U.S. Department of Labor

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

BRB No. 19-0084 BLA

LOYAL E. TACKETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LOCKWORTH, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN RESOURCES INSURANCE COMPANY	)	DATE ISSUED: 01/30/2020
	)	
	)	
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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

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

Thomas L. Ferreri and Matthew J. Zanetti (Ferreri Partners, PLLC), Louisville, 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, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05518) of Administrative Law Judge Steven D. Bell pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on March 25, 2014.[1]

The administrative law judge found claimant had 13.68 years of coal mine employment and therefore did not invoke 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). Considering whether claimant established entitlement to benefits without the presumption, the administrative law judge determined claimant established complicated pneumoconiosis at 20 C.F.R. §718.304 based on the new x-ray and medical opinion evidence. Because claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, the administrative law judge awarded benefits.

On appeal, employer argues the administrative law judge lacked authority to hear and decide the case because he was not properly appointed in accordance with the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer also challenges the administrative law judge's findings that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis and established a change in an applicable condition of entitlement. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds in a limited brief, contending employer forfeited its Appointments Clause argument by failing to timely raise it before the administrative law judge. Employer filed a reply brief, reiterating its Appointments Clause contentions.

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[1] This is claimant's third claim for benefits. On September 22, 2006, the district director denied his most recent prior claim, filed January 20, 2006, for failure to establish any element of entitlement. Director's Exhibit 2. Claimant did not take any further action until filing his current claim. Director's Exhibit 4.

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).

Appointments Clause

Employer urges the Board to vacate the administrative law judge's Decision and Order Awarding Benefits and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. , 138 S.Ct. 2044 (2018).[3] Employer contends it did not waive its right to raise an Appointments Clause[4] argument for the first time on appeal.[5] Employer's Brief at 11. In

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[2] The record reflects claimant's last coal mine employment occurred in Kentucky. Hearing Transcript at 10. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 9-10.

[3] *Lucia* involved a challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to the Special Trial Judges at the Tax Court, SEC administrative law judges are "inferior officers" subject to the Appointments Clause. *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

[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] On July 20, 2018, the Department of Labor (DOL) conceded that the Supreme Court's holding in *Lucia* applies to the DOL's administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

response, both claimant and the Director assert employer forfeited its challenge by failing to timely raise the issue before the administrative law judge. Claimant's Brief at 6; Director's Response Brief at 2-7. The Director further asserts that exceptional circumstances do not exist to excuse employer's forfeiture. Director's Response Brief at 7 n.7. Employer replies that "it was unclear whether [an administrative law judge] who had not been constitutionally appointed had authority to act on the [A]ppointments [C]lause issue." Employer's Reply Brief at 2. Employer maintains it is sufficient that an Appointments Clause challenge is first raised before the Board. *Id.* at 2-4. Employer's arguments are without merit.

The Appointments Clause issue is "non-jurisdictional" and thus subject to the doctrines of waiver and forfeiture.[6] *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, giving employer more than three months to raise the issue to the administrative law judge prior to his October 12, 2018 Decision and Order Awarding Benefits. Had employer timely raised its Appointments Clause challenge to the administrative law judge, he could have considered the issue and, if appropriate, provided the relief employer is requesting by referring the case for assignment to a different, properly appointed administrative law judge. *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). Instead, employer waited to raise its arguments until after the administrative law judge issued an adverse decision. Based on these facts, we conclude that employer forfeited its Appointments Clause challenge by not timely raising it before the administrative law judge. *See Powell,* BRB No. 18-0557 BLA, slip op. at 4*; Kiyuna*, BRB No. 19-0103 BLA, slip op. at 4.

Furthermore, employer 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). We reject employer's argument that *Freytag v. Commissioner*, 501 U.S. 868 (1991) mandates consideration of its Appointments Clause argument. Employer's Brief at 11. In *Freytag*, the Supreme Court excused waiver of the Appointments Clause issue as it pertained to Special Trial Judges

[6] Because the issue can be waived or forfeited, we reject employer's contention that its Appointments Clause argument must be addressed regardless of whether it was timely raised below. *See Powell v. Service Employees Intnl, Inc.*, __ BRBS __, BRB No. 18-0557, slip op. at 4 (Aug. 8, 2019); Employer's Reply Brief at 2-3.

(STJs) appointed by the United States Tax Court. The Court stated "this is one of those rare cases in which we should exercise our discretion to hear petitioners' challenge," because to do otherwise would leave unresolved "important questions . . . about the Constitution's structural separation of powers." 501 U.S. at 873, 879. The same rationale for excusing waiver or forfeiture is not present in this case because, as the Supreme Court determined in *Lucia*, the analysis in *Freytag* for determining that STJs are inferior officers subject to the Appointments Clause applies a fortiori to administrative law judges. *Lucia*, 138 S.Ct. at 2053-2054. As the Court observed, existing case law provided "everything necessary to decide this case." 138 S.Ct. at 2053.

Thus, we hold that employer forfeited its Appointments Clause challenge and deny the relief requested.

Subsequent Claim

Where claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish any element of entitlement.

Employer contends the administrative law judge failed to adequately consider the evidence in the two prior denied claims, noting that the first claim contained a negative reading of an x-ray dated November 12, 2001 and the second claim contained a negative reading of an x-ray dated February 21, 2006. Employer's Brief at 13. Contrary to employer's assertion, the administrative law judge acted within his discretion in finding evidence submitted several years prior to be "out of date" and considering evidence submitted in the current claim more indicative of claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004); *Workman v. E. Assoc. Coal Corp.*, 23 BLR 1-22, 1-27 (2004); Employer's Brief at 13; Decision and Order at 12-13, 33, 34 n.273. Nor does employer demonstrate how the 2001 and 2006 x-rays would have made any difference in the administrative law judge's consideration of x-rays dating from April 2014 to January 2017 submitted with the present claim. *Id.* at 14; Employer's Brief at 12-13; *see Shinseki v. Sanders*, 556 U.S. 396 (2009). Therefore, we reject employer's argument that the administrative law judge failed to provide an adequate subsequent claim analysis.

Entitlement to Benefits

Section 411(c)(3) of the Act provides an irrebuttable presumption a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In determining whether claimant has invoked the irrebuttable presumption, the administrative law judge must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis. 30 U.S.C. §923(b); *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The administrative law judge found the x-ray and medical opinion evidence supports a finding of complicated pneumoconiosis[7] while the CT scan evidence does not.[8] 20 C.F.R. §718.304(a), (c); Decision and Order at 28-33. Weighing all of the evidence, he found the x-ray and medical opinion evidence more probative than the CT scan evidence, entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis. *Id.* at 34.

The administrative law judge first considered ten interpretations of five x-rays. He found those taken on April 14, 2014, August 6, 2014, December 26, 2016, and January 16, 2017 inconclusive because dually-qualified physicians read each as positive and negative. 20 C.F.R. §718.304(a); Decision and Order at 14, 28-29. He found the January 21, 2015 x-ray positive for complicated pneumoconiosis, however, based on the reading of Dr. Crum, whose radiological credentials are superior to those of Dr. Dahhan, who provided a negative reading of the x-ray.[9] Decision and Order at 29; Director's Exhibits 19; Claimant's Exhibit 6. Because one x-ray is positive for complicated pneumoconiosis based

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[7] The administrative law judge noted there is no biopsy evidence of record. 20 C.F.R. §718.304(b); Decision and Order at 27.

[8] The administrative law judge noted that while "no party proffered CT scans administered or read in connection with the claim," Dr. Hall's June 21, 2016 CT scan was included in the treatment records. Decision and Order at 15. He found that Dr. Hall's CT scan reading "did not make a finding as to the presence of pneumoconiosis." *Id.*

[9] The administrative law judge found Dr. Crum "more highly qualified" because he is a dually-qualified B reader and Board-certified radiologist, while Dr. Dahhan is neither. Decision and Order at 29.

on the reading of a dually-qualified physician, four are inconclusive, and none are negative, the administrative law judge found the x-ray evidence established complicated pneumoconiosis. 20 C.F.R. §718.304(a); Decision and Order at 29. We affirm this finding as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer argues the administrative law judge erred in finding the medical opinion evidence establishes complicated pneumoconiosis. 20 C.F.R. §718.304(c); Employer's Brief at 13-15. Employer's argument lacks merit. The administrative law judge considered the opinions of Drs. Gallup, Green, Nadar, Dahhan, and Rosenberg. Drs. Gallup, Green, and Nadar opined claimant has progressive massive fibrosis while Drs. Dahhan and Rosenberg opined he does not have complicated pneumoconiosis. Director's Exhibits 14, 19; Claimant's Exhibits 1, 5; Employer's Exhibits 1, 2. The administrative law judge found the opinions of Drs. Gallup, Green, and Nadar better reasoned and documented than the contrary opinions of Drs. Dahhan and Rosenberg. Decision and Order at 30-33. He therefore found the preponderance of the medical opinion evidence established the presence of complicated pneumoconiosis. *Id.* at 33.

Employer argues the administrative law judge erred in discrediting Dr. Rosenberg's opinion because he "relied on his personal review of undesignated chest CT scans." Employer's Brief at 13-15. According to employer, Dr. Rosenberg did not "personally review[] actual chest CT scans, but rather had only reviewed reports of chest CT scans contained within treatment records of the plaintiff." *Id.*

Employer's argument misses the point. The administrative law judge did not discredit Dr. Rosenberg based on a misunderstanding that the physician personally reviewed and interpreted CT scan images. The administrative law judge discredited his opinion because the CT scan reports on which Dr. Rosenberg relied were not admitted into the record. Employer does not challenge the finding that Dr. Rosenberg relied on non-record evidence, including CT scans, in rendering his diagnosis of no complicated pneumoconiosis. Nor does employer assert that it attempted to submit that evidence into the record.

As the administrative law judge noted, Dr. Rosenberg opined claimant does not have complicated pneumoconiosis based on his review of the results of medical tests, including x-rays and CT scans purportedly found within treatment records from various medical providers. Employer's Exhibit 1. Dr. Rosenberg specifically referenced an October 9, 2010 CT scan from the Hope Family Medical Center. *Id.* Noting his view that CT scans are more accurate than chest x-rays for determining the presence or absence of micronodular abnormalities, he opined claimant's "CT scans did not reveal micronodular abnormalities" and "[t]here clearly is no confirmation of large formation referred to by Dr. Crum." *Id.* The administrative law judge accurately observed that Dr. Rosenberg based

his opinion on "treatment records that have not been designated [as evidence] from Dr. Dotson, Cabell Huntington, Hope Family Medical Center, and King's Daughters Medical Center, including CT scans." Decision and Order at 24. He also accurately observed that Dr. Rosenberg based his diagnosis of no clinical pneumoconiosis in part on "the fact that the undesignated CT scans he reviewed did not show micronodular abnormalities." *Id.* at 32. Because Dr. Rosenberg relied on CT scans that were not part of the record, the administrative law judge permissibly discredited his opinion as not well-documented. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc) (McGranery and Hall, JJ., concurring and dissenting); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004); Decision and Order at 32.

As employer raises no further arguments and substantial evidence supports the administrative law judge's decision to credit the medical opinions based on x-rays showing large opacities, we affirm his finding that the medical opinion evidence establishes complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 30, 31, 33.

Further, employer does not identify specific error in the administrative law judge's finding that the x-ray and medical opinion evidence outweigh the CT scan evidence. *Scarbro*, 220 F.3d at 255; *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.304; Decision and Order at 32-39. Nor does employer challenge his finding that claimant's complicated pneumoconiosis arose out of coal mine employment. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.203(b). Thus, we affirm these findings.[10] We further affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and the award of benefits.

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[10] In light of our affirmance of the administrative law judge's finding that clamant established complicated pneumoconiosis and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, we need not address his findings on simple clinical and legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

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