U.S. Department of Labor

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

BRB No. 18-0577 BLA

JUSTIN EVDELL JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ICG KNOTT COUNTY LLC	)	
	)	
and	)	
	)	
ARCH COAL INCORPORATED	)	DATE ISSUED: 10/31/2019
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, 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: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05534) of Administrative Law Judge Joseph E. Kane 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 subsequent claim filed on November 18, 2013.[1]

The administrative law judge credited claimant with thirty-one years of underground coal mine employment[2] and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2012), and established a change in the applicable condition of entitlement. 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

[1] On October 30, 2012, the district director denied claimant's prior claim, filed on October 7, 2011, for failure to establish total disability. Director's Exhibit 1. Employer contends the current claim was filed on December 10, 2013. Employer's Brief at 25. Contrary to employer's contention, the claim was filed on November 18, 2013, "the day it [was] received by the office in which it [was] first filed." 20 C.F.R. §725.303(a)(1); Director's Exhibit 3.

[2] Claimant's coal mine employment was in Kentucky. Director's Exhibit 4. 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).

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has 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); *see* 20 C.F.R. §718.305.

Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] Employer also argues the administrative law judge erred in finding total disability and in invoking the Section 411(c)(4) presumption. Finally, it argues he erred in finding the presumption unrebutted.[5] 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 waived its Appointments Clause argument by failing to raise it before the administrative law judge. In a reply brief, employer reiterates its previous contentions.[6]

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. 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).

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[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.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding of thirty-one years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] Citing *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018), *stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), employer argues that the Affordable Care Act (ACA), which contains provisions reviving the Section 411(c)(4) presumption, "is invalid in its entirety." Employer's Reply Brief at 3-4. The United States Supreme Court, however, has 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).

Appointments Clause

Employer urges the Board to vacate the administrative law judge's Decision and Order Awarding Benefits and remand the case for assignment to a different constitutionally appointed administrative law judge for a new hearing pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). 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).

Lucia was decided over two 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 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.

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all relevant evidence and weigh the evidence supporting total disability against the 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).

The administrative law judge considered six new pulmonary function studies. Director's Exhibits 11, 15; Claimant's Exhibits 1, 2. He found an April 22, 2014 study

produced non-qualifying values,[7] both before and after the administration of a bronchodilator. Decision and Order at 8; Director's Exhibit 11. Although a September 18, 2015 study also produced non-qualifying values before and after the administration of a bronchodilator, the administrative law judge determined this study was invalid. Decision and Order at 20. The administrative law judge found the remaining four pulmonary function studies, conducted on August 4, 2014, October 23, 2014, August 10, 2015, and November 5, 2015, produced qualifying values.[8] *Id.* Because the four most recent valid studies produced qualifying values, the administrative law judge found the pulmonary function studies established total disability. *Id.*

Employer initially argues the administrative law judge erred in finding the non-qualifying September 18, 2015 pulmonary function study invalid. Employer's Brief at 14-16. We agree. The administrative law judge noted that Dr. Raj, who administered the study, indicated it met the criteria for acceptability, but not the criteria for reproducibility. Decision and Order at 20. Because the administrative law judge found that Dr. Raj did not rely on the results of the study in assessing the degree of claimant's pulmonary impairment, he concluded the results were invalid and "not reliable or probative" as to claimant's disability. *Id.*

We agree with employer that the administrative law judge mischaracterized Dr. Raj's opinion. Employer's Brief at 15. Dr. Raj did not invalidate the results of the study,[9] and he relied upon its results to support his opinion that claimant is totally disabled from a pulmonary standpoint.[10] Claimant's Exhibit 1. Because the administrative law judge mischaracterized the evidence, we cannot affirm his determination the September 18, 2015

[7] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values contained in Appendix B of 20 C.F.R Part 718. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[8] The August 4, 2014 study produced qualifying values both before and after the administration of a bronchodilator. Director's Exhibit 15.

[9] The technician noted claimant provided good effort and cooperation during the study. Claimant's Exhibit 1.

[10] Dr. Raj interpreted the results of the September 18, 2015 pulmonary function study as revealing a "moderate obstructive defect." Claimant's Exhibit 1 at 2.

non-qualifying pulmonary function study is invalid.[11] *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255 (6th Cir. 1983); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). Consequently, the administrative law judge erred in not weighing this study along with the other new pulmonary function studies.

Employer also contends the administrative law judge erred in not considering the reliability of the qualifying pulmonary function studies conducted on the October 23, 2014, August 10, 2015, and November 5, 2015. Employer's Brief at 16-17. Employer notes these studies, found in claimant's treatment notes, contain only one tracing, making it impossible to determine the reproducibility of the results. *Id.* Although the quality standards apply only to evidence developed for a claim and are inapplicable to treatment records, 20 C.F.R. §718.101(b); *J.V.S.* [*Stowers*] *v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-89 (2008), the administrative law judge must still be persuaded a study is "reliable" for "it to form the basis for a finding of fact on an entitlement issue." 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000). The administrative law judge erred in not addressing whether the results of these studies are reliable. *Stowers*, 24 BLR at 1-89.

Based on the above-referenced errors,[12] we must vacate the administrative law judge's finding that the pulmonary function studies established total disability, and remand the case for further consideration.[13] 20 C.F.R. §718.204(b)(2)(i). As the administrative

[11] The quality standards provide that a study that does not satisfy the reproducibility criteria "may still be submitted for consideration in support of a claim for black lung benefits." Appendix B to 20 C.F.R. Part 718, (2)(ii)(G).

[12] Employer also contends the administrative law judge erred in not considering a pulmonary function study Dr. Alam administered on March 28, 2012, which yielded non-qualifying results both before and after the administration of a bronchodilator. Employer's Brief at 16-17; *see* Claimant's Exhibit 2. Because this study predates the denial of claimant's prior claim, it is not relevant to whether claimant has demonstrated a change in the applicable condition of entitlement. *See* 20 C.F.R. §725.309(d)(4). However, if the administrative law judge finds the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant will have established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). The administrative law judge would then be required to consider claimant's 2013 claim on the merits, based on a weighing of all of the evidence of record, including the evidence submitted in connection with claimant's prior claims. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

[13] Claimant's average height of 71.5 inches, as the administrative law judge determined, falls between the heights of 71.3 and 71.7 inches listed in the applicable tables. Applying the lower height of 71.3 inches and claimant's age of 55 at the time of the April

law judge's findings with regard to the pulmonary function study evidence influenced his weighing of the medical opinion evidence on the issue of total respiratory disability,[14] we also vacate his finding at 20 C.F.R. §718.204(b)(2)(iv).

Employer argues the administrative law judge, on remand, should reconsider his determination that claimant's usual coal mine work as a section foreman required heavy labor. Employer's Brief at 11-14. We disagree. The administrative law judge noted claimant indicated the physical requirements of his job as a section foreman "varied," as he was required to check on everybody's safety, making sure there were "no bad conditions in the face area." Decision and Order at 18; Director's Exhibit 5; Hearing Transcript at 16. While claimant did not provide specific testimony or documentation regarding the exertional requirements of his work as a section foreman, the administrative law judge relied on claimant's descriptions of that work that he provided to the physicians.

The administrative law judge noted Dr. Alam documented that claimant, as part of his work as a section foreman, "performed safety checks, shoveled rock and coal, rock dusted by hand and machine, operated a scoop, shuttle car, and continuous miner, performed repairs, built brattice, crib and seals, hung curtains, performed supply work, and helped with belt and power moves." Decision and Order at 18; Director's Exhibit 11. Similarly, the administrative law judge noted Dr. Raj provided a description, indicating

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22, 2014 pulmonary function test, the administrative law judge accurately concluded the study is non-qualifying. The administrative law judge failed to address, however, that when the higher height of 71.7 inches is applied, the pre-bronchodilator FEV1 and MVV values for the April 22, 2014 pulmonary function test are qualifying for total disability. Because the administrative law judge has not explained his rationale for relying on the lower height of 71.3 inches, we vacate his finding that the pre-bronchodilator portion of the April 22, 2014 pulmonary function study is non-qualifying. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We note that the Director has previously taken the position that when a miner's height falls between two heights listed in the table, an administrative law judge should use the greater closest height to evaluate whether the results are qualifying. *See Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 n.6 (4th Cir. 1995) (noting that the Office of Workers' Compensation Programs Procedure Manual specifically mandates using the closest greater height when a miner's actual height falls between heights listed in the table).

[14] The administrative law judge credited Dr. Alam's opinion that claimant is totally disabled because he found it consistent with the evidence, including the October 23, 2014, August 10, 2015, and November 5, 2015 qualifying pulmonary function studies. Decision and Order at 21.

claimant's most recent work included "section boss, scoop operator and continuous miner operator," requiring him to "rock dust by hand and machine, pin tops, hang curtains, work at the face of the mine, and lift 20 to 100 pounds at any given time." Decision and Order at 18; Claimant's Exhibit 1. The administrative law judge determined this was "heavy work" based on the *Dictionary of Occupational Titles*, which defines "heavy work" as including "lifting no more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds." Decision and Order at 18 n.49, *citing* 20 C.F.R. §404.1567.

The administrative law judge, in his role as fact-finder, evaluates the credibility of the evidence of record. *See Rowe*, 710 F.2d at 255. In this case, the administrative law judge permissibly determined the unrefuted descriptions from employer's physicians[15] established claimant's usual coal mine employment required heavy labor. *Id.* Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant's work as a section foreman required heavy labor.

Because we have vacated the administrative law judge's finding of total disability pursuant to 20 C.F.R. §718.204(b)(2), we also vacate his finding that claimant invoked the Section 411(c)(4) presumption.[16] 30 U.S.C. §921(c)(4).

[15] Employer cites no contrary evidence that undermines the physicians' descriptions of claimant's work as a section foreman.

[16] We decline to address, at this time, employer's challenge to the administrative law judge's determination that it failed to establish rebuttal of the presumption. On remand, should the administrative law judge again find that claimant has invoked the Section 411(c)(4) presumption, employer may challenge the administrative law judge's rebuttal findings.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge