U.S. Department of Labor

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

BRB No. 18-0537 BLA

JO ANN WATTS (Widow of EUGENE WATTS) Claimant-Respondent v. DIAMOND MAY COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/17/2019 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Michelle S. Gerdano (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 appeals the Decision and Order Awarding Benefits (2015-BLA-05807) of Administrative Law Judge Jennifer Gee on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on March 20, 2014.

The administrative law judge credited the miner with "almost 20 years" of underground coal mine employment[1] and found the miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found claimant[2] invoked the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012). The administrative law judge also found 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 had not been appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] Employer further contends

[1] The miner's most recent coal mine employment was in Kentucky. Hearing Transcript at 20. 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).

[2] Claimant is the widow of the miner, who died on August 4, 2013. Director's Exhibit 13.

[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.

the administrative law judge erred in crediting the miner with at least fifteen years of coal mine employment and in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that employer waived its Appointments Clause argument by failing to raise it before the administrative law judge.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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*, 585 U.S. , 138 S. Ct. 2044 (2018). However, 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.*, BLR , BRB No. 18-0557 (Aug. 8, 2019) (published).

Lucia was decided over seven weeks before the administrative law judge issued her 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 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

[4] We affirm, as unchallenged, the administrative law judge's finding that the miner was totally disabled. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different administrative law judge.

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

Employer argues that the administrative law judge erred in finding that claimant established at least fifteen years of coal mine employment. Employer's Brief at 9-11. Consequently, employer argues that claimant is not entitled to invoke the Section 411(c)(4) rebuttable presumption.

Claimant bears the burden of proof to establish the length of the miner's coal mine employment. *Mills v. Director, OWCP*, 348 F.3d 133, 136 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). As the regulations provide only limited guidance for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

In calculating the length of the miner's coal mine employment, the administrative law judge considered the miner's Social Security Administration (SSA) earnings statement, letters from employers, and testimony from the miner and claimant. Decision and Order at 6. For the miner's coal mine employment prior to 1978, the administrative law judge credited him for each quarter in which he had earnings from coal mine operators that exceeded $50.00 as reflected in the SSA earnings statement. Using this method, the administrative law judge found the miner's coal mine employment earnings exceeded $50.00 for sixty-four quarters, or sixteen years. *Id.* at 6.

Employer argues that it is not reasonable for an administrative law judge to credit a miner with each quarter of pre-1978 coal mine employment in which he had earnings from coal mine operators that exceeded $50.00. Employer's Brief at 9-11. Contrary to employer's contention, the Board and the Sixth Circuit have recognized this method of calculation as reasonable.[5] *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); *see also Shepherd v. Incoal, Inc.*, 915 F.3d 392, 405-06 (6th Cir. 2019), *reh'g denied*, No. 17-4313 (6th Cir. May 3, 2019) (administrative law judge may apply the *Tackett* method unless the beginning and ending dates of the miner's coal mine employment reveal "the miner was not employed by a coal mining company for a full calendar quarter"). However, the Sixth Circuit has cautioned that "as quarterly income approaches th[e] floor of $50.00, it seems

[5] The Board has found this method of calculation reasonable and consistent with Social Security Administration regulations. *Combs v. Director, OWCP*, 2 BLR 1-904, 1-906 (1980).

reasonable to conclude that the miner did not work in the mines most days in the quarter." *Shepherd*, 915 F.3d at 406. Here, however, the miner earned at least $200.00 in fifty-eight of the sixty-four quarters the administrative law judge credited. Director's Exhibit 10. Thus, even excluding six quarters, the administrative law judge permissibly credited the miner with fifty-eight quarters, or fourteen and one-half years of pre-1978 coal mine employment.

The administrative law judge also credited the miner with an additional 3.90 years of coal mine employment from 1978 to 1983. Decision and Order at 6-7. Because employer does allege any specific error in regard to this part of the administrative law judge's calculation, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the administrative law judge's determination that the miner had at least fifteen years of underground coal mine employment.[6]

In light of our affirmance of the administrative law judge's findings that the miner had at least fifteen years of underground coal mine employment, and a totally disabling respiratory or pulmonary impairment, we affirm her determination claimant invoked the Section 411(c)(4) presumption.

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

Because claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[7] 20 C.F.R. §718.305(d)(2)(i), or that "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). The

[6] Employer does not dispute that all of the miner's coal mine employment took place underground. Decision and Order at 8.

[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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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).

administrative law judge found that employer failed to establish rebuttal by either method.

Employer contends the administrative law judge "erroneously analyzed the medical evidence and impermissibly substituted her opinion for that of the medical experts to find no rebuttal."[8] Employer's Brief at 12-13. Employer also asserts, without further explanation, that the administrative law judge's "credibility determinations . . . are patently unreasonable." *Id.* at 13. The Board must limit its review to contentions of error that the parties specifically raise. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Because employer does not identify any specific error with regard to the administrative law judge's determination that the opinions of Drs. Vuskovich and Tuteur are insufficient to establish rebuttal of the presumption, these findings are affirmed. Decision and Order at 18-23. Consequently, we affirm the administrative law judge's findings that employer failed to rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(2)(i), (ii).

[8] Employer alleges that no evidence supports a finding that the miner had pneumoconiosis or that his death was hastened by pneumoconiosis. Employer's Brief at 13. However, because claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, she was not required to submit evidence establishing that the miner's death was due to pneumoconiosis.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge