U.S. Department of Labor

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

BRB No. 18-0506 BLA
and 18-0507 BLA

DELMA RATLIFF(Widow of, and on behalf of the Estate of, JAMES RATLIFF)	)	
Claimant-Respondent	)	
v.	)	
T & W COAL COMPANY, INCORPORATED	)	
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 08/29/2019
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 on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., 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: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2011-BLA-06271, 2011-BLA-05406) of Administrative Law Judge Joseph E. Kane, awarding benefits on claims 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 January 27, 2009[1] and a survivor's claim filed on October 14, 2009, and is before the Board for the second time.

In the initial decision, the administrative law judge credited the miner with 16.75 years of coal mine employment in underground mines or in conditions substantially similar to those in an underground mine.[2] He also found the miner had a totally disabling respiratory or pulmonary impairment and therefore claimant invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). He further found employer did not rebut the presumption and awarded benefits. Based on the award in the miner's claim, he found claimant entitled to survivor's benefits pursuant to Section 422(*l*) of the Act.[4] 30 U.S.C. §932(*l*) (2012).

[1] The miner died on October 8, 2009; claimant, his widow, is pursuing his 2009 claim. Director's Exhibits 26, 27.

[2] The miner's most recent coal mine employment was in Kentucky. Director's Exhibit 5. Accordingly, 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).

[3] 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 coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] Section 422(*l*) provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits,

Pursuant to employer's appeal, the Board affirmed, as unchallenged, the administrative law judge's finding that the miner was totally disabled. *Ratliff v. T & W Coal Co.*, BRB Nos. 15-0091 BLA and 15-0092 BLA, slip op. at 3 n.5 (Mar. 29, 2017) (unpub.). However, the Board held the administrative law judge did not adequately explain his decision to credit the miner with at least fifteen years of qualifying coal mine employment. The Board affirmed his finding that the miner had 7.25 years of qualifying coal mine employment from 1961 to 1977 and 5.0 years of qualifying coal mine employment from 1986 to 1990. *Id.* at 9 n.13. It vacated his finding of 4.0 years of qualifying coal mine employment as a coal truck driver from 1979 to 1982, agreeing with employer that he failed to adequately address whether this employment took place at an underground mine site or in conditions substantially similar to those in an underground mine. *Id.* at 8. The Board therefore vacated the administrative law judge's finding of at least fifteen years of qualifying coal mine employment.[5] Consequently, the Board also vacated his finding that claimant invoked the Section 411(c)(4) presumption, and remanded the case for further consideration. *Id.* at 9-10. In the interest of judicial economy, the Board affirmed the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption. *Id.* at 11-15. Finally, because the Board had vacated the award in the miner's claim, it also vacated the award in the survivor's claim. *Id*. at 15.

On remand, the administrative law judge credited the miner with 17.35 years of qualifying coal mine employment. He therefore found that claimant invoked the Section 411(c)(4) presumption, and reiterated his finding that employer failed to rebut the presumption. Accordingly, he reinstated the awards of benefits in both the miner's claim and the survivor's claim.

On appeal, employer argues the administrative law judge lacked authority to decide this case because he was not properly appointed under the Appointments Clause of the U.S. Constitution, Art. II § 2, cl. 2.[6] Employer also asserts the administrative law judge erred

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without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

[5] The Board also vacated the administrative law judge's finding that the miner was entitled to credit for 0.50 year of coal mine employment for his work in 1978, 1983, 1985 and 1991 because he used an improper method of calculation. *Ratliff v. T & W Coal Co.*, BRB Nos. 15-0091 BLA and 15-0092 BLA, slip op. at 8-9 (Mar. 29, 2017) (unpub.). It also instructed him, on remand, to consider whether the miner was entitled to credit for coal mine work in 1958 and 1959. *Id.* at 7 n.10.

[6] Article II, Section 2, Clause 2, sets forth the appointing powers:

in crediting the miner with fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. It further contends the administrative law judge erred in finding it did not rebut the presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that employer waived its Appointments Clause challenge by failing to raise it in its previous appeal to the Board. In a reply brief, employer reiterates its previous arguments.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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

We agree with the Director that employer waived its Appointments Clause argument by failing to raise it when the case was previously before the Board. *See Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (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); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its opening brief); Director's Brief at 3-4. The exception for considering a forfeited argument due to extraordinary circumstances recognized in *Jones Brothers v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018) is inapplicable because, unlike the Federal Mine Safety and Health Review Commission, the Board has the long-recognized authority to address properly raised questions of substantive law.[7] *See Gibas v. Saginaw Mining Co.*,

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> [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.

[7] Moreover, unlike the petitioner in *Jones Brothers* who at least "identified the constitutional issue" in its appeal to the Federal Mine Safety and Health Review

748 F.2d 1112, 1116-17 (6th Cir. 1984) (holding that because the Board performs the identical appellate function previously performed by the district courts, Congress intended to vest in the Board the same judicial power to rule on substantive legal questions as was possessed by the district courts); *Duck v. Fluid Crane and Constr. Co.*, 36 BRBS 120, 121 n.4 (2002) (the Board "possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its jurisdiction"). Therefore, we reject employer's argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different administrative law judge.

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

Employer argues the administrative law judge erred in crediting the miner with at least fifteen years of qualifying coal mine employment and therefore erred in finding claimant invoked the Section 411(c)(4) presumption. On remand, the administrative law judge again credited the miner with 7.25 years of qualifying coal mine employment from 1961 to 1977 and 5.0 years of qualifying coal mine employment from 1986 to 1990. Decision and Order on Remand at 4-5. He also credited the miner with 4.0 years of coal mine employment based on the miner's work as a coal truck driver from 1979 to 1982. *Id.* at 4. He specifically found the miner's testimony at a 1996 hearing established that his work as a coal truck driver took place in conditions substantially similar to those in an underground mine, and therefore constituted qualifying coal mine employment. *Id.* at 6-7. Finally, the administrative law judge credited the miner with a total of 0.50 year of coal mine employment in 1958 and 1959 and a total of 0.60 year of coal mine employment in 1978, 1983, 1985, and 1991. *Id.* at 4-6. He therefore credited the miner with 17.35 years of qualifying coal mine employment. *Id.* at 7.

Employer initially argues the administrative law judge erred in crediting the miner with 7.25 years of qualifying coal mine employment from 1961 to 1977 and 5.0 years of qualifying coal mine employment from 1986 to 1990. Employer's Brief at 8-19. The Board's previous affirmance of these findings constitutes the law of the case. As employer has not demonstrated any exception to the law of the case doctrine, we decline to address

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Commission, employer in this case did not identify the issue at all in its previous appeal to the Board. The fact that the Supreme Court issued its decision in *Lucia* after employer filed its previous appeal in this claim does not excuse employer's failure to raise the argument, as *Lucia* makes clear "that existing case law 'says everything necessary to decide this case'" and "[n]o precedent prevented the company from bringing the constitutional claim before then." *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 257 (6th Cir. 2018), *quoting Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2053 (2018).

its arguments. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Employer also argues the administrative law judge erred in finding that the miner's 4.0 years as a coal truck driver from 1979 to 1982 took place in conditions substantially similar to those in an underground coal mine. In addressing this issue, the administrative law judge accurately noted that the "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); Decision and Order on Remand at 6. He noted that the miner testified during a 1996 hearing that he was exposed to coal mine dust during "all" of his coal mine employment. Director's Exhibit 1 at 28. The administrative law judge emphasized that the miner did not state that he was only exposed during his underground coal mine employment, but that he was exposed during all of it. Decision and Order on Remand at 7. The administrative law judge found the miner's testimony credible, noting that it occurred in 1996, shortly after he left coal mine employment. *Id.* He thus found that the miner's testimony established that he was regularly exposed to coal mine dust during all of his coal mine employment, including the four years he worked as a coal truck driver from 1979 to 1982. Decision and Order on Remand at 7.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012); *Gray v. SLC Coal Co*., 176 F.3d 382 (6th Cir. 1999). The Board cannot substitute its inferences for those of the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Because it is based on substantial evidence, we affirm the administrative law judge's determination that the miner's 4.0 years of work as a coal truck driver from 1979 to 1982 constitutes qualifying coal mine employment.[8] 20 C.F.R. §718.305(b)(2); *see Central Ohio Coal Co. v. Director,*

[8] We reject employer's contention that its due process rights were violated because the administrative law judge relied on the miner's 1996 hearing testimony to assess the dust conditions in his surface mine employment. Employer's Brief at 24. Employer argues that there was no reason for it to cross-examine the miner regarding the conditions of his surface coal mine employment in 1996 because the Section 411(c)(4) presumption had not yet been reinstated. *Id*. However, employer's inability to reexamine the miner due to his death during the pendency of this claim does not give rise to a due process violation. *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 807, 21 BLR 2-302, 2-319 (4th Cir. 1998) ("The Due Process Clause does not require the government to insure the lives of black lung claimants."). Moreover, as the Director notes, the miner's work as a

OWCP [*Sterling*], 762 F.3d 483, 490-91 (6th Cir. 2014) (claimant need only establish regular exposure to coal dust to prove substantially similar conditions); Decision and Order on Remand at 7.

In light of our affirmance of the administrative law judge's findings that the miner established at least fifteen years[9] of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm his determination that claimant invoked the Section 411(c)(4) presumption. We further decline to revisit the Board's prior holding with respect to rebuttal of the Section 411(c)(4) presumption, as it constitutes the law of the case and employer has not shown that an exception to the doctrine applies here. *See Brinkley*, 14 BLR at 1-150-151. We therefore affirm the administrative law judge's award of benefits in the miner's claim. Consequently, we also affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*).

coal mine transportation worker made the extent of his coal mine dust exposure a relevant issue at the time of his prior claims. Director's Brief at 4 n.2; *see* 20 C.F.R. §725.202(b).

[9] Because we have affirmed the administrative law judge's findings that the miner established a total of 16.25 years of qualifying coal mine employment from 1961 to 1977, from 1979 to 1982, and from 1986 to 1990, error, if any, in finding an additional 1.10 years in 1958, 1959, 1978, 1983, 1985, and 1991 would not affect his determination that claimant invoked the Section 411(c)(4) presumption. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits in the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge