U.S. Department of Labor

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

BRB No. 19-0008 BLA

FREDERICK B. BATEMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLUFF SPUR COAL CORPORATION	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH/CHARTIS	)	DATE ISSUED: 01/13/2020
	)	
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.

R. Luke Widener (Penn, Stuart & Eskridge), Bristol, Virginia, 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: BOGGS, Chief Administrative Appeals Judge, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05994) of Administrative Law Judge Dana Rosen rendered on a claim filed on May 28, 2014,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that claimant established twenty-one and three-quarters years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. Thus, she found claimant invoked the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). She further determined 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 was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Alternatively, employer asserts the administrative law judge erred in finding claimant invoked the Section 411(c)(4) presumption because she did not explain how she calculated the length of claimant's coal mine employment and did not properly weigh the evidence on total disability. Employer also asserts the administrative law judge erred in finding the presumption unrebutted. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that the Board should reject employer's arguments concerning the Appointments Clause.

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

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[1] Claimant filed a claim in 2010, but subsequently withdrew it. *See* Decision and Order at 4 n.9. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he 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); 20 C.F.R. §718.305.

substantial evidence, and in accordance with applicable law.[3] 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 Challenge

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[4] of the Constitution. Employer's Brief at 5-7. It argues the administrative law judge in this case was similarly appointed improperly.

Employer acknowledges that the Secretary of Labor (the Secretary) ratified Judge Rosen's prior appointment and all Department of Labor (DOL) administrative law judges on December 21, 2017.[5] It maintains, however, that the Secretary's ratification was

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[3] Because claimant's last coal mine employment occurred in Virginia, the Board will apply the law 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); Director's Exhibit 3; Hearing Transcript at 6.

[4] 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.

[5] 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

insufficient to "cure the defect" in her initial appointment. Employer's Brief in Support of Petition for Review 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 5-7. 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 5, *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 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,

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> 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.

Administrative Law Judge's Exhibit 3.

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.

Thus, we hold that the Secretary's action constituted a proper ratification of the appointment of the administrative law judge.[6] *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 National Labor Relations Board 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.

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 Notice of Hearing simply reiterates the statutory and regulatory requirements governing the hearing

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[6] 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).

procedures.[7] 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.

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.

Invocation of the Section 411(c)(4) Presumption

Length of Coal Mine Employment

Claimant bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). The Board will uphold an administrative law judge's determination if based on a reasonable method and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The administrative law judge found that claimant worked for employer for five and one-quarter years,[8] from February 8, 2002 through October 21, 2007, and that his last day of work was April 28, 2007. Decision and Order at 9; Director's Exhibit 6. She noted the only evidence relevant to claimant's coal mine employment prior to 2002 is the Social Security Administration earnings records and his work history form. Decision and Order at 9; Director's Exhibit 3, 4. She summarily concluded that the documentary evidence established sixteen and one-half years of coal mine employment between 1971 and 2001.

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[7] The Notice of Hearing informed the parties of the date for a telephonic hearing, set time limits for completion of discovery and submission of evidence, provided general advice to parties proceeding without counsel, and addressed other routine hearing matters. *See* Notice of Telephonic Hearing and Scheduling Order dated October 10, 2017.

[8] Employer stipulated to 5.26 years of coal mine employment. Hearing Transcript at 6.

Director's Exhibit 9. Thus, she found that claimant established a total of twenty-one and one-half years of underground coal mine employment.[9]

Employer argues that the administrative law judge's findings on the length of coal mine employment do not satisfy the Administrative Procedure Act (APA).[10] Employer's Brief at 9. We agree, in part. Substantial evidence supports the administrative law judge's determination that claimant worked for employer for five and one-quarter years. The administrative law judge did not explain, however, how she calculated the length of claimant's coal mine employment as sixteen and one-half years between 1971 and 2001.[11] *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Employer's Brief at 9. Because we are unable to discern the basis for the administrative law judge's finding, we are unable to determine if she applied a reasonable method of calculation. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016) (stating that the court could not "guess at what the [administrative law judge] meant to say, but didn't't"); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (Board lacks the authority to render factual findings to fill in gaps in the administrative law judge's opinion). Thus, we must vacate her determination that claimant established a total of twenty-one and three-quarter years of coal mine employment, and at least fifteen years of qualifying underground coal mine employment. *See Wojtowicz*, 12 BLR at 1-165; Decision and Order at 9.

Total Disability

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable

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[9] Claimant testified that all of his coal mine employment was underground. Hearing Transcript at 18.

[10] The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issue of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[11] Claimant's Social Security Administration earnings records show earnings with Teays Mining in 1996. Director's Exhibit 3. Employer correctly notes it is unclear whether the administrative law judge counted these earnings as coal mine employment. Employer's Brief at 10. Employer maintains they do not reflect coal mine employment since claimant did not list Teays Mining on his "otherwise exhaustive list" of coal mine employers on his work history form. *Id.*

gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and 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. *Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988). Here, the administrative law judge found claimant established total disability based on the pulmonary function studies and medical opinions, and when weighing the evidence as a whole.[12] Decision and Order at 24-28.

Employer argues that the administrative law judge erred in weighing the pulmonary function study evidence. Employer's Brief at 12-15. We agree. The administrative law judge considered five pulmonary function studies. Decision and Order at 11, 24-26. The July 9, 2014 pulmonary function study had qualifying values,[13] before and after a bronchodilator was administered. Director's Exhibit 11. The May 18, 2015 pulmonary function study had non-qualifying pre-bronchodilator values but qualifying post-bronchodilator values. Director's Exhibit 12. The May 24, 2016 and August 1, 2017 pulmonary function studies had qualifying values and no bronchodilators were administered. Claimant's Exhibits 5, 6. The December 13, 2017 pulmonary function study had non-qualifying values before and after the administration of a bronchodilator. Employer's Exhibit 9.

The administrative law judge gave little weight to the May 24, 2016 pulmonary function study because she credited Dr. Castle's opinion that it is invalid.[14] Decision and

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[12] The administrative law judge found that claimant could not establish total disability based on the blood gas studies, as they were non-qualifying, and she found no evidence to establish that claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii). Decision and Order at 13, 26.

[13] 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).

[14] The administrative law judge's use of the table height of 64.6 inches is affirmed as unchallenged. *See Toler v. E. Associated Coal Corp.,* 43 F.3d 109, 114 (4th Cir. 1995); *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11 n.16.

Order at 25. She found the remaining studies valid.[15] *Id.* at 25-26. Noting that the December 13, 2017 pulmonary function study contained "remarkably different [results] than the results obtained on the many previous tests," she found the weight of the pulmonary function study evidence supported a finding of total disability "based on the qualifying results of [the] July 2014, May 2015 and August 2017" studies. *Id.* at 26.

Employer correctly asserts the administrative law judge did not discuss the weight she gave a non-qualifying April 8, 2014 pulmonary function study contained in claimant's treatment records. *See McCune*, 6 BLR at 1-998 (fact-finder's failure to discuss relevant evidence requires remand); Employer's Exhibit 1; Employer's Evidence Summary Form at 9; Employer's Closing Argument Brief at 6-7 (unpaginated). Moreover, although the administrative law judge characterized the May 18, 2015 study as "qualifying," she did not explain how she resolved the conflict between the non-qualifying pre-bronchodilator values and the qualifying post-bronchodilator values.[16] Director's Exhibit 12.

Because the administrative law judge did not consider all the relevant evidence and adequately explain her findings, her analysis of the pulmonary function studies does not satisfy the APA. *See Wojtowicz*, 12 BLR at 1-165. We therefore vacate her determination that a preponderance of the pulmonary function studies support a finding that claimant is totally disabled. Decision and Order at 26.

Additionally, we vacate the administrative law judge's finding that claimant established total disability based on the medical opinions, as her credibility determinations

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[15] Employer misstates that the administrative law judge found the August 1, 2017 pulmonary function study invalid. Employer's Brief at 13. Rather, she specifically found the study valid after rejecting Dr. Fino's criticisms of it. Decision and Order at 25.

[16] Employer asserts the qualifying post-bronchodilator values are not reliable. Employer's Brief at 14, *citing* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980). Thus, employer contends that "[o]nce all studies are properly considered, instead of there being three qualifying studies against one non-qualifying study, there are in fact three non-qualifying studies and only two qualifying studies. Employer's Brief at 14. Employer also contends that the December 13, 2017 study is not "remarkably different" from the April 8, 2014 study, which the administrative law judge failed to consider, or the non-qualifying pre-bronchodilator results of the May 18, 2015 study. *Id.*, *quoting* Decision and Order at 26. The administrative law judge may address these arguments on remand.

were influenced by her weighing of the pulmonary function studies.[17] 20 C.F.R. §718.204(b)(2)(iv). Consequently, we vacate the administrative law judge's findings that claimant established a totally disabling respiratory impairment and invoked the Section 411(c)(4) presumption. Decision and Order at 24, 28. We therefore vacate the award of benefits and remand this case for further consideration.[18]

On remand, the administrative law judge must determine the length of claimant's coal mine employment based on a reasonable method and explain her findings.[19] *See Muncy*, 25 BLR at 1-27. She must also reweigh the pulmonary function studies and medical opinions and determine whether they support a finding that claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(i), (iv). She must consider all of the relevant evidence and determine whether claimant satisfied his burden to establish a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(b)(2); *Defore*, 12 BLR at 1-28-29. If claimant establishes at least fifteen years of qualifying coal mine employment and total disability, he will invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. If the presumption is invoked on remand, the administrative law judge must consider if employer rebutted it.[20] If the presumption is not

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[17] The administrative law judge credited Dr. Ajjarapu's opinion that claimant is totally disabled as supported by the qualifying pulmonary function studies. Decision and Order at 27; Claimant's Exhibits 7, 9. She discredited Dr. Fino's and McSharry's opinions that claimant is not totally disabled because they relied on the December 13, 2017 non-qualifying study. Decision and Order at 27; Director's Exhibit 12; Employer's Exhibit 9.

[18] Because we vacate the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, we need not reach employer's arguments that the administrative law judge erred in finding the presumption unrebutted.

[19] The administrative law judge must determine the beginning and ending dates of all periods of coal mine employment to the extent the evidence permits. 20 C.F.R. §725.101(a)(32)(ii). The length and dates may be established "by any credible evidence." *Id*. If the evidence is insufficient to establish beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, the administrative law judge may use any reasonable method to calculate claimant's employment, including the formula at 20 C.F.R. §725.101(a)(32)(iii).

[20] Employer correctly asserts the administrative law judge did not mention Dr. McSharry's February 15, 2018 supplement report in considering whether employer rebutted the Section 411(c)(4) presumption and that she should address it on remand. Employer's Brief at 21. Additionally, employer contends the administrative law judge

invoked, the administrative law judge must consider claimant's entitlement under 20 C.F.R. Part 718. 20 C.F.R §§718.202(a), 718.203, 718.204(b), (c). In reaching all of her findings on remand, the administrative law judge must consider all of the relevant evidence and explain her rationale consistent with the APA.

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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

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failed to consider that Dr. Ajjarapu relied on incorrect coal mine employment and smoking histories. *Id.* at 22-24. On remand, the administrative law judge must consider the credibility of the medical opinions based on the documentation and rationales underlying their conclusions, taking into consideration her determinations regarding the length of claimant's coal mine employment and his smoking history, if any. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).