U.S. Department of Labor

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

BRB No. 20-0544 BLA

ROGER L. HALE, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JEWELL SMOKELESS COAL CORPORATION c/o HEALTHSMART CASUALTY CLAIMS	)	DATE ISSUED: 10/20/2021
	)	
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 Awarding Benefits of Noran J. Camp, Administrative Law Judge, United States Department of Labor.

Charity A. Barger (Street Law Firm, LLP), Grundy, Virginia, for Employer.

Jeffrey S. Goldberg (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: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Noran J. Camp's Decision and Order Awarding Benefits (2019-BLA-05060) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on January 17, 2017.

The ALJ credited Claimant with 13.19 years of coal mine employment and thus found he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] Considering whether Claimant established entitlement to benefits without the presumption, the ALJ accepted Employer's concession that Claimant has a totally disabling respiratory or pulmonary impairment and found the evidence established legal pneumoconiosis[2] and total disability due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b), (c).

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution.[3] It further asserts the removal provisions applicable to the ALJ rendered his

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. The parties stipulated Claimant has less than fifteen years of coal mine employment. Hearing Transcript at 7; Joint Stipulations at 1-2.

[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). 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).

[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.

appointment unconstitutional. Employer also challenges his findings of legal pneumoconiosis and total disability due to pneumoconiosis. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response asserting the ALJ had authority to decide the case. Employer filed a reply brief reiterating its arguments.[4]

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 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).

Appointments Clause Challenge

Employer requests the Board vacate the Decision and Order and remand this case to be heard by a constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[6] Employer's Brief at 5-7; Employer's Reply Brief at 1-3. It notes the United States Supreme Court held in *Lucia* that Securities and Exchange Commission ALJs

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U.S. Const. art. II, § 2, cl. 2.

[4] Employer alleges the ALJ's length of coal mine employment calculation is not in accordance with law or supported by substantial evidence. Employer's Brief at 13-15. As the ALJ accepted the parties' stipulation that Claimant has less than fifteen years of coal mine employment and found Claimant ineligible for the Section 411(c)(4) presumption, Employer has not explained how the alleged errors would make a difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984). We therefore affirm the ALJ's finding of 13.19 years of coal mine employment.

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

[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 the 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). The Department of Labor has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

were not properly appointed in accordance with the Appointments Clause of the Constitution. Employer's Brief at 5-7. It argues the ALJ in this case similarly was not properly appointed.

The Director argues the Secretary of Labor's (Secretary's) appointment of Judge Camp[7] conforms to the Appointments Clause and is presumptively valid, and Employer has failed to demonstrate otherwise. Director's Brief at 2-3. We agree with the Director's argument.

The Secretary specifically appointed Judge Camp as an ALJ at the Department of Labor (DOL) to "execute and fulfill the duties of that office according to law and regulation and to hold all the powers and privileges pertaining to that office. U.S. Cons. Art. II, § 2, cl. 2; 5 U.S.C. §3105." Secretary's September 12, 2018 Letter to ALJ Camp; Director's Brief at 2. Congress authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 2, *quoting Marbury v. Madison*, 5 U.S. 137, 157 (1803). Further, 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 Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016), *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001). Employer has failed to demonstrate that the Secretary's action was not open or unequivocal, or otherwise explain how it was improper. Thus Employer has failed to meet its burden to overcome the presumption of regularity. *Butler*, 244 F.3d at 1340.

We further reject Employer's argument that Executive Order 13843, which removes ALJs from the competitive civil service, supports its Appointments Clause argument because incumbent ALJs remain in the competitive civil service pending promulgation of implementing regulations. Employer's Brief at 6. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause.

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[7] The Secretary of Labor issued a letter to the ALJ on September 12, 2018, stating:

> Pursuant to my authority as Secretary of Labor, I hereby appoint you as an [ALJ] in the U.S. Department of Labor, authorized to execute and fulfill the duties of that office according to law and regulation and to hold all the powers and privileges pertaining to that office. U.S. Cons. Art. II, § 2, cl. 2; 5 U.S.C. §3105. This action is effective upon transfer to the U.S. Department of Labor.

Secretary's September 12, 2018 Letter to ALJ Camp.

It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's appointment of the ALJ, which we have held constituted a valid exercise of his authority.

Thus we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 7-9. Employer 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*. *Id*. 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). *Id.*; Employer's Reply Brief at 3-6.

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 [ALJs]" 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."[8] 140 S. Ct. at 2201. It did not address ALJs.

[8] 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).

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. 1970. The Court explained "the *unreviewable authority* wielded by [Administrative Patent Judges] during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id.* (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. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988), *quoting Hooper v. California*, 155 U.S. 648, 657 (1895). Here, Employer does not even attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (a reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Moreover, the only circuit to squarely address the issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-38 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional.

Entitlement Under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions,[9] 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. Failure to establish any one of these elements precludes an award of benefits. *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[9] The ALJ correctly found there is no evidence in the record to support a diagnosis of complicated pneumoconiosis. Decision and Order at 3 n.7, 5 n.8. Thus, Claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must establish that he suffers from 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).

Employer contends the ALJ erred in applying the ten-year presumption at 20 C.F.R. §718.203(b) to find Claimant's respiratory impairment is due to coal mine dust exposure, thereby improperly shifting the burden of proof to Employer to rebut the presence of legal pneumoconiosis. Employer's Brief at 9-13. We agree.

Under 20 C.F.R. §718.203(b), there is a rebuttable presumption that a miner's pneumoconiosis arose out of coal mine employment if the presence of pneumoconiosis is established and the miner has at least ten years of coal mine employment. 20 C.F.R. §718.203(b). The ALJ noted the physicians of record agree Claimant has a chronic obstructive lung disease and that he credited Claimant with at least ten years of coal mine employment. Decision and Order at 11. Based on that, he concluded "[Claimant] is thus entitled to the 718.203(b) presumption, namely, that he has a chronic pulmonary disease arising out of coal mine employment, that is to say, he is now presumed to have 'legal pneumoconiosis.' I will therefore next examine whether Employer has rebutted the presumption." *Id*.

Contrary to the ALJ's analysis, Claimant has the burden to affirmatively establish he has legal pneumoconiosis. 20 C.F.R. §718.3, 718.202(a)(4). 20 C.F.R. §718.203(b).[10] A finding of legal pneumoconiosis, based on the definition of that disease, necessarily subsumes the disease causation inquiry. Consequently when legal pneumoconiosis is found, the presumption does not come into play because the requirement that the miner's pneumoconiosis arose from coal mine employment has already been met. 20 C.F.R. §718.201; *Andersen v. Director, OWCP*, 455 F.3d 1102, 1105-06 (10th Cir. 2006) (Section 718.203(b) rebuttable presumption does not extend to claims of legal pneumoconiosis); *Henley v. Cowan & Co., Inc.*, 21 BLR 1-147, 1-151 (1999) (a separate determination of etiology at Section 718.203 is unnecessary with a finding of legal pneumoconiosis at Section 718.202(a)(4)); *but see Island Creek Coal Co. v. Young*, 947 F.3d 399, 406 (6th Cir. 2020) (the term "pneumoconiosis" found in 20 C.F.R. §718.203, standing alone, refers

[10] The presumption applies *after* a finding of pneumoconiosis is made. This is obvious from the language of 20 CFR 718.203: "In order for a claimant to be found eligible…it must be determined that the miner's *pneumoconiosis* arose . . . out of coal mine employment . . . . (b) If a miner who is suffering or suffered from *pneumoconiosis* was employed . . . ."

to both clinical and legal pneumoconiosis). The presumption that Claimant's pneumoconiosis arose out of coal mine employment is invoked only *after* he establishes the existence of *clinical* pneumoconiosis.[11] Because the ALJ found Claimant failed to establish clinical pneumoconiosis, the presumption at 20 C.F.R. §718.203(b) is not applicable in this case. Decision and Order at 5 n.8. Consequently, we vacate the ALJ's finding of legal pneumoconiosis and remand this case for him to reconsider the medical opinion evidence, maintaining the burden of proof on Claimant to establish the existence of legal pneumoconiosis, i.e., that Claimant's obstructive lung disease is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *see* 20 C.F.R. §§718.201(a)(2), 718.204(a)(4); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986). Because it was based on his legal pneumoconiosis finding, we must also vacate the ALJ's determination that Claimant established total disability causation and further vacate the award of benefits. *See* Decision and Order at 15-17.

On remand, the ALJ must reconsider whether the medical opinion evidence, including Claimant's treatment records, establishes the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a)(4). He should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *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). Moreover, he must weigh all of the relevant evidence together to determine whether Claimant suffers from legal pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-09 (4th Cir. 2000). The ALJ must set forth his findings in detail, including the underlying rationales, in accordance with the APA.[12] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

If Claimant establishes legal pneumoconiosis on remand, the ALJ must consider whether it substantially contributed to his totally disabling respiratory or pulmonary impairment. If the ALJ finds legal pneumoconiosis is not established, Claimant will have

[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).

[12] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), requires the ALJ to set forth his "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A).

failed to establish an essential element of entitlement. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed in part, vacated in part, and the case is remanded 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