U.S. Department of Labor

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

BRB No. 19-0046 BLA

WOODY L. RATLIFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EXCEL MINING, LLC	)	DATE ISSUED: 01/29/2020
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer.

Rita A. Roppolo (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:

Claimant appeals the Decision and Order on Remand Denying Benefits (2013-BLA-05310) of Administrative Law Judge Paul C. Johnson, Jr., 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 and is before the Board for a second time.

In his initial decision, the administrative law judge credited claimant with thirty-three years of underground coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. The administrative law judge therefore determined claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] He further found employer did not rebut the presumption and awarded benefits.

Pursuant to employer's appeal, the Board affirmed as unchallenged the administrative law judge's finding of thirty-three years of underground coal mine employment, but vacated his finding that the medical opinion evidence established total respiratory disability. The Board held the administrative law judge erred in discrediting the opinions of Drs. Broudy and Jarboe that claimant is not totally disabled. Consequently, the Board also vacated his determination that claimant invoked the Section 411(c)(4) presumption. The Board instructed the administrative law judge on remand to consider all of the relevant evidence and determine whether the weight of the evidence established total respiratory disability.[2]

On remand, the administrative law judge found claimant failed to establish totally disability. Thus, the administrative law judge also found claimant could not invoke the Section 411(c)(4) presumption or affirmatively establish entitlement to benefits under 20 C.F.R. Part 718 and denied benefits.

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where the evidence establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] In the interest of judicial economy, the Board affirmed, as unchallenged, the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption. *Ratliff v. Excel Mining, LLC*, BRB No. 17-0050 BLA (Oct. 31, 2017) (unpub.); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

On appeal, claimant argues the administrative law judge lacked the authority to hear and decide the case because he had not been properly appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II §2, cl. 2.[3] Claimant also challenges the administrative law judge's determination that the pulmonary function studies do not establish total disability. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, arguing the administrative law judge had authority to decide the case.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order on Remand Denying Benefits 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board reviews questions of law de novo. *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116 (6th Cir. 1984).

Appointments Clause

Claimant challenges the administrative law judge's authority to hear and decide this case. He notes that pursuant to the United States Supreme Court's holding in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), this claim must be remanded for a new hearing before a properly appointed administrative law judge. *See* Claimant's Brief at 2. Employer and the Director respond, arguing claimant waived his Appointments Clause argument by

[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.

Art. II, § 2, cl. 2.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

failing to timely raise it, and thus, the Board should deny claimant's request for remand. Employer's Response Brief at 5-8 [unpaginated]; Director's Response Brief at 3-7.

The Appointments Clause issue is "non-jurisdictional" and thus subject to the doctrines of waiver and forfeiture. *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.") (citation omitted). *Lucia* was decided on June 21, 2018, well before the administrative law judge issued his September 25, 2018 Decision and Order on Remand Denying Benefits. Had claimant timely raised his Appointments Clause challenge to the administrative law judge, he could have considered the issue and, if appropriate, provided the relief claimant is requesting, i.e., he could have referred the case for assignment to a different, properly appointed administrative law judge to hold a new hearing and issue a decision based on the record developed at that hearing. *Powell v. Service Employees Intnl, Inc.*, __ BRBS __, BRB No. 18-0557, slip op. at 4 (Aug. 8, 2019); *Kiyuna v. Matson Terminal Inc.*, __ BRBS __, BRB No. 19-0103, slip op. at 4-5 (June 25, 2019). Based on these facts, we conclude claimant forfeited his Appointments Clause challenge by not timely raising it. *See Powell*, BRB No. 18-0557 BLA, slip op. at 4; *Kiyuna*, BRB No. 19-0103 BLA, slip op. at 4.

Furthermore, claimant has not identified any basis for excusing its forfeiture. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging). Thus, we hold claimant forfeited his Appointments Clause challenge and deny the relief requested. We will therefore consider claimant's arguments on the merits of the administrative law judge's Decision and Order on Remand Denying Benefits.

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

A claimant is totally disabled if a respiratory or pulmonary impairment, standing alone, prevents him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). Claimant may establish total disability through pulmonary function studies, arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, and medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh the relevant evidence supporting total disability against the 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). Claimant only contests the administrative law judge's determination that the pulmonary function study evidence, standing alone, was insufficient to establish total disability.

The administrative law judge considered the results of five pulmonary function studies. The March 22, 2012, June 19, 2012, and April 25, 2013 studies produced qualifying values before and after administration of bronchodilators. Decision and Order on Remand at 11; Director's Exhibit 9; Employer's Exhibit 1. The August 2, 2012 study produced non-qualifying values before bronchodilators; post-bronchodilator studies were not conducted.[5] Director's Exhibit 13. Finally, the April 14, 2016 study produced non-qualifying values pre-bronchodilator and qualifying values post-bronchodilator. Decision and Order on Remand at 11; Claimant's Exhibit 7. The administrative law judge then considered the validity of the studies, based on the observations of the physician who administered the test and the consulting opinions of Drs. Gaziano, Broudy, and Jarboe who reviewed the tracings. Decision and Order on Remand at 12-13; *see* Director's Exhibits 9, 13; Claimant's Exhibit 7; Employer's Exhibit 1. He concluded the March 22, 2012 and April 25, 2013 qualifying studies are "adequately reliable" but that the remaining studies are not reliable because claimant either did not give maximum effort or the study did not otherwise meet the quality standards.[6] Decision and Order on Remand at 12-13.

Claimant argues that having found the only reliable pulmonary function studies produced qualifying values, the administrative law judge failed to explain why the pulmonary function study evidence alone is insufficient to establish total disability. *See* Claimant's Brief at 2-3. Contrary to claimant's contention, the administrative law judge specifically found the pulmonary function studies inadequate to establish total disability "because the record contains a great deal of 'contrary probative evidence.'" Decision and Order at 11.

First, the administrative law judge did not find the pulmonary function studies themselves particularly probative. He noted that the August 2, 2012 study, the only fully non-qualifying study, was invalidated based solely on claimant's poor effort, which "supports the notion [c]laimant's lung function may be better than the results suggest." Decision and Order on Remand at 15-16; *see Anderson v. Youghiogheny & Ohio Coal Co.*, 7 BLR 1-152, 1-154 (1984) (holding that a non-qualifying ventilatory study that represents

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[6] We affirm, as unchallenged on appeal, the administrative law judge's determinations that the June 19, 2012 qualifying studies and the April 14, 2016 qualifying post-bronchodilator study are not sufficiently reliable to demonstrate total respiratory disability at 20 C.F.R. §718.204(b)(2)(i). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 12-13.

poor cooperation is still a valid measure of the lack of respiratory disability); *see also Crapp v. United States Steel Corp.*, 6 BLR 1-476, 1-479 (1983); Director's Exhibit 13; Employer's Exhibit 1.

Second, he found the problematic studies plainly outweighed by the other evidence of record. He accurately found claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii)-(iii) because all of the blood gas studies are non-qualifying[7] and there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order on Remand at 5, 13; Director's Exhibits 9, 13; Employer's Exhibit 1. Considering the medical opinions, the administrative law judge gave "the most weight" to Dr. Jarboe's view that claimant is not disabled finding it "very well-documented and well-reasoned" and "based on a more complete picture of Claimant's condition" than the other physicians' opinions.[8] *See* 20 C.F.R. §718.204(b)(2)(iv). Decision and Order on Remand at 5-11, 14-15; *see* Director's Exhibits 9, 13; Claimant's Exhibit 2; Employer's Exhibits 1, 5, 8.

Weighing all of the evidence as a whole, the administrative law judge thus permissibly concluded that while the record contains some "adequately reliable" qualifying pulmonary function studies, "[c]laimant has not sustained his burden of proving total

[7] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[8] The administrative law judge considered the opinions of Drs. Potter and Alam, diagnosing total disability, and the contrary opinions of Drs. Broudy and Jarboe. The administrative law judge gave "little probative weight" to Dr. Potter's opinion, diagnosing a totally disabling restrictive airway disease, because he did not adequately explain the basis for his findings. Decision and Order on Remand at 14; Claimant's Exhibit 2. He gave "significant probative weight to Dr. Alam's opinion, finding claimant is totally disabled, because it was based on "medically acceptable data" and is reasoned and documented. Decision and Order on Remand at 14; Director's Exhibit 9. The administrative law judge also gave "significant probative weight" to the contrary opinion of Dr. Broudy, finding it to be well-documented and well-reasoned. Decision and Order on Remand at 14-15; Director's Exhibit 13. The administrative law judge gave the most weight, however, to the well-documented and well-reasoned opinion of Dr. Jarboe, concluding claimant is not totally disabled from a respiratory standpoint, because it "was based on a more complete picture of [c]laimant's condition." Decision and Order on Remand at 15-16; Employer's Exhibit 1, 5, 8.

disability by a preponderance of the evidence."[9] Decision and Order on Remand at 15-16; *see Rafferty*, 9 BLR at 1-232 (administrative law judge must weigh all relevant probative evidence together, like and unlike, and determine whether claimant established total disability by a preponderance of the evidence); *Shedlock*, 9 BLR at 1-198 (contrary probative evidence is not limited to evidence of the same category or type but includes all evidence which is contrary and probative). We affirm this finding as supported by substantial evidence. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[9] In summarizing his findings, the administrative law judge mistakenly stated three, instead of two, of the four qualifying pulmonary function studies were not reliable. Decision and Order on Remand at 15. Remand is not required on this basis, however, as claimant does not specifically raise this error and, as explained above, substantial evidence supports the administrative law judge's determination that the evidence as a whole does not establish total disability. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 120-21 (1987).