U.S. Department of Labor

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

BRB No. 19-0070 BLA

JEFFERY D. BARNETTE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
REGENT ALLIED CARBON ENERGY	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 12/30/2019
	)	
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 of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Catherine Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05984) of Administrative Law Judge Dana Rosen on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on June 30, 2015.

The administrative law judge found claimant has twenty-seven years of underground coal mine employment[1] and a totally disabling respiratory or pulmonary impairment, and therefore invoked the Section 411(c)(4) presumption he is totally disabled due to pneumoconiosis.[2] 30 U.S.C. §921(c)(4) (2012). She further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge lacked the authority to hear and decide the case because she had not been appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer also argues she erred in finding the Section 411(c)(4) presumption unrebutted.[3] Claimant has not filed a

[1] Claimant's coal mine employment occurred in Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where the evidence establishes 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) (2012); *see* 20 C.F.R. §718.305.

[3] We reject employer's contention that, pursuant to *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018), *stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), the entire Affordable Care Act (ACA), including its provisions reviving the Section 411(c)(4) presumption, is unconstitutional. Employer's Brief at 4-5. On appeal, the United States Court of Appeals for the Fifth Circuit held one aspect of the ACA (the individual mandate) unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down as inseverable from the mandate. *Texas v. United States*, No. 19-10011, slip op. at 44-62 (5th Cir. Dec. 18, 2019) (King, J., dissenting). Moreover, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214-15 (2010), *aff'd sub nom. W.Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011); *Mathews v. United Pocahontas Coal*

response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, arguing the administrative law judge had authority to decide the case.[4]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is 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).

Appointments Clause

Employer challenges the administrative law judge's authority to hear and decide this case. It notes the United States Supreme Court held in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), that Securities and Exchange Commission (SEC) administrative law judges were not properly appointed in accordance with the Appointments Clause[5] of the Constitution. Employer's Brief at 5-7. It argues the administrative law judge in this case was similarly appointed improperly.

Co., 24 BLR 1-193, 1-201 (2010). Further, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are "fully operative as a law." *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), as amended (Dec. 21, 2011).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] 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.

Employer acknowledges that after the administrative law judge's initial appointment, the Secretary of Labor ratified her prior appointment and all Department of Labor (DOL) administrative law judges on December 21, 2017.[6] It maintains, however, that the Secretary's ratification was insufficient to "cure the defect" in the administrative law judge's initial appointment. Employer's Brief at 6. The Director responds that the administrative law judge had the authority to hear and decide this case because the Secretary's December 21, 2017 ratification of the prior appointment was proper under the Appointments Clause. Director's Brief at 6-7. We agree with the Director.

As the Director notes, an appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 6, *quoting Marbury v. Madison*, 5 U.S. 137, 157 (1803). Further, 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). In cases involving the Appointments Clause, ratification is permissible so long as the agency head 1) had at the time of ratification the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 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). Further, under the "presumption of regularity," courts presume that public officers have properly discharged their official duties, with "the burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

The Secretary had, at the time of ratification, the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603. Congress

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[6] The Secretary of Labor issued a letter to the administrative law judge 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 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 Dana Rosen.

has 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.

Under the presumption of regularity, we presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. In evaluating these factors, we note the Secretary did not generally ratify the appointment of all administrative law judges in a single letter. Rather, he specifically identified Administrative Law Judge Rosen and indicated he gave "due consideration" to her appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Rosen. The Secretary further stated that he was acting in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Rosen "as an Administrative Law Judge." *Id*. Employer does not assert that the Secretary had no "knowledge of all the material facts" or that he did not make a "detached and considered judgment" when he ratified Judge Rosen's appointment, and therefore employer does not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (holding 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 that the Secretary's action constituted a proper ratification of the appointment of the administrative law judge.[7] *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (holding as valid the appointment of civilian members of the Coast Guard Court of Criminal Appeals where the Secretary of Transportation issued a memorandum "adopting" the General Counsel's assignments to the Coast Guard Court of Military Review "as judicial appointments of my own"); *Advanced Disposal*, 820 F.3d 592, 604-05 (holding that a properly constituted NLRB can retroactively ratify the appointment of a Regional Director with statement that it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" all its earlier actions as an invalid Board).

Employer next argues that *Lucia* precludes the administrative law judge from hearing this case, notwithstanding the Secretary's ratification. Employer contends that because the administrative law judge was not properly appointed until December 21, 2017, more than two months after she issued a Notice of Hearing, her 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 6-7. We disagree.

[7] Employer notes the Secretary's ratification letter was "clearly signed electronically." Employer's Brief at 6. Even if the Secretary used an autopen, this would not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F.Supp.2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002).

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 it be expected to 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. 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 [s]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,[8] we reject employer's argument that this case should be remanded for a new hearing before a new administrative law judge.

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 nor clinical pneumoconiosis[9] or that "no part of

[8] Employer notes the administrative law judge "presumably" also received the Director's Exhibits before the Secretary ratified her appointment. Employer's Brief at 7. We agree with the Director that the required transfer of the Director's Exhibits to the administrative law judge does not involve any consideration of the merits and would not color the administrative law judge's consideration of the case. Director's Brief at 5; *see* 20 C.F.R. §725.455(b) (administrative law judge "shall receive into evidence . . . the evidence submitted to the Office of Administrative Law Judges [(OALJ)] by the district director"); *see also* 20 C.F.R. §725.421 (district director shall transmit evidence and related documents to the OALJ in any case referred for a hearing).

[9] "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). "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

[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 found employer failed to establish rebuttal by either method.

To establish that claimant does not have legal pneumoconiosis, employer must demonstrate he 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 v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). In determining that employer failed to establish claimant does not have legal pneumoconiosis,[10] the administrative law judge considered the opinions of Drs. Fino and McSharry.[11] Dr. Fino opined that claimant has a disabling respiratory impairment due to asthma. Director's Exhibit 14 at 8. He found insufficient evidence to justify a diagnosis of legal pneumoconiosis. *Id.* Dr. McSharry diagnosed moderate to severe asthma that "would pose significant limitations to [the miner's] exertional abilities." Employer's Exhibit 1 at 2. He opined the miner's asthma was not caused or aggravated by his coal mine dust exposure. *Id.*; Employer's Exhibit 14 at 22.

The administrative law judge noted that Drs. Fino and McSharry diagnosed asthma based in part on claimant's significant improvement in lung function following administration of bronchodilators. Decision and Order at 9; Director's Exhibit 14 at 10; Employer's Exhibit 14 at 16. However, she noted both physicians acknowledged claimant has some fixed obstruction.[12] Decision and Order at 24. She permissibly discredited their opinions because they failed to adequately explain how they eliminated claimant's twenty-seven years of coal mine dust exposure as a significant contributor to this fixed obstructive

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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).

[10] The administrative law judge found that employer established claimant does not have clinical pneumoconiosis. Decision and Order at 22.

[11] The administrative law judge also considered Dr. Ajjarapu's diagnosis of legal pneumoconiosis in the form of chronic bronchitis caused by coal mine dust exposure. Director's Exhibit 16.

[12] Dr. Fino opined claimant has "some fixed obstruction" after administration of a bronchodilator. Director's Exhibit 14 at 10. Dr. McSharry opined claimant demonstrated a "fairly dramatic response to a bronchodilator," but there was "still some obstruction remaining . . . ." Employer's Exhibit 14 at 16.

impairment.[13] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); *see also Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); Decision and Order 24-25. As the administrative law judge permissibly discredited the opinions of Drs. Fino and McSharry,[14] the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis,[15] we affirm her finding that employer failed to disprove the existence of legal pneumoconiosis. Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether employer established that "no part of [claimant'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). She rationally discounted the opinions of Drs. Fino and McSharry that claimant's disability is not due to pneumoconiosis because they did not diagnose legal pneumoconiosis, contrary to her finding that employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 25. Therefore, we affirm the administrative law judge's determination that employer failed to rebut legal pneumoconiosis as a cause of claimant's total disability. *See* 20 C.F.R. §718.305(d)(1)(ii).

[13] The administrative law judge noted Dr. Fino stated that ten to fifteen percent of asthmatics can develop airway remodeling which causes a fixed obstruction. Decision and Order at 24. However, she found Dr. Fino did not adequately explain why claimant's coal mine dust exposure could not have also been a cause of the fixed obstruction. *Id.* She similarly found that Dr. McSharry did not adequately explain why he attributed all of claimant's pulmonary impairment to asthma, even though some obstruction remained after bronchodilators were administered. *Id.*

[14] Employer does not directly challenge the administrative law judge's basis for discrediting the opinions of Drs. Fino and McSharry, stating only, without elaboration, that the administrative law judge "provided no meaningful analyses into the medical opinions of Dr. Fino and Dr. McSharry." Employer's Brief at 16.

[15] Because it is employer's burden to establish rebuttal and the administrative law judge permissibly discredited the opinions of Drs. Fino and McSharry, we need not address employer's arguments regarding her consideration of Dr. Ajjarapu's opinion and the treatment records. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 8-15.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge