U.S. Department of Labor

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

BRB No. 19-0151 BLA

KENNETH D. DORTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GUEST MOUNTAIN MINING CORPORATION	)	DATE ISSUED: 03/31/2020
	)	
and	)	
	)	
CHARTIS CASUALTY 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 a Subsequent Claim of Larry S. Merck, 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/carrier.

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

Before: BUZZARD, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits in a Subsequent Claim (2013-BLA-06108) of Administrative Law Judge Larry S. Merck 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 October 3, 2012.

The administrative law judge found claimant has 37.26 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. He therefore found claimant 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 the applicable condition of entitlement.[2] 20 C.F.R. §725.309(c).

[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. Employer concedes claimant established at least fifteen years of qualifying coal mine employment. Hearing Transcript at 9; Employer's Brief at 2. We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established 37.26 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

[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 September 25, 1997, because claimant failed to establish any of the elements 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).

The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues a district court decision holding that the Affordable Care Act (ACA) is unconstitutional and invalidated the Section 411(c)(4) presumption. Employer further contends the administrative law judge lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] Employer also argues he erred in finding claimant established total disability and invoked the Section 411(c)(4) presumption. Employer further argues against the administrative law judge's findings that it did not rebut the presumption and that the evidence as a whole preponderates in claimant's favor. 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 its ACA unconstitutionality argument is without merit.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits in a Subsequent Claim if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

Constitutionality of the Affordable Care Act

We reject employer's contention that, pursuant to *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018), the Affordable Care Act (ACA), including its provisions

[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 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.

[4] 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 Exhibit 4.

reviving the Section 411(c)(4) presumption, is unconstitutional. Employer's Brief at 6-7. On appeal, the United States Court of Appeals for the Fifth Circuit held one aspect of the ACA (the individual requirement to maintain health insurance) 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 that requirement. *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 Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that 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).

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).[5] Employer specifically contends the administrative law judge took significant actions while not properly appointed and the Secretary of Labor's ratification of his appointment on December 21, 2017, does not cure the Appointments Clause violation. Employer's Brief at 7-10. The Director asserts employer voluntarily waived its Appointments Clause challenge by failing to timely respond to the administrative law judge's Order requiring employer to indicate if it sought reassignment to a different administrative law judge pursuant to *Lucia*. Director's Brief at 1-2. 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, following the issuance of the United States Supreme Court's decision in *Lucia*, the administrative law judge expressly ordered the parties to "file a statement indicating

[5] 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*.

whether they seek reassignment . . . to a different [administrative law judge]" within twenty days. Notice and Order dated September 19, 2018; Director's Brief at 2. Employer failed to file a response. Had employer timely raised its Appointments Clause challenge to the administrative law judge, he could have considered the issue and, if appropriate, provided the relief employer is now requesting. Based on these facts, we conclude that employer voluntarily waived its Appointments Clause challenge and deny the relief requested. We will therefore consider employer's arguments on the merits of the administrative law judge's award of benefits.

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 miner's total disability is established by qualifying pulmonary function studies, qualifying arterial blood gas studies,[6] 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

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 13; Director's Exhibits 15, 16; Employer's Exhibit 1; Claimant's Exhibits 2, 3. Because the administrative law judge found no evidence of cor pulmonale with right-sided congestive heart failure, he also found total disability was not established under 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 14-15. He then considered the results of five new blood gas studies. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 14. The December 13, 2013 blood gas study Dr. Sargent conducted produced non-qualifying values at rest and during exercise, while the studies taken both before and after it (on November 13, 2012, January 21, 2014, and February 27, 2017), which Drs. Klayton, Gallup and Nader conducted, respectively, at rest

[6] 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).

only,[7] produced qualifying values. Director's Exhibit 15; Claimant's Exhibits 2, 3; Employer's Exhibit 1. The April 16, 2013 study Dr. Rosenberg conducted also produced qualifying values at rest but non-qualifying values with exercise. Director's Exhibit 16. Because four of the five resting blood gas studies, including the most recent study, are qualifying, the administrative law judge found the blood gas studies established total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 14.

Employer alleges the administrative law judge erred in shifting the burden to employer to establish claimant's blood gas study results continued to be normal after the non-qualifying 2013 exercise test and subsequent tests continued to show improvement. These contentions are without merit. Contrary to employer's assertions, the administrative law judge did not place these burdens on employer. Rather, he acted within his discretion in determining that the blood gas studies established total disability because a preponderance of them, including the most recent, is qualifying. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (it is rational to accord greater weight to more recent evidence if it is consistent with the principle that pneumoconiosis is a latent and progressive disease).

The administrative law judge next considered the new medical opinions from Drs. Klayton, Gallup, Nader, Sargent, and Rosenberg, together with the claimant's treatment records. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 26-30. Drs. Klayton, Gallup, and Nader opined that claimant is totally disabled by hypoxemia and hypercapnia based on his arterial blood gas results.[8] Director's Exhibit 15; Claimant's Exhibits 2, 3. Based on normal post-bronchodilator pulmonary function study results, Dr. Sargent opined that

[7] Because the at-rest blood gas studies Drs. Klayton, Gallup, and Nader conducted were qualifying, they were not required to conduct exercise studies. 20 C.F.R. §718.105(b).

[8] Dr. Klayton examined claimant on November 13, 2012, and opined he is totally disabled due to his inability to walk more than 100 feet on level ground before having to stop to catch his breath, and arterial blood gases which show severe hypercapnia and moderately severe hypoxemia. Director's Exhibits 15, 62. Dr. Gallup examined claimant on January 21, 2014, and opined he has severe pulmonary limitations and is totally disabled due to a reduced FEV1 and MVV and significant room air hypoxia with hypercarbia, which would prevent him from performing his last coal mine job. Claimant's Exhibit 2. Dr. Nader examined claimant on February 27, 2017, and diagnosed hyperinflation in association with severe air flow obstruction, and determined claimant is totally disabled from a pulmonary standpoint. Claimant's Exhibit 3.

claimant is not suffering from any permanent respiratory impairment and, therefore, retains the respiratory capacity to perform his last coal mine employment. He further opined that claimant has no gas exchange limitation based on an improvement in pO_2 and drop in pCO_2 values during the exercise blood gas study performed in conjunction with his December 13, 2013 examination.[9] Employer's Exhibit 1. Dr. Rosenberg opined that claimant could perform his last coal mining job and is not disabled from a pulmonary or respiratory perspective because although his blood gas studies revealed a gas exchange abnormality at rest, it "normalized with exercise."[10] Director's Exhibit 16; Employer's Exhibit 11.

The administrative law judge initially observed that each of the physicians is Board-certified in pulmonary medicine. Decision and Order at 26. He then credited the opinions of Drs. Klayton, Gallup, and Nader as reasoned and documented, supported by the qualifying blood gas studies' results, and other factors such as claimant's inability to walk more than 100 feet without having to stop to catch his breath (Dr. Klayton), chronic obstructive pulmonary disease requiring extensive home treatment (Dr. Gallup), and a contribution from underlying obstructive airways disease (Dr. Nader). *Id*. at 27. In contrast, the administrative law judge found the contrary opinions of Drs. Sargent and Rosenberg entitled to "little weight" because they were not well-reasoned or well-documented and contrary to the weight of the qualifying blood gas studies. *Id*. at 30. Thus, he concluded that the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 30.

Reviewing the claimant's treatment records, the administrative law judge found the 2014 and 2015 non-qualifying blood gas studies were not credible evidence and no treating physician expressed an opinion as to claimant's ability to perform his usual coal mine employment. Decision and Order at 30, 32; Claimant's Exhibits 4, 7; Employer's Exhibits

[9] Dr. Sargent examined claimant on December 13, 2013 and provided a supplemental report dated March 18, 2017. Employer's Exhibit 1. Based on the non-qualifying results of the blood gas study he conducted and normal post-bronchodilator pulmonary function study results indicating a reversible obstructive impairment, Dr. Sargent opined that claimant "is not suffering from any permanent respiratory impairment." *Id*. He opined that claimant retains the respiratory capacity to perform his last job and is likely suffering from obesity-hypoventilation syndrome. After reviewing the qualifying blood gas studies from 2012 and 2014, Dr. Sargent acknowledged that they showed resting hypoxemia and hypercarbia, but noted that claimant's pO_2 value improved with exercise during the 2013 blood gas study. Employer's Exhibit 1 at 36.

[10] Dr. Rosenberg examined claimant on April 16, 2013, provided deposition testimony on April 18, 2017, and reviewed claimant's medical testing from 1997 through March 2017. Director's Exhibit 16; Employer's Exhibit 11.

6, 7, 8, 9. Weighing the evidence together, he found the blood gas study evidence, as supported by the opinions of Drs. Klayton, Gallup, and Nader, establishes total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 32.

Employer argues the administrative law judge should have found blood gas studies contained in claimant's treatment records reliable because they were conducted in a hospital and Department of Labor quality standards do not apply to objective testing conducted for treatment purposes. Employer's Brief at 14. We disagree. While employer is correct that quality standards apply only to evidence developed for a claim, the administrative law judge must still be persuaded a study is "reliable" for "it to form the basis for a finding of fact on an entitlement issue." 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000); 20 C.F.R. §718.101(b); *J.V.S.* [*Stowers*] *v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-89 (2008). The single-page reports from Lonesome Pine Hospital reflect non-qualifying blood gas study results from 2014 and 2015 that are labelled "abnormal" with no further explanation. Employer's Exhibits 7, 9. As the administrative law judge's finding that the blood gas studies in claimant's treatment records do not "provide a credible comparison" is supported by substantial evidence, it is affirmed.

We also reject employer's argument the administrative law judge erred in discrediting the opinions of Drs. Sargent and Rosenberg. Employer's Brief at 8-19. The administrative law judge noted that in opining claimant is not disabled from a respiratory or pulmonary standpoint, both doctors relied on claimant's exercise blood gas study results from 2013, which showed an improvement in claimant's pO_2 value and a drop in his pCO_2 value with exercise. Decision and Order at 29. Dr. Sargent opined: "[B]lood gas abnormalities due to interstitial lung disease due to coal worker's [sic] pneumoconiosis do not improve and in fact often worsen with exercise. Therefore there is clearly no gas exchange limitation to this man's exertional tolerance."[11] Exhibit 1 at 36. Similarly, Dr. Rosenberg[12] agreed claimant's resting blood gas values were qualifying, but concluded that

[11] Dr. Sargent compared blood gas studies from 2012 and 2014, which he noted showed resting hypoxemia and hypercarbia, with the exercise blood gas study performed in conjunction with his 2013 examination that showed a marked improvement in claimant's PO_2 value with exercise and a drop in his PCO_2 value. Dr. Sargent opined, "[t]his is exactly what would be expected in resting blood gas abnormalities due to obesity hypoventilation syndrome. . ." Employer's Exhibit 1 at 36.

[12] Dr. Rosenberg opined the qualifying blood gas studies revealed hypoventilation and constituted normal studies upon calculation of the A-a gradient. He testified that after calculating the A-a gradient, claimant does not have a problem with oxygenation, but has a problem with ventilation which gets better when he exercises. Director's Exhibit 16; Employer's Exhibit 11.

his situation was "transient," noting that "with exercise [claimant's] abnormal gas exchange improved, again supporting the fact that he does not have a coal mine dust related pulmonary condition." Director's Exhibit 16 at 5; Employer's Exhibit 11 at 18. The administrative law judge rationally determined that even if claimant's condition was transient in 2013, all but one of the resting blood gas studies were qualifying for total disability including the most recent ones, and "the fact remains that [his] ABG values fluctuate to disability levels while simply at rest, which has been a chronic problem dating back to 2012."[13] Decision and Order at 30. *See Adkins*, 958 F.2d at 51-52; *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc) (it is permissible to rely upon the evidence submitted with the current claim because it more accurately reflects the claimant's current condition).

Contrary to employer's assertions, the administrative law judge did not shift the burden of proof to employer nor did he selectively analyze the medical opinions. He permissibly found the resting blood gas studies established total disability and rationally determined the opinions of Drs. Sargent and Rosenberg were undermined by their reliance on non-qualifying exercise blood gas studies from 2013 that were outweighed by the preponderance of the qualifying studies reflecting disabling values at rest as far back as 2012 and as recently as 2017. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). There is no merit, therefore, to employer's assertion that the administrative law judge erred by discounting the opinions of Drs. Sargent and Rosenberg despite their allegedly having a more accurate picture of claimant's health. Employer's Brief at 16.

We also reject employer's argument that the opinions of Drs. Klayton, Gallup, and Nader are not reasoned or credible because they were "unaware" of the entirety of claimant's blood gas study results. Employer's Brief at 16-19. Dr. Klayton opined that the blood gas study he conducted during his examination of claimant reflected "severe hypercapnia and moderately severe hypoxemia." Director's Exhibit 15. Dr. Gallup opined that the objective testing he obtained during his examination of claimant revealed a "moderate obstructive ventilatory defect" and "significant room air hypoxia with hypercarbia." Claimant's Exhibit 2. Similarly, Dr. Nader determined the objective testing performed during his examination reflected "underlying obstructive airway disease" with "significant air trapping and hyperinflation" and "hypertension." Claimant's Exhibit 3.

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[13] The administrative law judge also identified other indicia of impairment such as Dr. Klayton's observation that following his examination in 2012, claimant became markedly tachypneic and wheezed while bending over to tie his shoes. Decision and Order at 30.

Further, each physician explained that the level of impairment the objective testing revealed would prevent claimant from returning to his prior coal mine work. *Id*. The administrative law judge therefore permissibly found that the opinions of Drs. Klayton, Gallup, and Nader were well-reasoned, as they were supported by physical examinations, an understanding of claimant's exertional limitations and symptoms, the results of pulmonary function studies and blood gas studies, and were consistent with the results of the qualifying blood gas study evidence. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Decision and Order at 27-28; Director's Exhibit 15; Claimant's Exhibits 2, 3. Thus, the administrative law judge provided valid rationales for his credibility determinations regarding the medical opinion evidence and did not engage in a selective analysis of the medical opinions.

In addition, we reject employer's argument that the administrative law judge failed to explain his review of the evidence as a whole. Employer's Brief at 19-20. Having found that the blood gas studies support a finding of total disability, the administrative law judge considered whether they were outweighed by any contrary probative evidence. Decision and Order at 32. As discussed above, he permissibly found that the medical opinion evidence supports a finding of total disability and does not constitute contrary probative evidence that would undermine the qualifying blood gas studies. He also considered the non-qualifying pulmonary function studies but permissibly found they do not undermine the qualifying blood gas studies. *See Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984) (blood gas studies and pulmonary function studies measure different types of impairment); Decision and Order at 32.

We therefore affirm the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2) overall, a change in an 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.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge