U.S. Department of Labor

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

BRB No. 19-0099 BLA

ARTHUR DAVIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JOSEPH FORRESTER TRUCKING	)	
	)	
and	)	
	)	
AMERICAN RESOURCES INSURANCE COMPANY	)	DATE ISSUED: 01/28/2020
	)	
	)	
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 Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

Thomas L. Ferreri and Matthew J. Zanetti (Ferrerri Partners, PLLC), Louisville, Kentucky, for employer/carrier.

William M. Bush (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-05809) of Administrative Law Judge Larry A. Temin rendered on a claim filed on March 17, 2015,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge initially determined employer is the responsible operator. He next found claimant established 23.11 years of qualifying surface coal mine employment and a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). Thus, he determined that claimant established a change in an applicable condition of entitlement and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §725.309(c). The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge lacked the authority to decide the case because he had not been appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer next argues the administrative law judge erred in determining it is the responsible operator because claimant did not work for it as a miner. Employer further argues he erred in finding the Section 411(c)(4) presumption unrebutted. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing employer forfeited its Appointments Clause argument by failing to raise it before the administrative law judge. The Director also contends employer is the responsible operator.[3] In a reply brief, employer reiterates its argument that the

[1] On December 3, 2013, the district director denied claimant's prior claim, filed on December 12, 2012, because he did not establish any element of entitlement. Director's Exhibit 1 at 6, 317.

[2] Section 411(c)(4) provides a rebuttable presumption that claimant 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 impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] The Director asserts: (1) employer has either affirmatively conceded or waived its right to contest its designation as the responsible operator before the district director; (2)

administrative law judge has not been properly appointed.[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.[5] 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, 362 (1965).

Appointments Clause

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[6] of the

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the evidence employer relies on in support of its argument is inadmissible; and (3) that evidence nonetheless establishes that claimant was a miner under the applicable legal standard. Director's Brief at 8.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c) and invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] Claimant's coal mine employment occurred in Kentucky. Hearing Transcript at 12, 30. Accordingly, this case arises within the jurisdiction 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).

[6] 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.

Constitution. It argues the administrative law judge in this case was similarly appointed improperly. Employer's Brief at 13-15.

We agree with the Director that employer forfeited its Appointments Clause argument by failing to raise it when the case was before the administrative law judge. *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); *Powell v. Serv. Employees Int'l, Inc.*, BRBS , BRB No. 18-0557 (Aug. 8, 2019); Director's Brief at 3-8.

Lucia was decided over four months before the administrative law judge issued his Decision and Order Awarding Benefits, but employer failed to raise its arguments while the claim was before the administrative law judge. At that time, the administrative law judge could have addressed employer's arguments and, if appropriate, taken steps to have the case assigned for a new hearing before a new administrative law judge. *See Kiyuna v. Matson Terminals, Inc.*, BRBS , BRB No. 19-0103 at 4 (June 25, 2019). Instead, employer waited to raise the issue until after the administrative law judge issued an adverse decision. Because employer has not raised any basis for excusing its forfeiture of the issue, we reject its argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different administrative law judge.[7]

Responsible Operator

The responsible operator is the "potentially liable operator"[8] that most recently employed the miner for at least one year. 20 C.F.R. §§725.494, 725.495(a)(1). Once the

[7] 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 Int'l, Inc.*, BRBS , BRB No. 18-0557, slip op. at 4 (Aug. 8, 2019); Employer's Reply Brief at 2-3.

[8] In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator, the operator must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of not less than one year, at least one day of the employment must have occurred after December 31, 1969, and the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

Director properly identifies a potentially liable operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or that another operator financially capable of assuming liability more recently employed the miner for at least one year. *See* 20 C.F.R. §725.495(c).

Employer argues it is not the responsible operator because claimant did not work for it as a miner.[9] Employer's Brief at 18-19. We will not consider employer's argument because we agree with the Director that employer has waived its right to contest liability for benefits in this claim.

The Director correctly asserts that in claimant's prior claim, employer conceded it was the responsible operator liable for benefits. Director's Brief at 11, Director's Exhibit 1 at 90 (Operator Response to Schedule for the Submission of Additional Evidence (SSAE). The regulations provide that "any stipulation made by any party in connection with the prior claim will be binding on that party in the adjudication of the subsequent claim." 20 C.F.R. §725.309(c)(5); *see* 62 Fed. Reg. 3337, 3353 (Jan. 22, 1997). Thus, employer's stipulation in the prior claim that it is liable for benefits is binding in the current subsequent claim. 20 C.F.R. §725.309(c)(5).

Further, even if employer were not held to its earlier stipulation, employer specifically waived its right to challenge its designation in the current subsequent claim. The regulation at 20 C.F.R. §725.412(a) addresses the obligation of the parties to respond to the SSAE:

> (a)(1) Within 30 days after the district director issues a schedule pursuant to §725.410 of this part containing a designation of the responsible operator liable for the payment of benefits, that operator shall file a response with regard to its liability. The response shall specifically indicate whether the operator agrees or disagrees with the district director's designation.
>
> (2) If the responsible operator designated by the district director does not file a timely response, *it shall be deemed to have accepted the district director's designation with respect to its liability, and to have waived its right to contest its liability in any further proceeding conducted with respect to the claim*.

[9] Under the Black Lung Benefits Act, a "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. §902(d); *see* 20 C.F.R. §§725.101(a)(19), 725.202(a).

20 C.F.R. §725.412(a) (emphasis added).

The district director issued an SSAE in this subsequent claim on October 27, 2015, and identified employer as the responsible operator. Director's Exhibit 25. Employer was given thirty days, or until November 26, 2015, to contest its designation. *Id*. Employer was further informed in the SSAE that if it failed to respond, it would be deemed to have accepted its designation and to have waived its right to contest its liability in any further proceedings. *Id*. Employer responded to the SSAE on December 23, 2015, and requested an extension of time to submit medical evidence. Director's Exhibit 27. Employer did not state whether it agreed or disagreed with the district director's responsible operator determination. *Id*. Because employer did not file a timely response to the SSAE disputing its designation as the responsible operator,[10] employer is foreclosed from contesting its designation and has waived its right to contest its liability for benefits. 20 C.F.R. §725.412(a)(2). Thus, we affirm the administrative law judge's determination that employer is the responsible operator.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that he has neither legal nor clinical pneumoconiosis,[11] 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 establish rebuttal by either method.[12]

[10] Employer does not dispute in this appeal that it did not timely respond to the Schedule for the Submission of Additional of Evidence.

[11] "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).

[12] The administrative law judge found that employer established claimant does not have clinical pneumoconiosis. Decision and Order at 22-25.

Employer argues the administrative law judge erred in discrediting Dr. Dahhan's opinion that claimant does not have legal pneumoconiosis.[13] We disagree.

To disprove legal pneumoconiosis, employer must establish claimant does not suffer from 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). As the administrative law judge noted, Dr. Dahhan opined that claimant's pulmonary function testing showed a mixed restrictive and obstructive respiratory impairment. Employer's Exhibit 11 at 14-15. He specifically opined that claimant's restrictive impairment was unrelated to coal dust exposure because "the x-ray [does not] show any restriction." *Id*. at 15. The administrative law judge rationally found Dr. Dahhan's opinion inconsistent with the Department of Labor's position that a miner may have legal pneumoconiosis (defined as either a restrictive or obstructive impairment, or both) without abnormalities on a chest x-ray. *See* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488-89 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12 (4th Cir. 2012); *see also* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000).

Additionally, the administrative law judge permissibly found Dr. Dahhan did not adequately explain why claimant's twenty-six years of coal dust exposure did not significantly contribute to, or substantially aggravate, his obstructive respiratory impairment, even if it was caused primarily by smoking. *See* 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 27; Employer's Exhibit 11 at 17. Thus, we affirm the administrative law judge's rejection of Dr. Dahhan's opinion on legal pneumoconiosis and

[13] We reject employer's argument that the administrative law judge erred in not considering Dr. Broudy's January 25, 2013 report, which was submitted in claimant's prior claim, relevant to whether employer rebutted the Section 411(c)(4) presumption. Employer's Brief at 15-16; s*ee Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988) (holding that it is illogical to find rebuttal established based on evidence that predates the evidence on which invocation is based).

his determination that employer did not rebut the presumption by establishing that claimant does not have pneumoconiosis.[14] 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether employer established that "no part of the miner's 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)(ii). Contrary to employer's contention, the administrative law judge rationally discounted Drs. Dahhan's and Rosenberg's opinions on the cause of claimant's total disability because they did not diagnose legal pneumoconiosis, contrary to his finding that employer failed to disprove the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 28-29; Employer's Exhibits 2, 6, 11, 12. Thus, we affirm the administrative law judge's determination employer failed to establish that no part of claimant's respiratory disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 28-29. We therefore affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption.

[14] We affirm, as unchallenged, the administrative law judge's finding that Dr. Rosenberg's opinion is not adequately reasoned to disprove legal pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 26; Employer's Exhibits 2, 12.

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