U.S. Department of Labor

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

BRB Nos. 22-0514 BLA
and 22-0515 BLA

EMMA JEAN STILTNER (o/b/o and Widow of DANNY A. STILTNER)	)	
Claimant-Respondent	)	
v.	)	
SUPERIOR MINING & MINERALS	)	
and	)	DATE ISSUED: 6/28/2023
OLD REPUBLIC 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 in Miner's and Survivor's Claims of Monica Markley, Administrative Law Judge, United States Department of Labor.

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

Michael A. Pusateri and Brian D. Straw (Greenberg Traurig, LLP), Washington, D.C., for Employer and its Carrier.

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Monica Markley's Decision and Order Awarding Benefits in Miner's and Survivor's Claims (2015-BLA-05333 and 2016-BLA-05605) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on May 23, 2011, and a survivor's claim[1] filed on November 20, 2014.

The ALJ credited the Miner with sixteen years and nine months of coal mine employment in both underground coal mines and surface coal mines in conditions substantially similar to those in an underground mine. She also found Claimant established the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption and awarded benefits in the miner's claim. Because the Miner was entitled to benefits at the time of his death, the ALJ also determined Claimant is automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[3]

On appeal, Employer argues the ALJ 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, Art. II § 2, cl. 2.[4] It also argues the removal provisions applicable to

[1] Claimant is the widow of the Miner, who died on November 2, 2014. Director's Exhibit 84. Claimant is pursuing the miner's claim on his behalf. Director's Exhibit 85.

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

[3] Section 422(*l*) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

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

ALJs rendered her appointment unconstitutional. In addition, it asserts the ALJ deprived it of due process by refusing to allow it to obtain discovery from the Department of Labor (DOL) regarding the scientific bases for the preamble to the 2001 regulatory revisions, while relying on the preamble to assess the evidence in this case. On the merits, it argues the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response urging the Benefits Review Board to reject Employer's constitutional challenges and its argument regarding its discovery requests, and affirm her finding Employer did not rebut the Section 411(c)(4) presumption. Employer has filed reply briefs to both Claimant's and the Director's briefs, reiterating its contentions.[5]

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

> [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 on appeal, the ALJ's findings that Claimant established the Miner had sixteen years and nine months of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, and thus invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9, 26-27.

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 69 at 4; June 23, 2020 Hearing Tr. at 31.

Appointments Clause

Employer urges the Board to vacate the ALJ's Decision and Order and remand this case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[7] Employer's Brief at 39-40. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[8] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 39-40. For the reasons set forth in *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 3-5 (May 26, 2023), we reject Employer's arguments.

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 37-39. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion in *Lucia*. Employer's Brief at 37. In addition, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019),

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[7] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs 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 (DOL) has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[8] The Secretary of Labor (the Secretary) issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the [DOL], and after due consideration, I hereby ratify the Department's prior appointment of you as an [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] of the U.S. [DOL] violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Markley.

vacated, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 38-39. For the reasons set forth in *Howard v. Apogee Coal Co*., 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

Employer's Request for Discovery

While the case was pending before the ALJ, Employer sought discovery from the DOL related to the deliberative process underlying the development of the preamble to the 2001 revised regulations. *See* Feb. 4, 2020 Director's Motion for Protective Order. In response, the Director moved for a Protective Order barring the requested discovery. *Id.* Employer opposed the Director's request. *See* February 11, 2020 Employer's Opposition to Motion for a Protective Order. The ALJ granted the Director's motion, finding Employer's discovery request would not lead to relevant information regarding the DOL's deliberative process or the science underlying the revised regulations that was not already set forth in the preamble. May 21, 2020 Order Granting Protective Order at 3-4.

Employer argues the ALJ violated its due process rights by preventing it from conducting discovery regarding the preamble and then discrediting the opinions of its physicians as being inconsistent with the science the DOL relied on in the preamble. Employer's Brief at 18-29. For the reasons set forth in *Johnson*, BLR , BRB No. 22-0022 BLA, slip op. at 8-9, we reject Employer's arguments.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[9] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as

[9] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

defined in [20 C.F.R] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer did not establish rebuttal by either method.[10]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015). The Sixth Circuit has held this standard requires Employer to establish the Miner's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id.* at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relied on the opinions of Drs. Rosenberg and Jarboe to disprove legal pneumoconiosis.[11] Employer's Exhibits 4, 5. Dr. Rosenberg diagnosed totally disabling chronic obstructive pulmonary disease (COPD) due to cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibit 4. Dr. Jarboe opined the Miner had severe airflow obstruction caused by a combination of smoking and bronchial asthma and not coal mine dust exposure. Employer's Exhibit 5. The ALJ found their opinions unpersuasive and inconsistent with the preamble to the revised 2001 regulations,[12] and thus found they

[10] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 30.

[11] The ALJ also considered the opinions of Drs. Splan, Vernon, and Klayton that the Miner had legal pneumoconiosis. Decision and Order at 30-33; Director's Exhibit 15; Claimant's Exhibits 1, 2. As their opinions do not aid Employer on rebuttal, we need not address its argument that the ALJ erred in weighing them. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 35-37.

[12] We reject Employer's argument that the ALJ was precluded from relying on the preamble to the 2001 revised regulations when weighing the opinions of Drs. Rosenberg and Jarboe. Employer's Brief at 29-33. An ALJ may evaluate expert opinions in conjunction with the preamble, as it sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012). Because the ALJ acted within her discretion in finding the opinions of Drs. Jarboe and Rosenberg unpersuasive in light of the preamble, we reject

are insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 34-36.

Employer argues the ALJ erred in discrediting the opinions of Drs. Rosenberg and Jarboe. Employer's Brief at 22-27. We disagree.

Drs. Rosenberg and Jarboe both opined the Miner's obstructive impairment was inconsistent with legal pneumoconiosis based, in part, on the marked reduction in his FEV1 value in relationship to his FVC value on pulmonary function testing. Employer's Exhibits 4 at 4, 39-40, 216-217; 5 at 21-22. The ALJ permissibly discredited their opinions because they are based on premises inconsistent with studies the DOL cited in the preamble that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio.[13] *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); 65 Fed. Reg. 79,940, 79,943 (Dec. 20, 2000); Decision and Order at 34, 36.

Further, Dr. Rosenberg concluded the Miner had diffuse emphysema, and "a diffuse emphysematous destruction of lung tissue" is consistent with cigarette smoking and "not characteristic of coal mine dust exposure." Employer's Exhibit 4 at 4-6, 41-42, 220-22. The ALJ acted within her discretion in finding Drs. Rosenberg's opinion inadequately explained given the DOL's recognition in the preamble that coal mine dust can cause centrilobular emphysema - which is a diffuse-type emphysema - and that coal dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms. *See Adams*, 694 F.3d at 801-02; 65 Fed. Reg. at 79,943; Decision and Order at 35.

The ALJ also found Dr. Rosenberg cited "studies showing that the loss of FEV1 caused by smoking far exceeds that caused by coal mine dust exposure, and cigarette smoking is typically much more destructive." Decision and Order at 34-35; *see* Employer's Exhibit 4. She permissibly found that "even assuming, as Dr. Rosenberg claimed, that cigarette smoking causes much more significant decrements in [lung] function than coal mine dust over time," the doctor did not adequately explain why the

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Employer's argument that she applied the preamble as a legislative fact or binding rule. Employer's Brief at 28-29.

[13] Employer contends the ALJ erred because Dr. Rosenberg's opinion is supported by medical studies post-dating the preamble. Employer's Brief at 21-24. As the Director correctly argues, "the studies cited by Dr. Rosenberg are not in the record; nor does Dr. Rosenberg describe them in detail or provide any information that would allow the ALJ to evaluate whether those studies call into question the science underlying the regulations." Director's Brief at 8. Thus we reject this argument. *Sterling*, 762 F.3d at 491.

Miner's "disabling obstruction was [not] caused, at least in part, by his exposure to coal mine dust, as well as his cigarette" smoking. Decision and Order at 34-35; *see Young*, 947 F.3d at 405.

Because the ALJ acted within her discretion in discrediting the opinions of Drs. Rosenberg and Jarboe,[14] we affirm her finding that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order at 37. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(2)(i).

Disability Causation

The ALJ next considered whether Employer established that "no part of the Miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 37-39. The ALJ permissibly discounted the opinions of Drs. Rosenberg and Jarboe regarding the cause of the Miner's respiratory total disability because they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the existence of the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 37. We therefore affirm the ALJ's finding that Employer failed to establish no part of the Miner's respiratory disability was caused by legal pneumoconiosis, 20 C.F.R. §718.305(d)(1)(ii), and the award of benefits in the miner's claim.

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the award in the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits pursuant to

[14] Employer also alleges ALJ Markley was bound by "illegal and unpublished but binding rules" contained in a set of April 2015 ALJ training materials that it alleges "require – in mandatory language – that particular opinions must be discredited." Employer's Brief at 29-30 (internal quotations omitted). To the extent Employer argues the ALJ was biased because of a training program, it has not supported its claim with evidence in the record that ALJs were instructed to reject certain evidence, or that the current ALJ attended the training or rendered an improper decision based on such training. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992) ("Charges of bias or prejudice are not to be made lightly, and must be supported by concrete evidence."). Therefore, Employer's claim of bias is rejected.

Section 422(*l*). 30 U.S.C. §932(*l*) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 39.

Accordingly, the ALJ's Decision and Order Awarding Benefits in Miner's and Survivor's Claims is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge