Order at 10.

The administrative law judge again did not adequately set forth her basis for giving greater weight to the CT scan interpretations finding complicated pneumoconiosis in light of the fact that each of those interpretations was contradicted by a negative interpretation from an equally-qualified physician. Because the administrative law judge's finding is not adequately explained, it does not comply with the APA. *See Addison*, 831 F.3d at 256-57; *Wojtowicz* at 1-165. Based on this error, and because her findings with respect to the x-ray evidence may affect her CT scan findings, we vacate the administrative law judge's finding that the CT scans establish complicated pneumoconiosis. 20 C.F.R. §718.304(c).

Medical Opinions

Because the administrative law judge's weighing of the x-ray and CT scan evidence affected the weight she assigned the medical opinion evidence, we also vacate her finding that the medical opinions establish complicated pneumoconiosis and her finding all the relevant evidence establishes complicated pneumoconiosis. 20 C.F.R. §718.304(a), (c). We therefore vacate her finding that Claimant invoked the Section 411(c)(3) presumption, and the award of benefits. We remand for reconsideration of the issue of complicated pneumoconiosis.

Evidentiary Issue

In revisiting the issue of complicated pneumoconiosis, the administrative law judge should address Employer's argument regarding the number of x-rays of record. Employer argues the administrative law judge's finding regarding the x-rays is based upon a mischaracterization of the evidence. Employer's Brief at 11-12. It asserts there are actually ten interpretations of four x-rays dated October 9, 2017, August 22, 2018, October 18, 2018, and November 16, 2018 (and not ten interpretations of five x-rays). *Id.*

Employer notes that Dr. Crum read an October 18, 2018 x-ray film. Employer's Brief at 11-12. Thereafter Employer requested the Department of Labor (DOL) send the film to its doctor, Dr. Adcock, to provide a rebuttal reading. *Id.* When the DOL sent the October 18, 2018 x-ray film to Dr. Adcock for interpretation, Employer contends the DOL incorrectly stated on the cover sheet that it was sending a film dated October 10, 2018. *Id.* That error was compounded when Dr. Adcock completed the ILO form indicating he read an x-ray dated October 10, 2018. *Id.* Thus Dr. Adcock's reading contained in Employer's

Exhibit 8 is actually a reading of the misidentified October 18, 2018 x-ray. *Id.* Employer designated the reading as a rebuttal to Dr. Crum's reading of the October 18, 2018 x-ray on two evidence summary forms. *Id.; see* Employer's Exhibit 12; Employer's August 1, 2019 Evidence Summary Form. Moreover, in their written closing arguments both Claimant's counsel and Employer's counsel identified and listed Dr. Adcock's interpretation as a reading of the October 18, 2018 x-ray. Claimant's Closing Arguments in Support of an Award of Benefits at 5; Operator's Brief at 3, 7.

Notwithstanding the parties' pleadings and evidence forms, the administrative law judge indicated in her Decision and Order that the record contains ten interpretations of five x-rays, with one x-ray dated October 10, 2018. Decision and Order at 5-6. Employer challenged that characterization to the administrative law judge in a Motion for Reconsideration, but she denied Employer's Motion and declined to reconsider the evidence as two interpretations of the same October 18, 2018 x-ray. *See* May 8, 2020 Order Denying Motion for Reconsideration. She held Employer had "65 working days (93 calendar days) to review" the x-ray the DOL sent Dr. Adcock, "notice the alleged error, and make another request to DOL for the proper document." *Id.* Because the "request to change the date on the x-ray reviewed by Dr. Adcock" cannot be characterized as "newly discovered evidence" or "an intervening change in law," the administrative law judge held the evidence "considered did not result in a clear error nor manifest injustice." *Id*

We agree with Employer that the administrative law judge erred in failing to adequately address its argument. Employer's Brief at 11-12. Employer argued before the administrative law judge that the DOL correctly sent the October 18, 2018 film to Dr. Adcock, but only misidentified it on its cover sheet.[9] *See* Employer's Motion for Reconsideration and Reopening of Evidentiary Record at 2-4. Employer contends it was not seeking "to change the date on the x-ray reviewed by Dr. Adcock." May 8, 2020 Order Denying Motion for Reconsideration; *see* Employer's Brief at 11-12. The administrative law judge's failure to adequately address Employer's argument is not harmless. The administrative law judge's characterization of Dr. Adcock's reading as a separate October

[9] In April 14, 2020 correspondence to Employer's counsel, the DOL claims examiner indicated "we don't have an x-ray dated 10/10/2018. We have an x-ray dated 10/18/18 which was taken at Norton Community Hospital . . . as part of an independent medical exam." Employer's Motion for Reconsideration and Reopening of Evidentiary Record, Exhibit C.

10, 2018 x-ray creates relevant evidentiary issues and may affect her consideration of the elements of entitlement.[10] 20 C.F.R. 725.414(a)(2)(i), (3)(i); Employer's Exhibit 12.

On remand, the administrative law judge should accurately characterize the evidence, addressing Employer's argument that the record includes ten interpretations of only four x-rays dated October 9, 2017, August 22, 2018, October 18, 2018, and November 16, 2018. Should she conclude Dr. Adcock's interpretation is a reading of an October 10, 2018 x-ray rather than a typographical error resulting from the mislabeling of the October 18, 2018 x-ray, the administrative law judge must address and resolve any resulting evidentiary issues. *See* 20 C.F.R. 725.414(a)(2)(i), (3)(i).

In summary, the administrative law judge on remand must reconsider whether the x-ray, CT scan, and medical opinion evidence establishes complicated pneumoconiosis, properly characterize the evidence of record, and adequately explain her findings as the APA requires. *Wojtowicz*, 12 BLR at 1-165; 20 C.F.R. §718.304(a), (c). She must weigh all the relevant evidence together to determine if the evidence as whole establishes complicated pneumoconiosis. *Cox,* 602 F.3d at 283*; Scarbro,* 220 F.3d at 255-56; 20 C.F.R. §718.304. If the administrative law judge finds complicated pneumoconiosis established on remand, she may reinstate the award of benefits.[11] If she finds Claimant has not established complicated pneumoconiosis, she must address whether he has established entitlement to benefits without the benefit of the Section 411(c)(3) presumption.

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[10] An October 10, 2018 x-ray interpretation would constitute a third affirmative reading in excess of the evidentiary limitations. *See* Employer's Exhibit 12. The characterization of this reading as an interpretation of a separate October 10, 2018 x-ray may also affect the administrative law judge's credibility determinations of the medical opinions from physicians who reviewed the x-rays. *See, e.g.,* Employer's Exhibit 11, Decision and Order at 7-8.

[11] Employer does not challenge the administrative law judge's finding that Claimant's complicated pneumoconiosis, if established, arose out of his coal mine employment. 20 C.F.R. §718.203(b). Thus we affirm this finding. *See Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge