U.S. Department of Labor

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

BRB No. 20-0459 BLA

HOBART P. RASNICK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN DOMINION COAL COMPANY, INCORPORATED	)	DATE ISSUED: 10/08/2021
	)	
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 Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus and Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Employer.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting 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 appeals Administrative Law Judge (ALJ) Francine L. Applewhite's[1] Decision and Order Granting Benefits (2017-BLA-06031) rendered on a claim filed on July 12, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 20.63 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found 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 failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the removal provisions applicable to ALJs render the ALJ's appointment unconstitutional. On the merits, Employer argues the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption.[3] It also argues the ALJ erred in finding the presumption unrebutted. Claimant did not file a response. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging rejection of Employer's constitutional challenge regarding the ALJ's removal protections. Employer filed a reply brief, reiterating its arguments.

The Benefits Review 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

[1] ALJ Morris Davis presided at the hearing; however, the claim was subsequently reassigned to ALJ Applewhite, who admitted post-hearing evidence and issued the decision. *See* Hearing Transcript; Notice of Reassignment; Decision and Order at 2.

[2] Section 411(c)(4) 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); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

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).

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded ALJs.[5] Employer's Brief at 10-13; Employer's Reply at 1-4. It generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[6] Employer's Brief at 11-12; Employer's Reply at 2-3. It also relies on the 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), and the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 11-12; Employer's Reply at 3-4.

Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v.*

[4] We will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 14, 22.

[5] Employer suggests the ALJ's appointment may not comply with the Appointments Clause of the United States Constitution, stating "[e]ven if the Secretary appointed [the ALJ] properly," "if she remains subject to the protections of the Civil Service rules notwithstanding her appointment to the DOL, she is not properly appointed." Employer's Brief at 11, 13. Employer, however, provides no arguments to support these equivocal statements. As the Board must limit its review to contentions of error the parties specifically raise, we decline to address this issue. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

[6] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States 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)).

Pehringer, F.4th , No. 20-71449, 2021 WL 3612787 at *10 (9th Cir. Aug. 16, 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Moreover, in *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as administrative law judges" who, "unlike members of the [PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id*. at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[7] 140 S. Ct. at 2201. It did not address ALJs.

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. at 1988. The Court explained "the *unreviewable authority* wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id.* at 1985 (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized that "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, as the Director argues, Employer does not attempt to show that Section 7521 cannot be reasonably construed in a

[7] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"); Director's Response at 3-4. Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, F.4th , No. 20-71449, 2021 WL 3612787 at *10.

Invocation of the Section 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 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 ALJ must consider all relevant evidence and weigh the evidence supporting total disability against the 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 ALJ found Claimant established total disability based on pulmonary function studies and medical opinion evidence, and the evidence as a whole.[8] Decision and Order at 6-8.

On appeal, Employer contests the ALJ's weighing of the pulmonary function study evidence, the medical opinion evidence, and the evidence as a whole. Employer's Brief at 14-18. However, when presenting its case to the ALJ, Employer argued only that its medical evidence is sufficient to rebut the Section 411(c)(4) presumption. Employer's Closing Arguments at 10-17. Employer did not contest whether Claimant is totally disabled or whether he invoked the Section 411(c)(4) presumption. Because Employer did not make these arguments to the administrative law judge, we will not address them. *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-4-7 (1995) (cannot raise argument before the Board for the first time on appeal); *Prater v. Director, OWCP*, 8 BLR 1-461, 1-462 (1986).[9] Consequently, as Employer did not properly raise total disability and

[8] The ALJ found the arterial blood gas studies did not support total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 6.

[9] As part of its' challenge on appeal to the ALJ's determination that the evidence establishes total disability, Employer argues the ALJ erred in failing to consider evidence relevant to whether the pulmonary function study evidence is valid. Employer's Brief at 16. While this case was before the ALJ, Employer summarized Dr. Fino's opinion that certain studies, including Dr. Ajjarapu's, are invalid. It also cited the general proposition that a physician's opinion can be discredited for relying on invalid testing. However, these

invocation of the presumption below, we affirm the ALJ's findings that Claimant established a totally disabling respiratory or pulmonary impairment and therefore invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305; *Dankle, supra*; *Prater, supra;* Decision and Order at 6-8.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal[10] nor clinical pneumoconiosis,[11] or that "no part

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statements were made specifically in the context of Employer's argument that it rebutted the presumption of pneumoconiosis and disability causation. As noted above, Employer did not argue that Claimant is not totally disabled; its brief to the ALJ further summarized Dr. Rosenberg's "conce[ssion] that claimant's pulmonary function testing reflected qualifying values," although he attributed the disabling impairment to Claimant's cardiac condition. *See* 20 C.F.R. §718.204(b)(2)(i), (c) (differentiating between the *existence* of a totally disabling impairment on pulmonary function testing and the *cause* of that impairment). Moreover, beyond summarizing Dr. Fino's general statements that Claimant's pulmonary function studies are not valid or do not reflect maximum effort, Employer did not explain to the ALJ how the studies fail to conform to the quality standards. *See Oreck v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987) (Levin, J., concurring) (a party alleging an objective study is invalid has a "two-part obligation": "specify in what way the study fails to conform to the quality standards" and "demonstrate how this defect or omission renders the study unreliable"); Employer's Closing Arguments at 12. On appeal, Employer now argues the studies are invalid and do not establish total disability. Employer's Brief at 16. Again, we will not consider such challenges for the first time on appeal. *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-4-7 (1995); *Prater v. Director, OWCP*, 8 BLR 1-461, 1-462 (1986).

[10] "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 significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[11] "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).

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). The administrative law judge did not consider whether Employer rebutted the existence of legal pneumoconiosis, but found Employer failed to rebut the existence of clinical pneumoconiosis and disability causation. Decision and Order at 9-11.

In determining Employer did not rebut the existence of clinical pneumoconiosis, the ALJ found that the preponderance of the x-ray evidence supports a finding of clinical pneumoconiosis. Decision and Order at 10. However, as Employer's argues, the ALJ failed to consider all of the relevant evidence. Employer's Brief at 20. Specifically, she erred in failing to consider Claimant's treatment records, which contain x-ray interpretations and CT scans, and the medical opinion evidence relevant to clinical pneumoconiosis.[12] 30 U.S.C. §923(b); Decision and Order at 9-10; Director's Exhibit 11; Employer's Exhibits 4, 6, 8 10-11. In light of the ALJ's failure to consider all relevant evidence, we must vacate her determination that Employer failed to rebut the existence of pneumoconiosis. 30 U.S.C. §923(b); see 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 10. We therefore vacate the ALJ's determination that Employer did not rebut the Section 411(c)(4) presumption.

Remand Instructions

On remand, the ALJ must reconsider if Employer has rebutted the presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. In determining whether Employer established rebuttal of the Section 411(c)(4) presumption, the ALJ should determine whether Employer has established rebuttal at 20 C.F.R. §718.305(d)(1)(i) by disproving the presumed existence of both legal *and* clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A), (B); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015). In so doing, the ALJ should first consider whether Employer has affirmatively established the absence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A). Performing the rebuttal analysis in the order set forth in the regulation satisfies the statutory mandate to consider all relevant evidence, and provides a framework for the analysis of the credibility of the medical opinions at Section 718.305(d)(1)(ii), the second rebuttal method. *See Minich*, 25 BLR at 1-159. To establish that Claimant's impairment was not legal pneumoconiosis, Employer must demonstrate it is not "significantly related to, or

[12] Because the ALJ must reconsider whether all the relevant evidence rebuts the existence of pneumoconiosis in light of the x-rays contained in Claimant's treatment records, the Board declines to address as premature Employer's argument that the ALJ erred in her weighing of the individual x-rays. Employer's Brief at 18-19.

substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b).

If the ALJ determines that Employer has failed to establish the absence of legal pneumoconiosis, she should then determine whether Employer has disproven the presence of clinical pneumoconiosis arising out of coal mine employment at Section 718.305(d)(1)(i)(B). If the ALJ finds that Employer has failed to rebut the existence of both legal and clinical pneumoconiosis in accordance with Section 718.305(d)(1)(i), she should reconsider whether Employer has rebutted the presumed fact of total disability causation at 20 C.F.R. §718.305(d)(1)(ii). Employer can satisfy its burden by proving that "no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); *see Minich*, 25 BLR at 2-159. If Employer proves that Claimant does not have legal and clinical pneumoconiosis, or no part of his disabling pulmonary impairment was caused by legal and clinical pneumoconiosis, Employer has rebutted the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1); *Minich*, 25 BLR at 1-159. If Employer fails, however, Claimant is entitled to benefits. In making her determinations, the ALJ must set forth her findings in detail and explain her underlying rationale as required by the APA. 5 U.S.C. §557(c)(3)(A); 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989).

Accordingly, the ALJ's Decision and Order Granting Benefits is affirmed in part, vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge