U.S. Department of Labor

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

BRB No. 20-0334 BLA

NORMAN A. McCOWAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LAMBERT COAL COMPANY, INCORPORATED	)	
	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH INSURANCE COMPANY	)	DATE ISSUED: 05/27/2021
	)	
	)	
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 an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Sarah Y. M. Himmel and Joseph N. Stepp (Two Rivers Law Group P.C.), Christiansburg, Virginia, for Employer and its Carrier.

Jeffrey S. Goldberg (Elena S. Goldstein, Deputy 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, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Larry S. Merck's Decision and Order Awarding Benefits in an Initial Claim (2017-BLA-05866) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

Claimant filed his claim on April 15, 2014, and the case was assigned to Administrative Law Judge Morris D. Davis, who presided over a formal hearing on August 10, 2018. When Judge Davis retired, the case was reassigned to Judge Merck. In his May 13, 2020 decision, Judge Merck credited Claimant with 21.08 years of underground coal mine employment based on Employer's concession. He found Claimant established a totally disabling respiratory or pulmonary impairment and therefore invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues Judge Davis and Judge Merck lacked the authority to preside over the case because they had not been appointed in a manner consistent with the Appointments Clause of the Constitution.[2] It also argues Judge Merck erred in finding it

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has 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) (2018); 20 C.F.R. §718.305.

[2] 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.

did not rebut the Section 411(c)(4) presumption. Claimant has not filed a response. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging the Benefits Review Board to reject Employer's constitutional challenges to Judge Davis' and Judge Merck's appointments.[3]

The Board's scope of review is defined by statute. We must affirm the Decision and Order 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 Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Appointments Clause

Employer urges the Board to vacate the Decision and Order and remand the case to be heard and decided by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[5] Employer's Brief at 6-9. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[6]

U.S. Const. art. II, § 2, cl. 2.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established 21.08 years of underground coal mine employment, total disability, and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 12.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 12; Director's Exhibits 3, 6.

[5] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) administrative law judge. The United States Supreme Court held that, similar to 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)).

[6] The Secretary of Labor issued separate letters to the administrative law judges on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an administrative law judge. This letter is intended to address any claim that

including Judges Davis and Merck, but maintains the ratification was insufficient to cure the constitutional defect in their prior appointments.[7] *Id*. We agree with the Director's argument that both had the authority to hear and decide this case because the Secretary's ratification brought their appointments into compliance with the Appointments Clause. Director's Brief at 2-3.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 3 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). 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.*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Moreover, 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)).

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. Thus, at the time he ratified the administrative law judges' appointments, the Secretary had the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603.

> administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to Administrative Law Judge Davis; Secretary's December 21, 2017 Letter to Administrative Law Judge Merck.

[7] On July 20, 2018, the Department of Labor (DOL) expressly conceded the Supreme Court's holding in *Lucia* applies to DOL administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

Under the presumption of regularity, we presume the Secretary had full knowledge of the decisions to be ratified and made detached and considered affirmations. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all administrative law judges in a single letter. Rather, he specifically identified Judge Davis and Judge Merck and gave "due consideration" to their appointments. Secretary's December 21, 2017 Letter to Administrative Law Judge Davis; Secretary's December 21, 2017 Letter to Administrative Law Judge Merck. The Secretary further acted in his "capacity as head of [DOL]" when ratifying each of their appointments "as an administrative law judge." *Id*. Having put forth no contrary evidence, Employer has 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.

Based on the foregoing, we hold the Secretary's action constituted a valid ratification of the appointments of Judge Davis and Judge Merck. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" all its earlier actions was proper). We therefore reject Employer's contention that the case must be remanded to be heard and decided by a different administrative law judge.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[8] or "no part of [his] 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)(i), (ii); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150

[8] "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).

(2015). Judge Merck (the administrative law judge) found Employer failed to establish rebuttal by either method.[9]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have 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(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8. Employer relies on the opinions of Drs. Fino and McSharry, who opined that Claimant has a disabling obstructive impairment due to emphysema caused by smoking and unrelated to his coal dust exposure. Employer's Exhibits 9, 10. Contrary to Employer's contentions, we see no error in the administrative law judge's findings that their opinions are not well-reasoned and therefore do not satisfy its burden of proof. Decision and Order at 16-18.

Dr. Fino excluded coal dust exposure as a significant cause of Claimant's disabling emphysema because studies show that, "based on the number of years [Claimant] worked in the mine," the "average loss" in FEV_1 on pulmonary function testing due to coal mine employment is about seventy-two cubic centimeters. Employer's Exhibit 9 at 16. Relying on a medical study, Dr. Fino stated he "doubted" Claimant had an above-average loss of lung function due to coal dust, given the negative x-ray evidence. *Id*. He further opined Claimant's severe reduced diffusing capacity is "distinctly unusual in coal mine induced disease," but "quite consistent with cigarette smoking." *Id*.

Similarly, Dr. McSharry excluded a diagnosis of legal pneumoconiosis, describing Claimant's pattern of impairment with airflow limitation, hyperinflation of the lungs, and reduced diffusion as "extremely common among long-time smokers" but "uncommon among non-smoking coal miners."[10] Employer's Exhibit 10 at 28. He also opined that Claimant's degree of impairment, absent any radiographic evidence of pneumoconiosis, is rarely caused by coal dust exposure. *Id*.

[9] The administrative law judge found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 16.

[10] Dr. McSharry agreed with Dr. Fino that the average loss of lung function from smoking is twice that from coal mine dust exposure. Employer's Exhibit 10 at 19. He further asserted less than ten percent of miners are susceptible to developing a disabling obstruction due to coal mine dust over a thirty-five year period of dust exposure at current dust levels, and that shorter periods of exposure would be associated with less impairment. *Id*. at 19-20.

Contrary to Employer's contention, the administrative law judge permissibly found the opinions of Drs. Fino and McSharry unpersuasive because they "focused on "generalities and statistics" rather than the specifics of Claimant's case. Decision and Order at 18; *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 17-18. He also permissibly found Dr. Fino, in suggesting Claimant's loss of FEV_1 is so great it cannot be accounted for by his twenty-one years of coal mine employment, failed to adequately explain why coal mine dust could not have significantly contributed to, or substantially aggravated, Claimant's impairment along with smoking. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 17.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions based on the experts' explanations for their diagnoses, and to assign those opinions appropriate weight. *See Owens*, 724 F.3d at 558; *Cochran*, 718 F.3d at 324; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012). Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge acted within his discretion in discrediting Drs. Fino's and McSharry's opinions, we affirm his finding that Employer failed to disprove legal pneumoconiosis. Thus, we affirm the administrative law judge's finding that Employer did not rebut the presumption by establishing Claimant does not have pneumoconiosis.[11] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge also found Employer failed to rebut the Section 411(c)(4) presumption by establishing "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 18-19. Contrary to Employer's

[11] As the administrative law judge gave a valid reason for discrediting Drs. Fino's and McSharry's opinions, we need not address Employer's contention that the administrative law judge erred in also finding their opinions inconsistent with the preamble to the 2001 revised regulations. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Additionally, because Employer has the burden of proof on rebuttal and the administrative law judge permissibly rejected the opinions of its medical experts, we need not address its arguments pertaining to the weight he accorded Dr. Ajjarapu's opinion that Claimant has legal pneumoconiosis.

contention, the administrative law judge permissibly discredited the disability causation opinions of Drs. Fino and McSharry because he found their conclusions "inextricably linked to their failure to diagnose legal pneumoconiosis." Decision and Order at 19; *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013). We therefore affirm the administrative law judge's determination that Employer failed to establish no part of Claimant's respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Thus, we affirm the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge