U.S. Department of Labor

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

BRB No. 19-0055 BLA

ROBERT L. MOORE Claimant-Respondent v. CONSOLIDATION COAL COMPANY c/o HEALTHSMART CASUALTY CLAIMS and Self-insured through CONSOL ENERGY, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/15/2020 DECISION and ORDER

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

Catherine Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for employer.

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, ROLFE, and GRESH, Administrative Appeals Judges

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-05214) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed on May 6, 2013, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

Based on employer's concession, the administrative law judge found claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] He found that employer failed to rebut the presumption and awarded benefits.

Employer appeals, raising two procedural challenges to the award of benefits. Employer also contends the administrative law judge erred in finding it failed to rebut the Section 411(c)(4) presumption. Claimant has not responded to the appeal. The Director, Office of Workers' Compensation Programs (the Director), filed a brief urging rejection of employer's procedural arguments.

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.[2] 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).

Employer's Procedural Arguments

Employer first contends the Board should hold this appeal in abeyance pending a final decision in *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018), which

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has 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), as implemented by 20 C.F.R. §718.305(b). Employer conceded claimant had at least thirty-three years of qualifying coal mine employment and established a totally disabling respiratory or pulmonary impairment by pulmonary function studies and medical opinions. Employer's Post-hearing Brief at 2; Director's Exhibit 27 at 9. We affirm these findings as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3; Employer's Brief at 2, 8-19.

[2] Because the miner'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); Decision and Order at 3.

declared one provision of the Affordable Care Act (ACA) unconstitutional and the remaining law inseverable from that provision. Employer's Brief at 5. We agree with the Director that this contention is without merit. Director's Brief at 7-8. The district court stayed its decision, pending appeal to the United States Court of Appeals for the Fifth Circuit. *Texas v. United States*, 352 F. Supp. 3d 665 (N.D. Tex. 2018). On appeal, the Fifth Circuit held one aspect of the ACA (the requirement to maintain health insurance) is unconstitutional, but vacated the district court's determination that the remainder of the ACA must also be struck down.[3] *Texas v. United States*, No. 19-10011, 2019 WL 6888446, at 27-28 (5th Cir. Dec. 18, 2019) (King, J., dissenting). Moreover, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214-15 (2010), *aff'd sub nom. W.Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). We thus deny employer's motion to hold this case in abeyance.

Employer next argues the administrative law judge lacked the authority to hear and decide this case because he had not been appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] Employer asserts that the Secretary of Labor's (the Secretary) December 21, 2017 ratification of Administrative Law Judge Johnson's appointment was insufficient to cure any constitutional deficiencies in his initial appointment. Employer notes the Supreme Court held in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), that Securities and Exchange Commission (SEC) administrative

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[3] Further, the Fourth Circuit has held that the Affordable Care Act amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative as a law. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012).

[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.

Art. II, § 2, cl. 2.

law judges were not properly appointed in accordance with the Appointments Clause of the Constitution because they were not appointed by the SEC Commissioners as the Heads of the Department. Employer's Brief at 6-7. It argues Judge Johnson was similarly first appointed to his position by officials other than the Secretary. *Id*. Thus, it contends he was appointed by the same improper process that the SEC utilized to appoint its administrative law judges and that it is entitled to a new hearing before a constitutionally-appointed administrative law judge.[5] *Id*. 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 6-7.

As the Director asserts, an appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 6, *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). 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.

[5] The Department of Labor (DOL) has expressly conceded that the United States Supreme Court's holding in *Lucia* applies to DOL administrative law judges. *See Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6. We note that employer raised this issue before the administrative law judge, and thus preserved it for appeal. *See* Employer's Motion to Hold Claim in Abeyance (Mar. 16, 2018); Order Denying Motion to Hold Claim in Abeyance (Apr. 4, 2018); Tr. at 5-6.

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, he specifically identified Judge Johnson and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Johnson, https://www.oalj.dol.gov/Proactive_disclosures_ALJ_appointments.html (last visited Dec. 16, 2019). The Secretary further stated he was acting in his "capacity as head of the Department of Labor" in ratifying the appointment of Judge Johnson "as a District Chief Administrative Law Judge." *Id.* Employer does not assert the Secretary had no "knowledge of all the material facts" or that he did not make a "detached and considered judgement" when he ratified Judge Johnson's appointment, and therefore employer has 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.

Based on the foregoing, we hold that the Secretary's action constituted a proper ratification of the appointment of the administrative law judge. *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 at 604-05 (holding that a properly constituted National Labor Relations Board can retroactively ratify the appointment of a Regional Director with a statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" all its earlier actions as an invalid Board). Therefore, we reject employer's argument that this case should be remanded for a new hearing before a different, constitutionally-appointed administrative law judge.[6]

[6] Employer asserts, without argument, that the administrative law judge's issuance of a Notice of Hearing prior to the ratification of his appointment constitutes "significant action" that entitles it to a new hearing under *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018). Employer also states that, "presumably," the administrative law judge received the Director's Exhibits prior to December 21, 2017. We reject the contention that the issuance of a Notice of Hearing and the receipt of exhibits from the district director, if true, tainted the adjudication such that employer is entitled to a new hearing. *Lucia*, 138 S.Ct. at 2055. 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. We further agree with the Director that the required transfer of the Director's Exhibits to the administrative law judge does not involve any consideration of the merits and would not color the administrative law judge's consideration of the case. Director's Brief at 5;

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

Once, as here, a claimant invokes the Section 411(c)(4) presumption, *see* n. 1, *supra*, he is presumed to be totally disabled due to pneumoconiosis. 20 C.F.R. §718.305(c)(1). Thus, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis[7] or that "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 employer failed to rebut the presumption by either method. He found the x-ray evidence insufficient to disprove clinical pneumoconiosis and Dr. Sargent's opinion insufficient to disprove legal pneumoconiosis or disability due to either disease. Decision and Order at 15-18. Employer appeals the findings that it did not disprove the existence of legal and clinical pneumoconiosis.

To establish claimant does not have legal pneumoconiosis, employer must demonstrate he does not have a chronic lung disease or impairment "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). Dr. Sargent performed a physical examination and records review, and diagnosed a severe obstructive ventilatory impairment caused solely by cigarette smoking and not by coal dust exposure. Decision and Order at 11, 16; Director's Exhibit 18. He stated that a coal dust-caused impairment would show a decreased FEV1 and FVC with a preserved FEV1/FVC ratio,

see 20 C.F.R. §725.455(b) (administrative law judge "shall receive into evidence . . . the evidence submitted to the Office of Administrative Law Judges [(OALJ)] by the district director"); *see also* 20 C.F.R. §725.421 (district director shall transmit evidence and related documents to the OALJ in any case referred for a hearing). Therefore, neither the administrative law judge's issuance of the Notice of Hearing nor his presumed receipt of the Director's Exhibits tainted the adjudication with an Appointments Clause violation requiring remand.

[7] "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).

whereas claimant's decreased FEV1 and FVC, and decreased FEV1/FVC ratio, are consistent with smoking. Decision and Order at 11-12; Director's Exhibit 18.

The administrative law judge found Dr. Sargent's opinion deficient and entitled to no weight. Decision and Order at 16-17. He found Dr. Sargent's attribution of claimant's respiratory impairment to smoking based on a reduced FEV1/FVC ratio inconsistent with the Department of Labor's (DOL) recognition, set forth in the preamble to the 2001 revised regulations, that chronic obstructive lung disease in miners may be discerned from lung function measurements including decreased FEV1 and FEV1/FVC results.[8] *Id.* at 16, *quoting* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000). In addition, he found Dr. Sargent failed to address the possible additive effects of claimant's coal mine dust exposure and smoking on his obstructive lung disease. Decision and Order at 16-17.

Employer contends the administrative law judge "improperly gave the Preamble to the revised regulations the force of law" in discrediting Dr. Sargent's opinion. Employer's Brief at 13. Employer acknowledges the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held in *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305 (4th Cir. 2012), that it is permissible for an administrative law judge to consult the preamble in assessing the credibility of medical opinions.[9] Employer's Brief at 13. Employer contends, however, the present case is distinguishable because the "alleged inconsistencies with the Preamble are central to the [administrative law judge's] decision to discredit the employer's physician." *Id.* We reject employer's contentions.

The administrative law judge did not give the preamble the force of law; rather, in assessing the credibility of Dr. Sargent's medical opinion, he permissibly consulted the preamble's explanation of the medical studies the DOL relied upon as the bases for its regulations. *See Looney*, 678 F.3d at 314; *see also A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248,

[8] Additionally, the administrative law judge observed that Dr. Sargent cited several medical studies in support of his opinion regarding the significance of the FEV1/FVC ratio, but failed to provide copies of the studies. The administrative law judge noted that he was, therefore, unable to assess the accuracy of Dr. Sargent's summary. *See* Decision and Order at 16. Notwithstanding this omission, the administrative law judge concluded that even if Dr. Sargent had provided copies, he would still reject the physician's opinion regarding the import of the FEV1/FVC ratio. *Id.* at 17.

[9] Employer states, without further elaboration, that *Looney* is "incorrect," noting it seeks to preserve its argument for appellate purposes. Employer's Brief at 13.

257 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); Decision and Order at 16-17. Employer has not established error in the administrative law judge's finding that Dr. Sargent's opinion is inconsistent with the DOL's recognition that coal mine dust exposure may cause chronic obstructive pulmonary disease with decrements in "certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC." Decision and Order at 16, *quoting* 65 Fed. Reg. at 79,943; *see Westmoreland Coal C. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Looney*, 678 F.3d at 316. Whether that finding was "central" to his decision, or not, does not affect its legitimacy. *Stallard*, 876 F.3d at 671-72.

We also find no merit to employer's contention that the administrative law judge improperly rejected Dr. Sargent's opinion for his failure to discuss whether coal mine dust exposure contributed to or aggravated any disease caused by smoking. *See* Employer's Brief at 16-17; *see generally Westmoreland Coal Co. v. Cochran*, 718 F.3d 319 (4th Cir. 2013). The administrative law judge permissibly found Dr. Sargent's opinion deficient because he failed to provide any explanation why claimant's lung function decrement could not be attributable to the additive effects of smoking and coal dust exposure. Decision and Order at 16-17. Thus, he concluded that employer did not demonstrate that coal mine dust exposure was not a contributing or aggravating cause of claimant's impairment. *Id.*; *see Looney*, 678 F.3d at 315-16; *Beeler*, 521 F.3d at 726; 65 Fed. Reg. at 79,940 (setting forth the DOL's acceptance of the view that smoking and coal mine dust exposure have additive effects on pulmonary and respiratory function).

We also reject employer's contention the administrative law judge violated the Administrative Procedure Act by failing to make a specific finding on claimant's "significant" smoking history.[10] Employer's Brief at 18-19. Although the administrative law judge did not render a specific finding, he reviewed claimant's testimony and the medical opinions regarding claimant's smoking history.[11] Employer does not contest the

[10] The Administrative Procedure Act 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 issues 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] The administrative law judge addressed claimant's testimony that he smoked about one-half pack of cigarettes per day from 1958 to 1988 and currently chews tobacco. Further, he noted Dr. Ajjarapu reported a history of 1.5 packs per day from 1971 to 1974, and one-half pack daily for thirty years. Dr. Go noted a variably-reported smoking history,

accuracy of the administrative law judge's summaries. Moreover, he did not reject Dr. Sargent's opinion for relying on an inaccurate smoking history. Rather, as discussed above, he provided an affirmable rationale for rejecting Dr. Sargent's opinion for reasons unrelated to the specific number of years claimant smoked: Dr. Sargent's rationale for excluding coal dust as a cause of claimant's impairment was contrary to the medical science in the preamble and he did not explain why coal dust could not have contributed along with smoking to claimant's impairment. *See* Decision and Order at 15-18. Employer has therefore failed to demonstrate how the identification of a specific smoking history would have made any difference to the administrative law judge's deliberative process and conclusions. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). As the administrative law judge provided valid reasons for discounting Dr. Sargent's opinion, any error in not rendering a specific finding on claimant's years of smoking is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *See Cochran*, 718 F.3d at 322; *Looney*, 678 F.3d at 315-16. Because it is supported by substantial evidence and in accordance with law, we affirm the administrative law judge's finding that Dr. Sargent's opinion fails to satisfy employer's burden to disprove the existence of legal pneumoconiosis.[12] Decision and Order at 16-17; *see W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018). We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).[13] Employer does not challenge, and we thus also

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relying on a fifteen to thirty pack-year cigarette smoking history. Dr. Sargent reported that claimant smoked for thirty years and still chews tobacco. Decision and Order at 5, 9-11.

[12] Because claimant invoked the Section 411(c)(4) presumption, it is presumed that he has legal pneumoconiosis. 20 C.F.R. §718.305(c)(1); *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018). As employer has failed to disprove the existence of legal pneumoconiosis, we need not address its contentions concerning the opinions of Drs. Ajjarapu and Go, which diagnosed respiratory impairments due to coal dust exposure and are thus not supportive of employer's burden on rebuttal. 20 C.F.R. §§718.305(d)(1)(i)(A), 718.201(a)(2), (b); Employer's Brief at 10-12.

[13] Thus, we need not address employer's contention that the administrative law judge erred in finding that it did not disprove the existence of clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(B). Employer must disprove both clinical and legal pneumoconiosis to rebut the Section 411(c)(4) presumption. *See* 20 C.F.R.

affirm, the administrative law judge's finding that it failed to disprove the presumed fact of disability causation under 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 17-18; *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Minich*, 25 BLR at 154-56; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). As employer has not rebutted the Section 411(c)(4) presumption, we affirm the award of benefits.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

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§718.305(d)(1)(i)(A), (B); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting); *see* Decision and Order at 5-6, 15; Employer's Brief at 9-10.