U.S. Department of Labor

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

BRB No. 19-0125 BLA

ISAAC HOLLAND	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 03/31/2020
	)	
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 Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

Michelle S. Gerdano (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-05218) of Administrative Law Judge Richard M. Clark 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 August 18, 2014.[1]

The administrative law judge credited claimant with at least twenty years of underground coal mine employment and found he established a totally disabling respiratory impairment. He therefore found claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c)[2] and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[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. In addition, employer contends that based on the holding in *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018), the Affordable Care Act (ACA) is unconstitutional; therefore, the provision making the Section 411(c)(4)

[1] The current claim is claimant's third. On January 7, 2004, Administrative Law Judge Stuart A. Levin denied claimant's most recent prior claim, filed on February 12, 2001, because he failed to establish pneumoconiosis or total respiratory disability. Decision and Order at 2; Director's Exhibit 2. The Board subsequently affirmed the denial of benefits. *Holland v. Shamrock Coal Co., Inc.*, BRB No. 04-0418 BLA (Jan 14, 2014) (unpub.); Director's Exhibit 2. Claimant took no further action until filing his current claim.

[2] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim also must 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). Claimant's most recent prior claim was denied because he did not establish the existence of pneumoconiosis or total disability. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing one of those elements. *See* 20 C.F.R. §725.309(c).

[3] 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 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.

presumption applicable to claims filed on or after January 1, 2005 and pending on or after March 23, 2010 is unconstitutional. Employer also challenges the administrative law judge's determination claimant established total respiratory disability, thereby invoking the presumption of total disability due to pneumoconiosis at Section 411(c)(4). Further, employer argues the administrative law judge erred in finding it failed to rebut the presumption even if it was properly invoked. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response brief, urging the Board to reject employer's arguments concerning the Appointments Clause and the constitutionality of the ACA.[4]

The Board's scope of review is defined by statute. The administrative law judge's decision and order must be affirmed 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). The Board reviews questions of law de novo. *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116 (6th Cir. 1984).

Appointments Clause

Employer alleges the administrative law judge did not have the authority to hear and decide this case, noting the United States Supreme Court held in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018) that Securities and Exchange Commission (SEC) administrative law judges were not appointed in accordance with the Appointments Clause[6] of the

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding of at least twenty years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 15 n.5; Director's Exhibit 1.

[6] 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

Constitution.[7] Employer's Brief at 5-7. Employer argues the administrative law judge in this case similarly was improperly appointed. Employer acknowledges the Secretary of Labor ratified the prior appointment of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017, but maintains that this action was insufficient as there was no prior valid appointment to ratify. *Id*. at 6-7.

The Director responds the administrative law judge had the authority to decide this case because the Secretary's ratification brought the administrative law judge's appointment into compliance. Director's Brief at 4-5. She also maintains employer failed to rebut the presumption of regularity that applies to the actions of public officers such as the Secretary. We agree with the Director's position.

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). Ratification is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 372 (D.C. Cir. 2017); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 602-03 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (3rd Cir. 2016). Thus, 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*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

The Secretary had, at the time of ratification, the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603. Congress has 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.

Under the presumption of regularity, we presume the Secretary had full knowledge of the decision to be ratified and made a detached considered affirmation. *Advanced*

> of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Art. II, § 2, cl. 2.

[7] Employer raised this issue before the administrative law judge in a Motion for Remand. The administrative law judge denied employer's motion, finding the Secretary of Labor's ratification of his appointment on December 21, 2017, foreclosed any potential ratification or removal issues warranting a *Lucia* remedy. *Holland v. Shamrock Coal Co., Inc.*, 2017-BLA-05218 (Sept. 5, 2018) (Order) (unpub.).

Disposal, 820 F.3d at 603. Employer does not assert that the Secretary had no "knowledge of all the material facts" or that he did not make a "detached and considered judgement" when he ratified Judge Clark's appointment, and therefore employer does not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340.

Thus, we hold that the Secretary's action constituted a proper ratification of the administrative law judge's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the Coast Guard Court of Criminal Appeals was valid where the Secretary of Transportation issued a memorandum "adopting" the General Counsel's assignments to the Coast Guard Court of Military Review "as judicial appointments of my own"); *Advanced Disposal*, 820 F.3d 592, 604-05 (a properly constituted NLRB can retroactively ratify the appointment of a Regional Director with statement that it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" all its earlier actions as an invalid Board). Consequently, we reject employer's request that the case be remanded for reassignment to a different administrative law.

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

We next address employer's challenge to the constitutionality and applicability of the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis. Citing *Texas v. United States*, 340 F.Supp.3d 579, employer contends the ACA, which reinstated the Section 411(c)(4) presumption, is unconstitutional. Employer asserts the district court ruled that the ACA individual mandate is unconstitutional so the Section 411(c)(4) presumption is also invalid. Employer's Brief at 7-8. The Director responds that the district court stayed its ruling striking down the ACA, *Texas v. United States*, 352 F.Supp.3d 665, 690 (N.D. Tex. 2018). Director's Brief at 2 n.1. Thus, the Director argues the decision does not preclude application of the amendments to the Act found in the ACA. *Id*. On appeal, the United States Court of Appeals for the Fifth Circuit held one aspect of the ACA (the individual mandate) is unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down as inseverable from the mandate.[8] *Texas v. United States*, No. 19-10011, 2019 WL 6888446, at 27-28 (5th Cir. Dec. 18, 2019) (King, J., dissenting). Further, the United States Supreme Court upheld the constitutionality of the ACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567

[8] Furthermore, the Board has declined to hold cases in abeyance pending the 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).

U.S. 519 (2012). We, therefore, reject employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case.

Invocation of the Section 411(c)(4) Presumption - Total Disability

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The administrative law judge found claimant established total disability through the pulmonary function studies, medical opinions, and the totality of the evidence.[9] Decision and Order at 17-19; *see* 20 C.F.R. §718.204(b)(2)(i), (iv).

The administrative law judge considered five new pulmonary function studies dated July 29, 2014, February 3, 2015, August 6, 2015, November 9, 2016, and October 12, 2017. 20 C.F.R. §718.202(b)(2)(i); Decision and Order at 8-9, 16-17; Director's Exhibits 12-13, 16; Claimant's Exhibit 4; Employer's Exhibit 3. He found all five of the studies produced qualifying values[10] before and after the administrative of bronchodilators but that only the February 3, 2015 study is valid. Decision and Order at 8-9, 16-17. As the only valid study is also qualifying, the administrative law judge found the pulmonary function study evidence supports a finding of total disability. *Id.*

Initially, we reject employer's assertion the administrative law judge erred in using sixty-two inches as claimant's height when finding the February 3, 2015 study qualifying, rather than the height of sixty-one inches listed on the study, which would render the study non-qualifying. *See* Employer's Brief at 14. The administrative law judge noted the five studies listed varying heights for claimant, ranging from sixty-one to sixty-three

[9] The administrative law judge found that the arterial blood gas studies do not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and there is no evidence claimant has cor pulmonale with right-sided congestive heart failure under 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 9, 17.

[10] A "qualifying" pulmonary function study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

inches. Decision and Order at 8, 16. Contrary to employer's contention, he permissibly resolved the conflict by averaging the various heights to find claimant's actual height is sixty-two inches. Decision and Order at 16; *see K.J.M.* [*Meade*] *v. Clinchfield Coal Co*., 24 BLR 1-40, 1-44 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983) (If there are substantial differences in the recorded heights among the pulmonary function studies, the administrative law judge must make a factual finding to determine the miner's actual height). The administrative law judge thus permissibly used the closest greater table height of 62.2 inches in determining the applicable height when comparing the February 3, 2015 study results with the values in the Appendix B tables. 20 C.F.R. Part 718, Appendix B; Decision and Order at 16.

There is merit, however, to employer's argument the administrative law judge erred in finding the February 3, 2015 study to be valid. Employer's Brief at 11. Dr. Vuskovich opined the study is unacceptable because claimant did not put forth sufficient effort to produce valid results. Director's Exhibit 13 at 12. Dr. Forehand who conducted the study responded that Dr. Vuskovich did not support his conclusion with the National Institute of Occupational Safety and Health (NIOSH) illustrations or other documentation and further failed to consider that Dr. Gaziano, a Department of Labor consultant, validated the study. Director's Exhibits 12 at 9; 17. Noting "that [c]laimant had good effort and understanding, and that the results met the [American Thoracic Society (ATS)] criteria" the administrative law judge found the February 3, 2015 study valid. Decision and Order at 16.

As employer contends, in crediting the opinions of Drs. Forehand and Gaziano that the February 3, 2015 pulmonary function study is valid over the contrary opinion of Dr. Vuskovich, the administrative law judge did not consider that on some of the February 3, 2015 test results, the technician noted ATS reproducibility was *not* met due to less than three acceptable efforts. Employer's Brief at 13; *see* Director's Exhibit 12. Further, the administrative law judge failed to consider Dr. Castle's testimony that all the pulmonary function studies, including the February 3, 2015 study, "were invalid for a number of reasons, including the fact that [claimant] did not exhale for an appropriate length of time, there was lack of reproducibility of some of the findings, and he used less than maximal effort during the flow volume loop and forced vital capacity maneuver." Employer's Exhibit 5 at 11. Consequently, the administrative law judge has not considered whether this evidence supports Dr. Vuskovich's conclusion that "[claimant] did not put forth the effort required to generate valid spirometry results." Director's Exhibit 13.

Where the administrative law judge fails to consider relevant evidence, and thereby fails to make appropriate factual findings and credibility determinations, the proper course for the Board is to remand the case for such determinations, instead of filling in the gaps in the administrative law judge's decision. *See* 30 U.S.C. §923(b); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Therefore, we must vacate the administrative

law judge's determination that claimant established total disability based on the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i). As the administrative law judge's weighing of the medical opinion evidence was based, in part, on his evaluation of the pulmonary function studies, we must also vacate his conclusions that claimant established total disability based on the medical opinions and based on the evidence as a whole at 20 C.F.R. §718.204(b)(2), (iv).[11] We vacate, therefore, the administrative law judge's findings that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c), invoked the Section 411(c)(4) presumption and that employer failed to rebut it.[12]

On remand, the administrative law judge must first reconsider whether the pulmonary function study evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(i) based on a weighing of all relevant evidence. In so doing, he must make a definitive finding regarding the validity of the February 3, 2015 study and explain his determination in accordance with the Administrative Procedure Act (APA).[13] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Furthermore, the administrative law judge must reconsider the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), taking into consideration the physicians' respective credentials, the

[11] The administrative law judge credited Dr. Forehand's opinion over those of Drs. Castle and Rosenberg in part because it is supported by the February 3, 2015 pulmonary function study he performed. Decision and Order at 17.

[12] Because we have vacated the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, we decline to address, as premature, employer's arguments pertaining to the administrative law judge's rebuttal findings. We note, however, that should the administrative law judge reach rebuttal on remand, he is not required to determine whether employer established claimant's impairment was not related "in any way" to dust exposure or that his dust exposure was "not a factor." *See* Decision and Order at 23; Employer's Brief at 18. Rather, employer has the burden to establish that claimant does 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); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-1-55 n.8 (2015) (Boggs, J., concurring and dissenting).

[13] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "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).

explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their opinions. *See Rowe*, 710 F.2d at 255; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998).

After reconsidering whether the pulmonary function study and medical opinion evidence establish total disability, the administrative law judge must weigh all the relevant evidence together to determine whether claimant established total disability at 20 C.F.R. §718.204(b). *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); *Rafferty*, 9 BLR at 1-232. The administrative law judge must set forth his findings in detail, including the underlying rationales, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

If claimant establishes total disability on remand, he also establishes a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c) and invokes the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b)(1), (c)(1). If the administrative law judge finds that claimant is not totally disabled, claimant will have failed to establish an essential element of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Accordingly, the Decision and Order Awarding Benefits 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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge