U.S. Department of Labor

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

BRB No. 19-0072 BLA

JAMES R. FAINE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BUCK BRANCH REBUILD & MANUFACTURING	)	DATE ISSUED: 02/06/2020
	)	
and	)	
	)	
NATIONAL UNION FIRE/CHARTIS	)	
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

H. Brett Stonecipher[1] (Fogle Keller Walker, PLLC), Lexington, Kentucky, for employer/carrier.

[1] On December 23, 2019, after employer/carrier's brief was filed in this appeal, Cameron Blair of Fogle Keller Walker, PLLC, Lexington, Kentucky, filed a Notice of Substitution of Counsel informing the Board that he now represents 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: ROLFE, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05729) of Administrative Law Judge Drew A. Swank in a claim filed on November 7, 2014 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with at least twenty-six years of underground coal mine employment[2] and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found employer did not rebut the presumption and awarded benefits as of the date claimant filed his claim.

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. It also challenges his authority in light of the removal provisions governing administrative law judges. Employer further argues the administrative law judge erred in finding the Section 411(c)(4) presumption unrebutted and in determining the date for the commencement of benefits. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing employer is not entitled to a

[2] Claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction 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) 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 impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

new hearing before a different administrative law judge and the Board should decline to address employer's removal provisions argument.[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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Four months before the administrative law judge issued his Decision and Order Awarding Benefits, the United States 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.[5] *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). That administrative law judge must be able "to consider the matter as though he [or she] had not adjudicated it before." *Lucia*, 138 S.Ct. at 2055.

Before *Lucia* was issued, the Secretary of Labor, exercising his power as the Head of a Department under the Appointments Clause, ratified the appointment of

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Employer's Brief at 13.

[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 [S]upreme 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.

Administrative Law Judge Swank. Secretary's December 21, 2017 Ratification Letter to Administrative Law Judge Swank. Employer contends that, because the administrative law judge was not properly appointed until[6] after he issued a Notice of Hearing, his decision must be vacated and the case remanded for a new hearing before a different administrative law judge.[7] Employer's Brief at 29-33. We disagree.

The only action the administrative law judge took before his ratification was issuing a Notice of Hearing. The Notice of Hearing essentially reiterates the statutory and regulatory requirements governing the hearing procedures; it does not involve any consideration of the merits or color the administrative law judge's consideration of the case. *Noble v. B & W Res., Inc.,* BLR , BRB No. 18-0533 BLA, slip op. at 4 (Jan. 15, 2020).

Thus, unlike *Lucia*, in which the judge presided over a hearing and issued an initial decision, the Notice of Hearing does not affect this administrative law judge's ability "to consider the matter as though he had not adjudicated it before."[8] *Lucia*, 138 S.Ct. at 2055. It therefore did not taint the adjudication with an Appointments Clause violation, and we

[6] Employer concedes that the administrative law judge was properly appointed as of the date of his ratification. Employer's Brief at 31.

[7] Before the administrative law judge, employer filed notices stating that it was preserving the issue of whether he was properly appointed. Employer's Notices dated March 19, 2018 and July 13, 2018. In response, the Director moved for an order to show cause directing the parties to state whether they wanted the case reassigned to a different administrative law judge. Director's Motion dated August 17, 2018. The administrative law judge denied the motion, noting that the only action he took before the Secretary of Labor ratified his appointment was issuing a Notice of Hearing. *Faine v. Buck Branch Rebuild & Mfg.*, 2017-BLA-05729 (Aug. 27, 2018) (Order) (unpub.).

[8] Employer notes that the administrative law judge's Notice of Hearing included a twenty-page limit for briefs, which "came into play" eleven months later when employer submitted a forty-seven page post-hearing brief and the administrative law judge returned the excess pages. Employer's Brief at 32; Administrative Law Judge Exhibit 1 at 4. But setting a page limit that could be exceeded upon request of the administrative law judge's permission does not involve any consideration of the merits, nor would it be expected to color the administrative law judge's consideration of the case. Moreover, as the Director notes, employer never sought permission to exceed the page limit, making any limitation on its post-hearing argument potentially self-imposed. Director's Brief at 5.

decline to remand this case to the Office of Administrative Law Judges.[9] *Noble*, BRB No. 18-0533 BLA, slip op. at 4.

Removal Provisions

Employer argues the administrative law judges' "[r]emoval [p]rocess violates the Executive Vesting Clause,"[10] in that it provides administrative law judges with "two levels of protection from removal without cause" and thus is unconstitutional. Employer's Brief at 33-34. We decline to address this issue, as it is inadequately briefed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

Before the Board will consider the merits of an appeal, the Board's procedural rules impose threshold requirements for alleging specific error. In relevant part, a petition for review "shall be accompanied by a supporting brief, memorandum of law or other statement which . . . [s]pecifically states the issues to be considered by the Board." 20 C.F.R. §802.211(b). The petition for review must also contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result." *Id*. Further, to merely "acknowledge an argument" in a petition for review "is not to make an argument" and "a party forfeits any allegations that lack developed argument." *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018), *citing United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009). A reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (refusing to consider the merits of an argument that the Federal Trade Commission is unconstitutional because its members exercise executive powers, yet can be removed by the President only for cause).

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[9] 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 32. The assignment of this case to the administrative law judge similarly 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).

[10] As employer described, the "Executive Vesting Clause of the Constitution, Art. II §1, forbids Congress from giving 'Officers' 'multilevel protections from removal,' by the President or those who exercise significant executive power." Employer's Brief at 33, *citing Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

As the Director notes, employer refers to the removal provisions for administrative law judges contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, and notes the Supreme Court's holding that the two-level removal protection applicable to the Public Company Accounting Oversight Board was held unconstitutional. Director's Brief at 6-7; Employer's Brief at 33-34, *citing Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). Employer has not explained how such a holding undermines the administrative law judge's authority to hear and decide this case.[11] We therefore agree with the Director that employer "cannot simply point to *Free Enterprise Fund* and declare its work done." Director's Brief at 7. Thus we decline to address this issue. *Cox*, 791 F.2d at 446-47; *Jones Bros.*, 898 F.3d at 677; *Hosp. Corp.*, 807 F.2d at 1392; 20 C.F.R. §802.211(b).

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,[12] or "no part 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 found that employer failed to establish rebuttal by either method.

[11] Employer cites the Supreme Court's decisions in *Free Enterprise* and *Lucia*. Employer's Brief at 33-34. It notes that in *Free Enterprise,* the Supreme Court invalidated a statutory scheme that provided the Public Company Accounting Oversight Board two levels of "for cause" removal protection and thus interfered with the President's duty to ensure the faithful execution of the law. *Id*. Employer does not set forth how *Free Enterprise* applies to the administrative law judge in this case. As the Director notes, the Supreme Court stated that its holding "does not address that subset of independent agency employees who serve as administrative law judges." *Free Enter. Fund*, 561 U.S. at 507 n.10; Director's Brief at 6. Further, the majority opinion in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1.

[12] "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). "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).

Legal Pneumoconiosis

To disprove legal pneumoconiosis,[13] employer must establish that claimant does not have a chronic lung disease or impairment that is "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). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that this standard requires employer "to disprove the existence of legal pneumoconiosis by showing that [claimant's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, F.3d , No. 19-3113, 2020 WL 284522, at 4 (6th Cir. Jan. 21, 2020).

The administrative law judge considered Drs. Rosenberg's and Jarboe's opinions that claimant does not have legal pneumoconiosis.[14] Decision and Order at 16-17, 25-31. He found their opinions not well-reasoned or persuasive and therefore found employer failed to establish that claimant does not have legal pneumoconiosis. *Id*.

Employer argues only that the administrative law judge erred in the weight he assigned to the opinions of Drs. Rosenberg and Jarboe.[15] Employer's Brief at 15-28. We disagree. The administrative law judge observed that Dr. Rosenberg eliminated coal mine dust exposure as a cause of claimant's worsening pulmonary function from 2014 to 2018 because claimant's impairment progressed too quickly and was too far removed from his coal mine employment. Employer's Exhibits 6 at 21-24; 10 at 3. Similarly, the administrative law judge noted that Dr. Jarboe eliminated coal mine dust exposure as a

[13] The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 7-16.

[14] Dr. Rosenberg diagnosed claimant with gas exchange abnormalities related to cigarette smoking and obesity, and restriction on pulmonary function testing due to obesity and obstruction due to smoking. Director's Exhibit 23; Employer's Exhibits 6 at 15-21; 10 at 2-3. Dr. Jarboe opined that claimant has primarily a restrictive ventilatory defect due to bronchial asthma and obesity, with other pulmonary function abnormalities due to smoking and asthma. Employer's Exhibits 5 at 8-9, 12; 7 at 22-28, 43.

[15] Employer notes that "the [administrative law judge] inferred his understanding that the issue of legal pneumoconiosis is the same as causation of total disability," but does not assert any error by the administrative law judge in doing so. Employer's Brief at 18.

cause of claimant's pulmonary impairment because of the rapid decline of claimant's lung function in recent years. Employer's Exhibits 5 at 11; 7 at 25-26, 28-29.

Contrary to employer's contention, the administrative law judge permissibly discredited Drs. Rosenberg's and Jarboe's reasoning as inconsistent with the Department of Labor's recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Young*, F.3d at , 2020 WL 284522 at 7; *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014); Decision and Order at 30; Employer's Exhibits 5 at 11; 6 at 21-24; 7 at 25-26, 28-29; 10 at 3. As the administrative law judge observed, the regulations place no limits on the latent and progressive nature of pneumoconiosis. *See* 20 C.F.R. §718.201(c). We thus affirm the administrative law judge's discrediting of Drs. Rosenberg's and Jarboe's opinions[16] and the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis.

Disability Causation

With respect to the second method of rebuttal, the administrative law judge permissibly found that the same reasons for discrediting Drs. Rosenberg's and Jarboe's opinions that claimant does not suffer from legal pneumoconiosis also undercut their opinions that claimant's total disability is unrelated to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735 (7th Cir. 2013); Decision and Order at 25-31. Therefore, we affirm the administrative law judge's determination that employer failed to establish no part of

[16] Because the administrative law judge provided a valid reason for discrediting Drs. Rosenberg's and Jarboe's opinions, we decline to address its challenges to the administrative law judge's other reasons for discrediting their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Further, because employer has the burden of proof on rebuttal and we affirm the administrative law judge's discrediting the only opinions supportive of that burden, we decline to address any argument employer raises regarding the weight the administrative law judge accorded to Drs. Everhart's and Nader's opinions. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 29-30; Employer's Brief at 27-28; Director's Exhibits 16, 26; Claimant's Exhibits 1, 2.

claimant's respiratory or pulmonary total disability was caused by pneumoconiosis[17] and we affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(2)(ii).

Benefits Commencement Date

The date for the commencement of benefits is the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date is not ascertainable from all the relevant evidence of record, benefits will commence the month the claim was filed, unless evidence the administrative law judge credits establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

The administrative law judge found total disability established because the two most recent pulmonary function studies administered in 2018 were qualifying[18] and although the blood gas studies did not support disability, all the physicians who submitted medical reports opined that claimant is disabled. Decision and Order at 19-25. When the administrative law judge later addressed the date for the commencement of benefits, he found the date of onset of claimant's total disability was not ascertainable because none of the medical opinions "satisfactorily address a specific onset date" and awarded benefits as of November 2014, the month claimant filed his claim. Decision and Order at 31.

As employer argues, however, at least one medical opinion explicitly concluded that claimant was not totally disabled after the filing date of his claim but became disabled later,

[17] Although employer did not identify this analysis in its brief, we note that the administrative law judge misstated the legal standard for rebutting the Section 411(c)(4) presumption. Decision and Order at 25, 29, 31. We need not remand this case for further consideration under the correct rebuttal standard, however, as the administrative law judge permissibly found Drs. Rosenberg's and Jarboe's opinions not well-reasoned and therefore insufficient to satisfy employer's burden of proof even if the correct rebuttal standard were applied. Moreover, the administrative law judge's incorrect "substantially contributing cause" standard for rebuttal of disability causation is less demanding than the correct "no part" standard he should have applied. Thus, the administrative law judge's use of the incorrect standard is harmless. *See Larioni*, 6 BLR at 1-1278.

[18] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

as his pulmonary condition worsened.[19] Employer's Brief at 29. Further, employer argues the administrative law judge relied on the two most recent pulmonary function studies administered in 2018 to find total disability established, finding that earlier studies administered in 2014, 2015, and 2017 were non-qualifying for total disability.[20] *Id*.; Decision and Order at 20; 20 C.F.R. §718.204(b)(2)(i).

Because there is evidence that claimant was not totally disabled after he filed his claim in 2014 that the administrative law judge did not discuss and weigh, we must vacate his finding as to the date for the commencement of benefits and remand this case for his reconsideration of that issue. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). On remand, the administrative law judge should address evidence indicating claimant was not totally disabled after the time he filed his claim. If the administrative law judge credits such evidence, benefits may not commence prior to that point in time. *See Lykins*, 12 BLR at 1-182-83.

[19] Based on his review of claimant's December 2, 2014 and November 17, 2015 pulmonary function studies and blood gas studies, Dr. Rosenberg initially concluded claimant was not totally disabled. Director's Exhibit 23. In a later medical report and deposition, Dr. Rosenberg noted that because more recent pulmonary function studies administered on June 17, 2017 and January 24, 2018 were qualifying, claimant's pulmonary condition had worsened to the point of total disability. Employer's Exhibits 6 at 8; 10 at 3. Review of the record also reflects Dr. Jarboe's opinion that when he evaluated claimant in April 2018, claimant's pulmonary function study showed a severe restrictive defect and claimant was totally disabled. Employer's Exhibit 5 at 6, 11-12. Dr. Jarboe noted further that claimant's pulmonary function had declined significantly since he was first evaluated in December 2014. Employer's Exhibits 5 at 11; 7 at 42.

[20] The administrative law judge incorrectly found the June 17, 2017 pulmonary function study non-qualifying. Decision and Order at 19. In fact, it is qualifying. Claimant's Exhibit 1; 20 C.F.R. §718.204(b)(2)(i); *see also* Employer's Brief at 29 (arguing for June 17, 2017 as the date for the commencement of benefits).

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge