U.S. Department of Labor

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

BRB No. 19-0176 BLA

ROBERT E. TACKETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITE COUNTY COAL	)	DATE ISSUED: 02/27/2020
	)	
and	)	
	)	
Self-insured through ALLIANCE COAL COMPANY	)	
	)	
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 on Remand of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Patrick C. Thomas and Brian P. Williams (Kahn, Dees, Donovan & Kahn, LLP), Evansville, Indiana, for claimant.

Tighe A. Estes and Kyle Johnson (Fogle Keller Walker, PLLC), Lexington, Kentucky, 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, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the November 30, 2018 Decision and Order Awarding Benefits on Remand (2013-BLA-05382) of Administrative Law Judge John P. Sellers, III 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 claim filed on February 24, 2012.

When first before the Office of Administrative Law Judges (OALJ), Administrative Law Judge Alice M. Craft (Judge Craft) found claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis because he has 16.49 years of underground coal mine employment and a total respiratory or pulmonary disability. 30 U.S.C. §921(c)(4) (2012).[1] She further found employer did not rebut the presumption and awarded benefits.

Employer appealed to the Board, which agreed Judge Craft erred in finding claimant totally disabled because she failed to consider whether one of the qualifying pulmonary function studies met the quality standards, erred in finding another study qualifying when the results were non-qualifying, and failed to determine whether two additional qualifying studies in claimant's treatment records are sufficiently reliable to establish total disability. Therefore, the Board vacated her finding of total disability and remanded the case for reconsideration of the pulmonary function studies. The Board also vacated her finding that claimant invoked the Section 411(c)(4) presumption, but in the interest of judicial economy affirmed her determination that employer did not rebut the presumption.[2] *Tackett v. White Coal Co.*, BRB No. 16-0584 BLA (Aug. 21, 2017) (unpub.).

[1] Section 411(c)(4) of the Black Lung Benefits 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 surface coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[2] The Board affirmed, as unchallenged on appeal, Judge Craft's finding that claimant established 16.49 years of underground coal mine employment. *Tackett v. White*

On remand, the case was reassigned to Administrative Law Judge John P. Sellers, III (the administrative law judge) on December 7, 2017, due to Judge Craft's retirement. Eight months later, employer filed a motion alleging the administrative law judge was not appointed in accordance with the Appointments Clause of the Constitution, Art. II § 2, cl. 2,[3] and asserting entitlement to a new hearing before a different administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[4] The administrative law judge found "employer did not make a timely *Lucia*-related challenge, and thus waived any objection based on the Appointments Clause." Decision and Order on Remand at 4. He further determined he had authority to decide the case because, "although the case was reassigned to me on December 7, 2017, other than to notify the parties of the reassignment, I took no significant action in this matter until after [the Secretary] ratified my appointment on December 21, 2017." *Id.*

On the merits of entitlement, the administrative law judge determined claimant established total disability and invoked the Section 411(c)(4) presumption. Based on the Board's affirmance of Judge Craft's finding that employer failed to rebut the presumption,

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Coal Co., BRB No. 16-0584 BLA, slip op. at 2 (Aug. 21, 2017) (unpub.); Decision and Order at 8.

[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] In *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), the Supreme Court held that Securities and Exchange Commission administrative law judges were not appointed in accordance with the Appointments Clause of the Constitution. *Lucia*, 138 S.Ct. at 2055. The Court further held that because the petitioner timely raised his Appointments Clause challenge, he was entitled to a new hearing before a different and properly appointed administrative law judge. *Id.*

he awarded benefits. *See Tackett*, BRB No. 16-0584 BLA, slip. op. at 6, 12; Decision and Order on Remand at 12.

In the current appeal, employer contends it timely raised its Appointments Clause challenge and is entitled to a new hearing because both Judge Craft and Judge Sellers lacked the authority to adjudicate the case. Employer also argues Judge Sellers erred in weighing the pulmonary function studies and determining that benefits commence the first day of the month in which claimant filed his claim. Claimant responds, urging affirmance of the decision. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, asserting employer forfeited its Appointments Clause argument by failing to timely raise it before Judge Craft or when the case was first before the Board. She also urges the Board to reject employer's argument that the quality standards apply to the pulmonary function studies included in Claimant's treatment records.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order Awarding Benefits on Remand must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 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

We agree with the Director that employer forfeited its Appointments Clause argument by failing to raise the issue when the case was previously before the Board. *See Lucia*, 138 S. Ct. at 2055 (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.") (internal citation omitted). Employer has not identified exceptional circumstances that would warrant excusing its forfeiture. *See Freytag v. Comm'r*, 501 U.S. 868, 879 (1991) ("rare" case where discretion was exercised to address untimely Appointments Clause challenge).

Employer's reliance on *Wilkerson* and *Turner Bros., Inc. v. Conley*, 757 F. App'x 697 (10th Cir. 2018) (unpub.) to establish timeliness is misplaced. In *Wilkerson*, the United States Court of Appeals for the Sixth Circuit held an employer forfeited its Appointments Clause argument by failing to raise the issue in its opening brief before that court. *See*

[5] The record reflects that claimant's last coal mine employment occurred in Illinois. Director's Exhibit 3 at 1; Hearing Transcript at 6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

Wilkerson, 910 F.3d at 256. In *Turner Bros.*, the United States Court of Appeals for the Tenth Circuit held an employer forfeited its Appointments Clause argument by failing to raise the issue before the Board. *See Turner Bros.*, 757 F.App'x at 700. Neither case addresses what constitutes a timely argument before the Board or otherwise suggests that the Board must entertain an Appointments Clause argument regardless of when a party raises it. Rather, both cases confirm that Appointments Clause arguments "are subject to ordinary principles of waiver and forfeiture." *See Wilkerson*, 910 F.3d at 256; *Turner Bros*., 57 F.App'x at 700.

More recently, the Sixth Circuit held in *Island Creek Coal Co. v. Bryan*, 937 F.3d 738 (6th Cir. 2019), that an employer forfeited its Appointments Clause challenge by failing to raise the issue in its initial brief before the Board. The court specifically stated that a party "[does] not properly exhaust these claims" when it fails to "follow the [Board's] claims-processing rules governing how to raise them." *Bryan*, 937 F.3d at 754. We thus reject employer's assertion that its Appointments Clause argument, raised for the first time several months after the Board decided the initial appeal in this claim, was timely.[6]

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability with qualifying pulmonary function studies, qualifying arterial blood gas studies,[7] evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant 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).

[6] We also see no error in the administrative law judge's finding that his issuance of scheduling orders prior to the Secretary of Labor's ratification of his appointment "would not be expected to affect [his] ability 'to consider the matter as though he had not adjudicated it before.'" *Noble v. B & W Res., Inc.*, BLR , BRB No. 18-0533 BLA, slip op. at 4 (Jan. 15, 2020) (*quoting Lucia*, 138 S.Ct. at 2055).

[7] A "qualifying" pulmonary function study or arterial 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. 20 C.F.R. §718.204(b)(2)(i), (ii).

The administrative law judge reconsidered the pulmonary function studies of record as the Board instructed. He determined the January 13, 2012 study was qualifying before bronchodilation but not after; the pre-bronchodilation March 26, 2012 study was non-qualifying; the August 23, 2012 study was non-qualifying before and after bronchodilation; the April 2, 2013 study was non-qualifying before bronchodilation but qualifying after; the May 9, 2013 study was non-qualifying before and after bronchodilation; and the January 21, 2015 study was qualifying before bronchodilation but not after. Decision and Order on Remand at 6-8; Director's Exhibit 10; Claimant's Exhibits 4, 5, 8 (at 42 and 76); Employer's Exhibit 4.

Because the January 13, 2012, April 2, 2013, and January 21, 2015 studies were conducted as part of claimant's treatment and not in anticipation of litigation, the administrative law judge found they are not subject to the quality standards set forth in 20 C.F.R. §718.103.[8] Decision and Order on Remand at 6-8. He further found these studies conducted during claimant's treatment to be reliable indicators of claimant's pulmonary condition and the January 21, 2015 pre-bronchodilator values "support a finding of total disability." *Id*. at 7-8. He gave this study "paramount weight given the fact that it is over a year-and-half more recent than the next most recent study," and is more reflective of claimant's current condition. *Id*. at 8. He thus concluded, "the pulmonary function studies, considered separately, support a finding of total disability." *Id*. at 10. He then determined the blood gas studies and medical opinions did not constitute contrary probative evidence and concluded that claimant established total disability by the pulmonary function study evidence. *Id*. at 12.

Employer challenges the administrative law judge's determination that under 20 C.F.R. §718.101(b)[9] the quality standards do not apply to pulmonary function studies

[8] The administrative law judge's finding that the January 13, 2012, April 2, 2013, and January 21, 2015 pulmonary function studies were conducted as part of claimant's medical treatment and not in conjunction with litigation is affirmed as unchallenged on appeal. *Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 6; Claimant's Exhibits 5, 8 (at 42 and 76).

[9] The regulation at 20 C.F.R §718.101(b) provides:

> The standards for the administration of clinical tests and examinations contained in this subpart shall apply to all evidence developed by any party after January 19, 2001 in connection with a claim governed by this part. . . . Any clinical test or examination subject to these standards shall be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. Unless otherwise provided, any

conducted as part of claimant's treatment. Employer's Brief at 7-9. The Board considered and rejected this argument in the prior appeal, and for the same reasons we do so again. *See Tackett*, BRB No. 16-0584 BLA, slip. op. at 6, *citing J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010) (quality standards "apply only to evidence developed in connection with a claim for benefits" and not to testing included as part of a miner's treatment); *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990) (the Board's previous disposition of an allegation constitutes the law of the case and will not be disturbed unless it is established the Board's decision was clearly erroneous or a valid exception to the law of the case doctrine applies); 65 Fed. Reg. 79,920, 79,927 (Dec. 20, 2000) (the quality standards do not apply to treatment records as "[20 C.F.R.] §718.101 is clear that it applies quality standards only to evidence developed 'in connection with a claim' for black lung benefits").

Employer's assertion that "the promulgation of [20 C.F.R. §]718.101 is arbitrary, capricious, contrary to law and creates a loop hole" is without merit. Employer's Brief at 9. To the extent employer intends to challenge the validity of this regulation, we agree with the Director that the issue is inadequately raised. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Jones Bros. v. Secretary of Labor*, 898 F.3d 669, 677 (to "acknowledge an argument" in a petition for review "is not to make an argument" and "a party forfeits any allegations that lack developed argument.") (*citing United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009); 20 C.F.R. §802.211(b) (threshold requirements for alleging error with specificity); Director's Brief at 9-10. In addition, contrary to employer's argument, the regulation at 20 C.F.R. §718.101(b) does not allow for the consideration of treatment record evidence that has no probative value. Rather, the administrative law judge must still be persuaded that an objective study appearing in a treatment record is "reliable" for "it to form a basis for a finding of fact on an entitlement issue." 65 Fed. Reg. at 79,928. As the Board instructed, the administrative law judge rendered such a finding in this case. *Tackett*, BRB No. 16-0584 BLA, slip op at 6 n.11; Decision and Order on Remand at 7.

Employer asserts the administrative law judge erred in finding the January 21, 2015 pulmonary function study to be reliable based on comments in the study's report which employer maintains apply only to the reliability of the non-qualifying post-bronchodilator values. Employer's Brief at 9-10. We disagree. The report, entitled "Pulmonary Function Analysis," has a space for recording "Pre Test Comments," which is blank, and a space for

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> evidence which is not in substantial compliance with the applicable standard is insufficient to establish the fact for which it is proffered.

20 C.F.R. §718.101(b).

"Post Test Comments," where text appears indicating: "Good patient effort, comp[re]hension & cooperation. Provent[]al used for bronchodilation. Pt tolerated testing well. No complaints voiced. No problems[.] The result of the test meet the ATS [American Thoracic Society] standards for acceptability and repeatability." Claimant's Exhibit 5. The next section of the report sets out "Pre-Bronch" and "Post-Bronch" spirometry results side-by-side, followed by "Pre-Bronch" lung volumes and "Pre-Bronch" diffusion capacities. *Id*. Based on the layout of the report, the administrative law judge permissibly found that "Post Test Comments" referred to observations made after the administration of claimant's pulmonary function testing had ended, rather than only to the post-bronchodilator testing. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order on Remand at 7; Claimant's Exhibit 5.

We also reject employer's remaining assertion that the pulmonary function studies in the treatment records, including the January 21, 2015 study, are unreliable in light of the fact that the other studies in the record dated March 26, 2012, August 23, 2012, and May 9, 2013 show significantly higher values. Director's Exhibit 10; Employer's Exhibit 4; Claimant's Exhibits 4, 5, 8; Employer's Brief at 10-11. The administrative law judge permissibly gave "paramount weight" to the qualifying pre-bronchodilator study dated January 21, 2015, as it was the most recent by at least one and a half years and best-reflected claimant's respiratory condition at the time of the hearing. Decision and Order on Remand at 8, 12; 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) ("[t]he use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis."); *see Freeman v. United Coal Co. v. Benefits Review Board* [*Wolfe*], 912 F.2d 164, 171, 14 BLR 2-53, 2-62 (7th Cir. 1990). We therefore affirm the administrative law judge's findings that claimant established total disability based on the pulmonary function study evidence and on a weighing of all relevant evidence together.[10] *See Shedlock*, 9 BLR at 1-198; Decision and Order on Remand at 9-12.

[10] The administrative law judge found the blood gas studies of record are non-qualifying. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order on Remand at 10. He further determined that because blood gas studies measure a different type of impairment, non-qualifying blood gas study results are not contrary to the qualifying pulmonary function study evidence. Decision and Order on Remand at 10. He also determined the medical opinions do not constitute contrary probative evidence as neither the physicians who diagnosed total disability, nor those who excluded it, had reviewed the entire set of pulmonary function studies in the record. 20 C.F.R. §718.204(b)(2)(iv); Decision and

In light of the Board's prior affirmance of the finding of at least fifteen years of qualifying coal mine employment, we further affirm the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(i), (iii); Decision and Order on Remand at 12. As the Board previously affirmed Judge Craft's finding that employer failed to rebut the presumption, the administrative law judge properly reinstated the award of benefits. Decision and Order on Remand at 12.

Date of Commencement of Benefits

Once entitlement to benefits is established, the date for the commencement of those benefits is determined by 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, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable, benefits commence with the month in which the claim was filed, unless credible evidence establishes the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

The administrative law judge determined benefits are payable beginning February 2012, the first day of the month in which the claim was filed, stating: "Here, the record does not establish when the [c]laimant first became disabled due to pneumoconiosis. No physician of record expressed an opinion on this matter, and the objective studies do not reflect a precipitous decline from which one could infer a date upon which he first became disabled." Decision and Order on Remand at 12. Employer argues the pulmonary function study evidence establishes claimant became disabled at some point between the non-qualifying study performed on May 9, 2013 and the qualifying pre-bronchodilator study performed on January 21, 2015. Employer's Brief at 12-13; Claimant's Exhibits 4, 5. Contrary to employer's assertion, non-qualifying pulmonary function studies alone do not establish the absence of disability. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"). Thus, the January 21, 2015 pulmonary function test merely established that the miner became

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Order on Remand at 10-11. We affirm the administrative law judge's findings as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

totally disabled on some prior date. S*ee Merashoff v. Consolidation Coal Co*., 8 BLR 1-105, 1-108-09 (1985); *Tobrey v. Director, OWCP*, 7 BLR 1-407, 1-409 (1984).

As the administrative law judge did not credit any evidence that claimant was not totally disabled due to pneumoconiosis at any time subsequent to the filing date of his claim, we affirm his conclusion the medical evidence does not reflect the date upon which claimant became totally disabled due to pneumoconiosis. He therefore rationally found that because the record does not establish when claimant became totally disabled due to pneumoconiosis, claimant was entitled to benefits from February 2012, the month in which he filed his claim. 20 C.F.R. §725.503(b); Decision and Order on Remand at 12. Therefore, we affirm the date of commencement of benefits as February 2012. 20 C.F.R. §725.503(b); *see Owens*, 14 BLR at 1-49.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge