U.S. Department of Labor

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

BRB No. 18-0595 BLA

DANIEL D. FIELDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ABUNDANCE COAL INCORPORATED #2	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE/CHARTIS	)	DATE ISSUED: 12/10/2019
	)	
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 Awarding Benefits and Order on Petition for Reconsideration of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Tighe Estes (Fogle Keller Walker, PLLC), Lexington, Kentucky, for employer/carrier.

William M. Bush (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: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits and Order on Petition for Reconsideration (2017-BLA-05691) of Administrative Law Judge Jason A. Golden rendered on a claim filed on May 12, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge found employer is the responsible operator and credited claimant with at least twenty-three years of underground coal mine employment.[1] He determined the evidence established complicated pneumoconiosis, entitling claimant to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. He further found claimant's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203. The administrative law judge subsequently issued an Order on Petition for Reconsideration rejecting employer's argument that he lacked the authority to hear and decide the case.

On appeal, employer argues the administrative law judge lacked the authority to hear and decide the case because he had not been appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer also argues he erred in finding it is the responsible operator. Finally, employer asserts that he improperly found complicated pneumoconiosis established.[2] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing the administrative law judge had authority to decide the case and correctly found employer is the responsible operator.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's decision and orders if they are rational, supported by substantial evidence, and in accordance with applicable law. 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).

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[1] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 7, 22.

[2] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established at least twenty-three years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

Appointments Clause

Two months before the administrative law judge issued his Decision and Order Awarding Benefits, the Supreme Court decided *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), holding that Securities and Exchange Commission administrative law judges were not appointed in accordance with the Appointments Clause of the Constitution.[3] *Lucia*, 138 S.Ct. at 2055. The Court further held that because the petitioner timely raised his challenge to the constitutional validity of the appointment of the administrative law judge, he was entitled to a new hearing before a properly appointed administrative law judge. *Id.*; *see also Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc).

Employer contends that because the administrative law judge was not properly appointed until December 21, 2017,[4] more than one month after he issued a Notice of Hearing, his Decision and Order Awarding Benefits must be vacated and the case remanded for a new hearing before a new administrative law judge. Employer's Brief at 5-6. We disagree.

The appropriate remedy for an adjudication tainted with an appointments violation is a new hearing before a properly appointed official. *Lucia*, 138 S.Ct. at 2055, *citing Ryder v. United States*, 515 U.S. 177, 182-83 (1995). That official must be able to consider the matter as though he had not adjudicated it before. *Lucia*, 138 S.Ct. at 2055. The issuance of a Notice of Hearing alone does not involve any consideration of the merits, nor would

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[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.

U.S. Const. art. II, § 2, cl. 2.

[4] The Secretary of Labor, exercising his power as the Head of a Department under the Appointments Clause, ratified the appointment of Administrative Law Judge Golden on December 21, 2017. Secretary's December 21, 2017 Letter to Administrative Law Judge Golden. Employer concedes that the administrative law judge was properly appointed as of his ratification. Employer's Brief at 5-6.

it color the administrative law judge's consideration of the case. It therefore did not taint the adjudication with an appointments clause violation requiring remand.

The Notice of Hearing simply reiterates the statutory and regulatory requirements governing the hearing procedures. The administrative law judge took no merits-related action and expressed no merits-related views in formulating and issuing it. Thus, unlike the situation in *Lucia*, in which the judge had presided over a hearing and issued an initial decision while he was not properly appointed, the Notice of Hearing in this case would not be expected to affect this administrative law judge's ability "to consider the matter as though he had not adjudicated it before." *Lucia*, 138 S.Ct. at 2055. As employer raises no other arguments in support of its position that the administrative law judge's appointment tainted the adjudication of this claim, we reject employer's argument that this case should be remanded for a new hearing before a new administrative law judge.[5]

Responsible Operator

The responsible operator is the "potentially liable operator"[6] that most recently employed the miner for at least one year. 20 C.F.R. §§725.494, 725.495(a)(1). Once the Director properly identifies a potentially liable operator, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or that another operator financially capable of assuming liability more recently employed the miner for at least one year. *See* 20 C.F.R. §725.495(c).

The district director issued a Notice of Claim informing Abundance Coal Inc. that it had been identified as a potentially liable operator. Director's Exhibit 35. Abundance Coal Inc. responded and denied it is a potentially liable operator. Director's Exhibit 39. The district director subsequently issued a Schedule for the Submission of Additional

[5] We also reject employer's argument that this case should be remanded because the Chief Administrative Law Judge was not properly appointed when he assigned this case to the administrative law judge. Employer's Brief at 5-6. The assignment of this case to the administrative law judge did not affect his ability, post-ratification, "to consider the matter as though he had not adjudicated it before." *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018).

[6] In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator, the operator must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of not less than one year, at least one day of the employment must have occurred after December 31, 1969, and the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

Evidence (SSAE) identifying Abundance Coal Inc. as the responsible operator because it employed claimant for a cumulative period of not less than one year and no other potentially liable operator employed him thereafter. Director's Exhibit 59. In its response to the SSAE, Abundance Coal Inc. asserted an entity named Abundance Coal Inc. #2 should be named the responsible operator because it is a potentially liable operator that more recently employed claimant.[7] Director's Exhibit 46. The district director responded that Abundance Coal Inc. and Abundance Coal Inc. #2 are names used interchangeably for the same entity. Director's Exhibit 47.

The district director then issued a Proposed Decision and Order awarding benefits addressed to "Abundance Coal Inc. #2 aka Abundance Coal Inc.," reiterating the entity employed claimant for at least one year with no potentially liable operator employing claimant subsequently. Director's Exhibit 63. Thus she named Abundance Coal Inc. #2 as the responsible operator. *Id*. Employer requested a formal hearing before the administrative law judge. Director's Exhibit 66.

The administrative law judge found claimant worked for employer, Abundance Coal Inc. #2, from 2005 to 2012 and no potentially liable operator employed claimant thereafter. Decision and Order at 6-9. *Id*. He further found Abundance Coal Inc. was not a "separate and distinct" entity during this time, but rather was "a fictitious name used by Abundance Coal Inc. #2." *Id*. He rejected employer's argument that the district director failed to provide it with adequate notice of the claim, noting that the Notice of Claim, SSAE, and Proposed Decision and Order were all sent to employer at the same address, 310 Arnold Fork, Kite, KY 41828, either under its own name or its "fictitious" name. *Id*.; Director's Exhibits 35, 59, 63. Therefore he found employer is the responsible operator and received actual notice of the claim. Decision and Order at 8-9.

Employer argues the administrative law judge erred in evaluating the relationship between Abundance Coal Inc. and Abundance Coal Inc. #2 in determining whether employer received adequate notice of the claim. Employer's Brief at 6-9. We disagree. As the administrative law judge noted, records from the Kentucky Secretary of State indicate that Abundance Coal Inc. was incorporated on October 20, 2003 and dissolved on November 9, 2004. Decision and Order at 8; Director's Exhibit 47. Thus this entity ceased to exist as an active company in November 2004. In contrast, Abundance Coal Inc. #2

[7] Abundance Coal Inc. submitted claimant's 2009 and 2010 W-2 tax statements which reflect earnings from Abundance Coal Inc. #2 for those years. Director's Exhibit 46. It also attached an attorney fee order issued in 2016 from claimant's state workers' compensation claim in which Abundance Coal Inc. #2 was listed as a party in the caption.

existed as an active entity during the time claimant worked for employer: it was incorporated on August 25, 2004 and was not dissolved until September 28, 2013. *Id*.

The administrative law judge also noted that, although claimant's Social Security Administration (SSA) statement of itemized earnings reflects income from Abundance Coal Inc. from 2004 to 2012, his individual W-2 tax statements show earnings from Abundance Coal Inc. #2 in 2009, 2010, and 2012. Decision and Order at 8 n.34; Director's Exhibits 6, 9 at 3-4. He also found claimant's testimony and employment history forms indicate Abundance Coal Inc. and Abundance Coal Inc. #2 are the same entity. Decision and Order at 6-9.[8]

Further, the administrative law judge noted Abundance Coal Inc. and Abundance Coal Inc. #2 have the same Employee Identification Number and mailing address on the relevant tax records and are associated with the same Mine Safety Health Administration numbers for four mine sites.[9] Decision and Order at 8-9, n.24; Director's Exhibits 6-7, 9, 47. He also noted they are both associated with the same insurance carrier with the same policy number. Decision and Order at 8-9; Director's Exhibits 35, 47. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant worked for Abundance Coal Inc. #2 from 2005 to 2012, during which time this entity also used Abundance Coal Inc. as a "fictitious" name. Decision and Order at 8; *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"); *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 633 (6th Cir. 2009). Thus we affirm the administrative law judge's finding that employer, Abundance Coal Inc. #2, is the responsible operator. Decision and Order at 6-9.

[8] Specifically, an attorney representing "Abundance Coal Inc. #2" questioned claimant in a deposition taken as part of his state workers' compensation claim. Director's Exhibit 28. He testified he started working for "Abundance Coal #2 in June 2004." *Id*. at 7-8, 18-19. He indicated "Abundance Coal" was owned by his brother-in-law, Ray Slone. *Id*. On his employment history form, claimant stated his last employer was "Abundance Ray Slone" from 2004 to 2012. Director's Exhibit 3. At the hearing, he testified that his employment with Ray Slone and "Abundance Coal" were the same. Hearing Transcript at 21-22.

[9] The district director noted that Kentucky "Mine Mapping records show that Abundance Coal Inc.#2 operated [four] mine sites under [Mine Safety Health Administration (MSHA)] ID #15-18711, #15-18793, #15-18997, [and] #15-19559," but an inquiry into the "MSHA database" indicates these four "numbers are listed under Abundance Coal Inc., not Abundance Coal Inc. #2." Director's Exhibit 47.

Complicated Pneumoconiosis

Section 411(c)(3) of the Act provides an irrebuttable presumption a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In determining whether claimant has invoked the irrebuttable presumption, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. 30 U.S.C. §923(b); *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The administrative law judge found the x-rays establish complicated pneumoconiosis, 20 C.F.R. §718.304(a), while the biopsy, CT scans, medical opinions, and treatment records do not. 20 C.F.R. §718.304(b), (c); Decision and Order at 18-23. Weighing all of the evidence, he found the x-rays outweighed the contrary evidence. *Id.*

Employer argues the administrative law judge erred in weighing the x-ray evidence. Employer's Brief at 11-12. We disagree. The administrative law judge considered six interpretations of four x-rays. 20 C.F.R. §718.304(a); Decision and Order at 10-11, 18-21; Director's Exhibits 16, 20, 24, 25; Claimant's Exhibit 1; Employer's Exhibit 2. He accurately noted that all the physicians who interpreted the x-rays are dually qualified as B readers and Board-certified radiologists. Decision and Order at 10-11, 18-21.

Dr. Meyer read the June 1, 2015 x-ray as negative for simple and complicated pneumoconiosis. Director's Exhibit 25. Dr. DePonte read the March 9, 2016 x-ray as positive for simple pneumoconiosis, 2/2, and complicated pneumoconiosis, Category A, but Dr. Meyer read it as negative for both simple and complicated pneumoconiosis. Director's Exhibit 20; Employer's Exhibit 2. Dr. DePonte read the June 15, 2016 x-ray as positive for simple pneumoconiosis, 2/2, and complicated pneumoconiosis, Category A, whereas Dr. Adcock read it as positive for simple pneumoconiosis, 2/2, but negative for complicated pneumoconiosis. Director's Exhibits 16, 24. Dr. DePonte read the February 21, 2017 x-ray as positive for simple pneumoconiosis, 2/2, and complicated pneumoconiosis, Category A.[10] Claimant's Exhibit 1.

[10] Employer asserts that Dr. Adcock read the February 21, 2017 x-ray as negative for complicated pneumoconiosis. Employer's Brief at 11-12. As the administrative law judge noted, however, employer designated this reading but "never submitted [it] to the court or offered it in evidence." Decision and Order at 11.

In resolving the conflict in the x-ray readings, the administrative law judge noted that Drs. DePonte and Adcock both agreed that claimant has simple pneumoconiosis, with a profusion rating of 2/2, based on the June 15, 2016 x-ray. Decision and Order at 19-20. Therefore he found claimant developed simple pneumoconiosis by June 15, 2016. *Id*. He further noted the March 9, 2016 x-ray was taken three months before the June 15, 2016 x-ray and thus found them contemporaneous with each other. *Id*. Because Dr. Meyer did not diagnose simple pneumoconiosis on the March 9, 2016 x-ray, the administrative law judge found Dr. Meyer was in the minority of dually qualified radiologists on the issue of whether claimant had the disease around this time. *Id*. Thus he found all of Dr. Meyer's readings "unreliable." *Id*.

The administrative law judge found the March 9, 2016 x-ray positive for complicated pneumoconiosis because Dr. DePonte's reading outweighed Dr. Meyer's reading and the February 21, 2017 x-ray similarly positive based on Dr. DePonte's uncontradicted reading. Decision and Order at 19-20. Because the readings by Drs. DePonte and Adcock of the June 15, 2016 x-ray were in conflict, he found that x-ray in equipoise. *Id*. He concluded claimant established complicated pneumoconiosis because two x-rays, "including the most recent x-ray," are positive for the disease and one x-ray is inconclusive. *Id*. at 19-21.

Employer does not challenge the administrative law judge's finding that Dr. Meyer's negative x-ray readings on complicated pneumoconiosis are "unreliable." Decision and Order at 19-20. Thus we affirm this credibility determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19-20. Employer argues the Board should find all four x-rays do not establish complicated pneumoconiosis and that the readings by Drs. Meyer and Adcock outweigh those of Dr. DePonte.[11] Employer's Brief at 11-12. Employer's argument constitutes a request to reweigh the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). We affirm as supported by substantial evidence the administrative law judge's finding that the x-ray evidence established complicated pneumoconiosis.[12] 20 C.F.R. §718.304(a); Decision and Order at 18-21.

[11] The administrative law judge found the x-rays contained in claimant's treatment records "do not refute the presence of complicated pneumoconiosis." Decision and Order at 20-21. This finding is affirmed as unchallenged. *See Skrack*, 6 BLR at 1-711.

[12] Employer argues the administrative law judge did not follow the Board's holding in *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc) when considering the CT scan evidence. Employer's Brief at 9. Specifically, employer asserts he erroneously considered the CT scan evidence with the x-ray evidence. *Id*.; 20 C.F.R. §718.304(a). Contrary to employer's argument, the administrative law judge correctly

Further, employer does not identify specific error in the administrative law judge's finding the x-ray readings outweigh the biopsy, CT scan, medical opinion, and treatment records. *Gray*, 176 F.3d at 388-89; *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.304; Decision and Order at 18-23. Nor does employer challenge his finding that claimant's complicated pneumoconiosis arose out of coal mine employment. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.203(b). Thus we affirm these findings and the award of benefits.[13]

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weighed the CT scan evidence under the "other means" prong as *Melnick* requires. 20 C.F.R. §718.304(c); *Melnick*, 16 BLR at 1-33-34; Decision and Order at 21.

[13] Employer asserts the administrative law judge erred in failing to find it is entitled to "offset" for benefits received in claimant's state workers' compensation claim. Employer's Brief at 13-14. Contrary to employer's argument, neither the administrative law judge nor the Board has authority to calculate the amount of monthly benefits to which claimant may be entitled; the district director will determine the computation of benefits following the issuance of an effective order requiring the payment of benefits. 20 C.F.R. §725.502(b)(2).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order on Petition for Reconsideration are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge