U.S. Department of Labor

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

BRB No. 19-0164 BLA

CHARLES P. MOORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CAPITAL COAL CORPORATION	)	DATE ISSUED: 02/28/2020
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Carrie Bland, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Sarah Y. M. Himmel (Two Rivers Law Group PC), Christiansburg, Virginia, for employer.

Michelle S. Gerdano (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 appeals the Decision and Order Awarding Benefits (2014-BLA-05481) of Administrative Law Judge Carrie Bland 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 miner's subsequent claim filed on May 21, 2013.[1]

The administrative law judge credited claimant with 24.06 years of underground coal mine employment and found claimant established a totally disabling respiratory impairment. She therefore found claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] and established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(c).[3] The

[1] Claimant filed his initial claim on September 9, 2005, which the district director denied in August 2006 because claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment. Director's Exhibit 1. Claimant took no further action until filing the present subsequent claim.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar 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] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he did not establish the existence of pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing he has pneumoconiosis. *See* 20 C.F.R. §725.309(c). Because the administrative law judge found the Section 411(c)(4) presumption invoked and thus claimant is presumed to suffer from pneumoconiosis, she properly concluded claimant established a change in an applicable condition of entitlement. *E. Associated Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-14 (4th Cir. 2015) (holding the

administrative law judge further determined employer did not rebut the presumption and awarded benefits.

On appeal, employer contends the administrative law judge lacked the authority to decide the case because she was not appointed consistent with the Appointments Clause of the Constitution, Art. II §2, cl. 2. Employer also challenges the administrative law judge's determination claimant established total respiratory disability, thereby invoking the presumption of total disability due to pneumoconiosis at Section 411(c)(4). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, arguing that because employer "expressly declined the opportunity" to request a remedy when the administrative law judge inquired previously, it waived its Appointments Clause challenge. Director Response Letter at 2.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order Awarding Benefits must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Appointments Clause Challenge

Citing *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018), employer contends the Secretary of Labor's ratification of the administrative law judge's appointment is not in accordance with the Appointments Clause of the Constitution, art. II §2, cl. 2,[5] because

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Section 411(c)(4) presumption can be used to establish an element of entitlement for purposes of demonstrating a change in an applicable condition of entitlement under 20 C.F.R. §725.309); Decision and Order at 26.

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

[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

there was no prior, proper appointment to ratify. We hold that employer waived this issue and cannot raise it on appeal.

The administrative law judge held a telephonic formal hearing on February 22, 2017. On December 21, 2017, the Secretary of Labor ratified the administrative law judge's prior appointment. On April 4, 2018, employer filed a Motion to Hold Decision in This Claim in Abeyance and Notice of Preservation of Issue (Abeyance Motion), raising the Appointments Clause issue and requesting this case be held in abeyance pending a ruling by the United States Supreme Court in *Lucia*. In a Notice and Order dated September 20, 2018, the administrative law judge acknowledged that the Supreme Court's decision in *Lucia* was issued on June 21, 2018, and stated that since she had not yet issued a decision in this case, employer's abeyance request was in effect granted. Therefore, she ordered employer to file a motion indicating what relief, if any, it requested in view of *Lucia*. Notice and Order at 1-2.

Employer responded by letter dated October 11, 2018, stating: "Please be advised that the Employer and Carrier do not wish to seek reassignment of this matter to a different Administrative Law Judge. We respectfully request that you retain assignment of this claim and adjudicate the pending matter to resolution." Employer's October 11, 2018 Letter at 1. Consequently, the administrative law judge issued her Decision and Order Awarding Benefits in this case on November 20, 2018.

Appointments Clause challenges are subject to ordinary rules of waiver and forfeiture. *See, e.g., Island Creek Coal Co. v. Bryan*, 937 F.3d 738 (6th Cir. 2019); *Energy West Mining Co. v. Lyle,* 929 F.3d 1202 (10th Cir. 2019). Employer expressly declined the opportunity to request any remedy pursuant to *Lucia* by stating it did not wish the case to be reassigned, and that the administrative law judge should "retain assignment" and "adjudicate the pending matter to resolution." Employer's October 11, 2018 Letter at 1. Therefore, employer waived the right to challenge the administrative law judge's appointment and the Secretary's ratification of that appointment, and has offered no reason why the Board should excuse its waiver. *In re DBC*, 545 F.3d 1373, 1380 (Fed. Cir. 2008) (declining to excuse waived Appointments Clause challenge to discourage "sandbagging"); *Powell v. Service Employees Int'l, Inc*., 53 BRBS 13 (2019); *Kiyuna v. Matson Terminals, Inc*., 53 BRBS 9 (2019). We therefore reject employer's Appointments Clause contention.

> 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.

Invocation of the Section 411(c)(4) Presumption – Total Disability

To invoke the Section 411(c)(4) presumption, claimant must establish he has a totally disabling respiratory or pulmonary impairment.[6] 20 C.F.R. §718.204(b)(2). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable and gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function or arterial blood gas studies,[7] evidence of cor pulmonale with right-sided congestive heart failure, or medical opinion evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh the relevant evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

In this case, the administrative law judge found claimant established total disability through medical opinions and the weight of the evidence as a whole.[8] The administrative law judge determined the opinions of Drs. Leke-Tambo and Al-Jaroushi[9] diagnosing a

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[6] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established 24.06 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9.

[7] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] Because the two new pulmonary function studies of record are non-qualifying, the administrative law judge found these tests do not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 15. Considering the new arterial blood gas study evidence, she found two studies are qualifying and two studies are non-qualifying, thereby rendering the blood gas study evidence in equipoise. She concluded "[c]laimant has not established total disability by a preponderance of the evidence at Section 718.204(b)(2)(ii)." Decision and Order at 16. The administrative law judge further found the record contains no evidence of cor pulmonale with right-sided congestive heart failure, and as such, total respiratory disability was not established under 20 C.F.R. §718.204(b)(2)(iii). *Id*.

[9] Dr. Leke-Tambo stated: Claimant "is totally disabled from a pulmonary capacity standpoint and is not able to perform his last coal mine job of 1 year duration. This

totally disabling respiratory impairment are documented, better reasoned, and more persuasive than the contrary opinions of Drs. Fino and Rosenberg. Decision and Order at 22-25. She found Dr. Leke-Tambo's opinion "very persuasive" because he relied, in part, on factors "consistent with the reports of the other reviewing physicians" and claimant's testimony.[10] Decision and Order at 24. Similarly, the administrative law judge found Dr. Al-Jaroushi's opinion "particularly persuasive" as predicated on: claimant's status as a nonsmoker; symptoms of dyspnea with moderate to heavy exertion; and blood gas studies demonstrating severe hypoxemia.[11] Claimant's Exhibit 2. She found Dr. Al-Jaroushi's explanation "consistent with the reports of the other reviewing physicians" and claimant's

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assessment is based on severe hypoxemia as seen on the arterial blood gases with a paO2 of 55." Director's Exhibit 12. In the section of his reported labeled "Impairment and Disability," Dr. Al-Jaroushi opined:

> [Claimant] is totally disabled from his pulmonary impairment to perform the usual tasks he used to perform when he was last employed as a miner for a total of 1 year. I base my diagnosis on history of exposure for 28 years of coal dust and rock dust. Patient never smoked in his life. He does have symptoms consistent with chronic bronchitis including chronic productive cough, wheezing and dyspnea on exertion. [Claimant] gets dyspneic with moderate to heavy exertion. [The blood gas study] showed severe hypoxemia, the lowest one on the repeat [blood gas study] was 49 at rest. [Chest x-ray] has a large opacity type A consistent with progressive massive fibrosis.

Claimant's Exhibit 2.

[10] Claimant testified at the hearing as to the exertional requirements of his coal mine work and to his increasing shortness of breath. Hearing Tr. at 12-14, 18-23.

[11] The administrative law judge noted in her summary of the blood gas study evidence that the test Dr. Al-Jaroushi administered on August 4, 2014, yielded qualifying values both at rest and during exercise. Decision and Order at 16; Claimant's Exhibit 2. However, in her discussion of Dr. Al-Jaroushi's opinion under 20 C.F.R. §718.204(b)(2)(iv), she "credited" Dr. Al-Jaroushi's finding that claimant's arterial blood gas study "showed 'severe hypoxemia' which albeit non-qualifying, may contribute to the [c]laimant's dyspnea." Decision and Order at 24. This error is harmless, however, because the arterial blood gas study upon which Dr. Al-Jaroushi relied is qualifying and supports the administrative law judge's ultimate determination of total disability. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

testimony. Decision and Order at 24; Claimant's Exhibit 2. She discredited the opinions of Drs. Fino and Rosenberg because they were unaware of the exertional requirements of claimant's usual coal mine work and did not explain why his symptoms did not render him totally disabled. Decision and Order at 24-25; Employer's Exhibits 8, 9.

Employer asserts the administrative law judge erred in crediting the opinions of Drs. Leke-Tambo and Al-Jaroushi because their diagnoses of a totally disabling pulmonary impairment are based on blood gas studies she found insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(ii). Employer also contends the administrative law judge did not accurately characterize their medical opinions. Employer's Brief at 9-10. Employer's argument do not have merit.

Contrary to employer's allegation, the administrative law judge's finding that the blood gas studies failed to establish disability did not require her to reject the opinions of Drs. Leke-Tambo and Al-Jaroushi, as they relied on valid, qualifying blood gas studies. *See Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216, 1-226 (2002) (en banc); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); *see also Jeffries v. Director, OWCP*, 6 BLR 1-1013, 1-1014 (1984) (arterial blood gas study may be found unreliable based only on a qualified physician's opinion). The regulation at 20 C.F.R. §718.204(b)(2)(iv) provides:

> Where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section, . . . total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment as described in paragraph (b)(1) of this section.

20 C.F.R. §718.204(b)(2)(iv). Thus, the administrative law judge did not err in finding the diagnoses of total disability Drs. Leke-Tambo and Al-Jaroushi made were documented by the qualifying blood gas studies they obtained. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); Decision and Order at 24.

We also reject employer's allegation that remand is required because the administrative law judge "attributed more findings to those physicians than either physician actually made" on the issue of disability. Employer's Brief at 10. Although the administrative law judge cited factors unrelated to total disability in crediting the opinions of Drs. Leke-Tambo and Al-Jaroushi, her determinations are supported by the qualifying

blood gas studies the physicians relied on to make their diagnoses.[12] Decision and Order at 22-23; Director's Exhibit 12; Claimant's Exhibit 2.

Whether a medical opinion is sufficiently reasoned is a question for the trier-of-fact. *See Lane v. Union Carbide Corp*., 105 F.3d 166 (4th Cir. 1977). Substantial evidence supports the administrative law judge's determination that Drs. Leke-Tambo and Al-Jaroushi provided documented and well-reasoned opinions. *Id*.; Decision and Order at 24-25, 32. Thus, we affirm her conclusion that "the preponderance of the medical opinion evidence supports a finding of total disability" at Section 718.204(b)(2)(iv). Decision and Order at 25.

Because employer raises no other specific allegation of error, we affirm the administrative law judge's finding claimant established total respiratory disability under 20 C.F.R. §718.204(b)(2)(iv). We also affirm, as supported by substantial evidence, the administrative law judge's finding that the weight of the evidence established total pulmonary disability. *See Rafferty*, 9 BLR at 1-232; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 25. Consequently, we affirm the administrative law judge's finding claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Because the administrative law judge found employer did not rebut this presumption, a determination employer has not adequately challenged on appeal,[13] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 26-31, we affirm the award of benefits in this subsequent claim.

[12] Moreover, there is no merit in employer's contention Dr. Al-Jaroushi relied on his diagnosis of progressive massive fibrosis to conclude claimant has a totally disabling pulmonary impairment. Employer's Brief at 10. Dr. Al-Jaroushi noted the presence of a large opacity on claimant's chest x-ray after he cited, among other factors, claimant's qualifying blood gas study showing severe hypoxemia in support of his diagnosis of total pulmonary disability. Director's Exhibit 12. Under these circumstances, the administrative law judge permissibly determined Dr. Al-Jaroushi's opinion is documented by the qualifying blood gas study he obtained. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-34 (4th Cir. 1998); Decision and Order at 23.

[13] The Board's procedural rules require that the brief accompanying a petition for review 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." 20 C.F.R. §802.211(b). In this case, employer states only, "[e]ven if the presumption is involved, the Petitioners carried the

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

burden of establishing that no part of [claimant's] total disability was due to pneumoconiosis." Employer's Brief at 12.