U.S. Department of Labor

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

BRB No. 19-0226 BLA

THOMAS C. CULBERTSON	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
TROJAN MINING & PROCESSING COMPANY	)	
	)	
	)	DATE ISSUED: 03/31/2020
and	)	
	)	
TRAVELERS INDEMNITY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order Awarding Benefits in an Initial 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.

Sarah M. Hurley (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: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits in an Initial Claim (2016-BLA-05968) of Administrative Law Judge Larry S. Merck on a claim filed on March 20, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with 12.39 years of underground coal mine employment. Because claimant established fewer than fifteen years of coal mine employment, he is unable to invoke the Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] Considering claimant's entitlement under 20 C.F.R. Part 718, the administrative law judge found he is totally disabled due to legal pneumoconiosis[2] and awarded benefits. 20 C.F.R. §§718.202(a)(4); 718.204(b)(2), (c).

On appeal, employer argues the administrative law judge lacked the authority to preside over the case because he had not been appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2, and that the Section 411(c)(4) presumption revived by the Affordable Care Act is invalid. Employer also argues the administrative law judge improperly found claimant proved legal pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that employer waived its Appointments Clause challenge while the case was before the administrative

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

[2] 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).

law judge and employer's argument that the Section 411(c)(4) presumption is unconstitutional lacks merit.[3] Director's Brief at 10.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits in an Initial 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

Appointments Clause Challenge

Employer notes the United States Supreme Court held in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018),[5] that Securities and Exchange Commission (SEC) administrative law judges were not properly appointed in accordance with the Appointments Clause[6] of

[3] Employer asserts the Section 411(c)(4) presumption is invalid. Employer's Brief at 7-8. Because the administrative law judge did not apply the Section 411(c)(4) presumption, we need not address employer's argument.

[4] Because claimant's most recent coal mine employment occurred in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[5] *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 Tax Court, SEC administrative law judges are "inferior officers" subject to the Appointments Clause. *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

[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 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.

the Constitution and argues the administrative law judge in this case was similarly appointed improperly. Employer's Brief at 8-11. Employer waived this issue, however, and cannot raise it on appeal.

Appointments Clause challenges are subject to ordinary rules of waiver and forfeiture. *See, e.g., Island Creek Coal Co. v. Bryan*, 937 F.3d 738 (6th Cir. 2019); *Energy West Mining Co. v. Lyle*, 929 F.3d 1202 (10th Cir. 2019). On June 21, 2018, the Supreme Court decided *Lucia*. On September 19, 2018, the administrative law judge issued an Order and Notice directing employer to state whether it sought reassignment of the case to a new administrative law judge in light of *Lucia*. The administrative law judge advised employer that if it did not file a response within twenty days "the remedy of reassignment and a new hearing in this matter will be deemed waived and the case will proceed before the undersigned." September 19, 2018 Notice and Order at 2. Employer did not respond.[7]

Employer thus waived the right to challenge the administrative law judge's appointment and the Secretary's ratification of his appointment. *See Wood v. Milyard*, 566 U.S. 463, 471 n.5 (2012) (distinguishing waivers and forfeitures and observing that "a federal court has the authority to resurrect only forfeited defenses"); *United States v. Jimenez*, 512 F.3d 1, 7 (1st Cir. 2007) ("A waiver is unlike forfeiture, for the consequence of a waiver is that the objection is unreviewable."). Moreover, employer has not offered a reason why the Board should excuse its waiver. *See In re DBC*, 545 F.3d 1373, 1380 (Fed. Cir. 2008) (declining to excuse waived Appointments Clause challenge to discourage "sandbagging"); *Powell v. Service Employees Int'l, Inc.*, 53 BRBS 13 (2019); *Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9 (2019). We therefore refuse to consider employer's Appointments Clause challenge.

20 C.F.R. Part 718 – Legal Pneumoconiosis

To be entitled to benefits under the Act, claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah,*

[7] Employer had requested the case be held in abeyance pending *Lucia*. On March 19, 2018, the administrative law judge denied employer's motion, citing the Secretary of Labor's December 21, 2017 ratification of his appointment.

Inc., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Employer argues the administrative law judge erred in finding claimant established legal pneumoconiosis based on Dr. Cordasco's medical opinion, contending it is equivocal, general, and insufficiently reasoned to support claimant's burden of proof.[8] Employer's Brief at 11-16. It further argues the administrative law judge did not adequately explain his findings under the Administrative Procedure Act.[9] *Id*. We disagree.

To establish legal pneumoconiosis, claimant must demonstrate that he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *see Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (a miner will be deemed to have a lung impairment "significantly related to" coal mine dust exposure, and thus legal pneumoconiosis, "by showing that his disease was caused 'in part' by coal mine employment").

Dr. Cordasco conducted the Department of Labor (DOL) pulmonary evaluation on April 14, 2014. Director's Exhibit 9. He diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease (COPD). *Id*. He noted: claimant worked for seventeen years in underground mines; operated various equipment; worked in conditions where the mine was only seven feet high; and had moderate to heavy coal dust exposure. *Id*. He also noted claimant had a smoking history of one pack a day from 1965-1992 and 2002-2011. *Id.* Dr. Cordasco concluded smoking and coal dust exposure caused claimant's COPD. *Id*.

In a supplemental letter dated December 7, 2014, Dr. Cordasco stated he reviewed a DOL letter calculating claimant's coal mine employment as 11.82 years. Director's Exhibit 9. Taking into consideration that revised history, he did not change his diagnosis, specifically stating claimant's "exposure to daily heavy airborne concentrations of coal and mineral dust over nearly a [twelve] year tenure in my estimation is still significant." *Id*. He opined claimant's severe respiratory impairment is related in part to his coal mine dust

[8] We affirm, as unchallenged, the administrative law judge's finding that claimant established total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[9] The Administrative Procedure Act 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).

exposure and while difficult to estimate the exact apportionment between it and claimant's smoking, concluded they were "equally weighted." *Id*.

Contrary to employer's contention, the administrative law judge permissibly found Dr. Coradasco's opinion reasoned and documented because it is based on "substantially accurate smoking and dust exposure histories," the results of "valid objective testing," and his physical examination of claimant. Decision and Order at 22; s*ee Jericol Mining, Inc. v. Napi*er, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). The administrative law judge also permissibly credited Dr. Cordasco's diagnosis of legal pneumoconiosis because he found it persuasive and consistent with the DOL's position that the risks of smoking and coal dust exposure are additive. 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000) (concluding that the risk of clinically significant airways obstruction and chronic bronchitis associated with coal mine dust exposure is additive with cigarette smoking); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003) (physician need not specifically apportion extent to which various causal factors contribute to a respiratory or pulmonary impairment); Decision and Order at 22. Further, he noted Dr. Cordasco's opinion is uncontradicted by "evidence entitled to similar probative weight."[10] Decision and Order at 23.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012). Employer's arguments pertaining to Dr. Cordasco's opinion amount to a request that the Board reweigh the evidence which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). Thus, we affirm the administrative law judge's finding that claimant established legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); *see Groves*, 761 F.3d at 597-98; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 23.

As employer raises no specific allegations of error regarding disability causation, other than to assert claimant does not have legal pneumoconiosis, we affirm the administrative law judge's finding that claimant established his total respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 29.

[10] The administrative law judge found the contrary opinions of Drs. McSharry and Sargent that claimant does not have legal pneumoconiosis unreasoned. Decision and Order at 21-22. We affirm those credibility determinations as they are not challenged. *See Skrack*, 6 BLR at 1-711.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge