U.S. Department of Labor

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

BRB No. 18-0597 BLA

HERSHEL WILLIAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BIG ELK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 10/31/2019
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	
	)	
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 on Remand of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

R. Luke Widener (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

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: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Remand (2013-BLA-05312) of Administrative Law Judge Jennifer Gee, rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on March 22, 2012, and is before the Board for the second time.

In her initial Decision and Order Awarding Benefits, issued on August 30, 2016, the administrative law judge credited claimant with twenty-two years of coal mine employment in conditions substantially similar to those in underground mines and found he has a totally disabling respiratory impairment. Thus, she determined that claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

Pursuant to employer's appeal filed on September 14, 2016, the Board vacated the administrative law judge's determination that all of claimant's coal mine employment was aboveground at an underground mine, or in conditions substantially similar to those in an underground mine, but affirmed her total disability finding. It also affirmed her finding that, if invoked, employer failed to rebut the Section 411(c)(4) presumption. The Board instructed the administrative law judge that if she determined on remand that claimant has at least fifteen years of qualifying coal mine employment, she could reinstate her findings claimant invoked the presumption and employer did not rebut the presumption, and the award of benefits. *Williams v. Big Elk Coal Co.*, BRB No. 16-0662 BLA (Sept. 28, 2017) (unpub.).

On remand, employer filed a motion dated February 15, 2018, asking the administrative law judge to hold the case in abeyance, pending the decision of the United States Supreme Court in *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. __, 138 S. Ct. 2044

[1] Under Section 411(c)(4) of the Act, claimant's total disability is presumed to be due to pneumoconiosis if he has at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b).

(2018).[2] The administrative law judge denied employer's motion on February 22, 2018, finding it was unlikely *Lucia* would resolve whether the Department of Labor (DOL) validly appointed its administrative law judges. She also determined the Secretary of Labor's ratification of her appointment on December 21, 2017 cured any alleged defects.

In her Decision and Order Awarding Benefits on Remand, the administrative law judge found claimant established that his work for all three of his employers was substantially similar to conditions in an underground coal mine, and thus invoked the Section 411(c)(4) presumption.[3] Relying on the Board's affirmance of her finding that employer did not rebut the presumption, she again awarded benefits.

In the present appeal, employer argues the administrative law judge lacked the authority to hear and decide the case because she was not appointed in accordance with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] Employer also challenges the

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[2] *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. __, 138 S. Ct. 2044 (2018), involved a challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). U.S. Const. Art. II, §2, cl. 2. The Supreme Court held that SEC administrative law judges are "inferior Officers" under the Appointments Clause of the Constitution and therefore must be appointed by the President, courts, or heads of departments. *Lucia*, 138 S. Ct. at 2053-2055. A litigant who "timely" raises the issue is entitled to a new hearing before a new, constitutionally appointed administrative law judge. *Id*. at 2055.

[3] She also accurately stated that because claimant's employment with A & A Coal was aboveground at an underground mine, he need not establish substantial similarity. *See Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013) (no showing of comparability of conditions is necessary for an aboveground employee at an underground coal mine); Decision and Order on Remand at 8 n.7.

[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.

administrative law judge's determination that claimant established at least fifteen years of qualifying coal mine employment to invoke the Section 411(c)(4) presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds in a limited brief, contending employer forfeited its Appointments Clause argument by failing to raise it before the Board in the prior appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits on Remand 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

In this appeal, employer argues for the first time that the administrative law judge did not have the authority to decide this case because she was not properly appointed under the Appointments Clause. Employer therefore urges the Board to vacate the administrative law judge's decision and remand the case for assignment to a different administrative law judge for a new hearing. Employer further alleges that exceptional circumstances justify its failure to raise the Appointments Clause issue at the earliest opportunity. The Director responds, urging the Board to hold that employer forfeited its Appointments Clause challenge and that there are no exceptional circumstances to excuse employer's forfeiture.

We agree with the Director that employer forfeited its Appointments Clause argument by failing to raise it in its initial briefing before the Board. *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.") (internal citation omitted); *Island Creek Coal Co. v. Bryan*, F.3d , Nos. 18-3680, 18-3909, 18-4022, 2019 WL 4282871, at *9-10 (6th Cir. Sept. 11, 2019) (petitioners forfeited appointments clause challenge by failing to raise it in initial briefing before the Board); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues the petitioner raises after it has filed its opening brief);Order Denying Employer's Motion for Reconsideration at 1-2; Director's Response Brief at 3.

Contrary to employer's contention, the exception for considering a forfeited argument due to extraordinary circumstances recognized in *Jones Bros. v. Sec'y of Labor*,

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Art. II, § 2, cl. 2.

898 F.3d 669 (6th Cir. 2018),[5] does not apply in this case. Unlike the Federal Mine Safety and Health Review Commission, the Board has the long-recognized authority to address properly-raised questions of substantive law. *Bryan*, F.3d , Nos. 18-3680, 18-3909, 18-4022, 2019 WL 4282871, at *9-10; *see Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116-17 (6th Cir. 1984) (holding that because the Board performs the identical appellate function the district courts previously performed, Congress intended to vest in the Board the same judicial power to rule on substantive legal questions as the district courts possessed); *Duck v. Fluid Crane & Constr. Co.*, 36 BRBS 120, 121 n.4 (2002) (the Board "possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its *jurisdiction*").

We also reject employer's argument that its failure to raise the Appointments Clause argument in its initial appeal to the Board should be excused due to "'the absence of legal authority' on the constitutionality of the [DOL's] appointments of its [administrative law judges]." Employer's Brief at 8, *quoting Jones Bros.*, 898 F.3d at 677; *see also* Employer's Brief at 9 ("much like the Sixth Circuit noted in *Jones Bros.*, prior to *Lucia*, there was considerable confusion on the constitutionality of the Department's appointments of [administrative law judges]"). No precedent prevented employer from bringing the constitutional claim before the date that the Supreme Court decided *Lucia*. *Wilkerson*, 910 F.3d at 257.

Similarly, there is no merit to employer's argument that *Freytag v. Commissioner*, 501 U.S. 868 (1991), mandates a finding that extraordinary circumstances exist to excuse forfeiture of its Appointments Clause argument. In *Freytag*, the Supreme Court excused waiver of the Appointments Clause issue as it pertained to Special Trial Judges (STJs)

[5] In *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018), the Sixth Circuit held the employer forfeited its Appointments Clause challenge by failing to raise it in its opening brief. The court nevertheless considered petitioner's argument because petitioner's confusion as to whether the Federal Mine Safety and Health Review Commission had the authority to decide petitioner's constitutional claim was "understandable." 898 F.3d at 678. We reject any suggestion the forfeiture of employer's Appointments Clause challenge should be excused because it was similarly confused as to whether the administrative law judge could reach the constitutional question. Forfeiture occurred when employer failed to raise the Appointments Clause argument before the Board in its initial appeal; the administrative law judge's authority to resolve constitutional issues is not relevant. *See Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84, 1-87-88 (1994). For this reason, we also reject employer's contention that because it raised the Appointments Clause issue in its opening brief in the present appeal, *Jones Bros.* is distinguishable.

appointed by the United States Tax Court.[6] 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 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 stated "everything necessary to decide this case." 138 S.Ct. at 2053.

We therefore hold employer forfeited its Appointments Clause challenge and deny the relief requested.

Invocation of the 411(c)(4) Presumption

Substantial Similarity of Conditions

Because claimant established total disability, he is entitled to the Section 411(c)(4) presumption if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. Conditions in an underground mine are "substantially similar" if claimant was "regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

The Board previously affirmed the administrative law judge's finding of twenty-two years of coal mine employment. *Williams*, BRB No. 16-0662 BLA, slip op. at 3. Employer concedes claimant had a total of 9.92 years of employment in conditions substantially similar to those in an underground mine.[7] Employer's Brief at 16 n.3. Employer argues, however, that the administrative law judge erred in finding claimant worked at least an additional ten years in substantially similar conditions for Ray Coal Company/Whitaker Coal Company (Ray Coal).[8] *Id.* at 10-16. Consequently, employer

[6] The Court ruled the petitioners waived their constitutional argument by consenting to a trial before an improperly appointed Special Trial Judge. *Freytag v. Commissioner*, 501 U.S. 868, 873 (1991).

[7] The total of 9.92 years is the sum of 9.75 years with employer and .17 years with A & A Coal Company. Employer's Brief at 16 n.3.

[8] On claimant's Employment History form (CM-911a), he indicated that he worked for Ray Coal from August 1977 to July 1999 on the surface. Director's Exhibit 3. The

alleges the administrative law judge also erred in finding claimant invoked the Section 411(c)(4) presumption. *Id*. at 17.

As the administrative law judge noted, claimant testified regarding his dust exposure in his various coal mining jobs.[9] Employer concedes this testimony establishes substantial similarity during his 9.75 years of work for employer, but argues the administrative law judge erred in "credit[ing] the claimant's testimony to his entire career." Employer's Brief at 16. Contrary to employer's argument, substantial evidence supports the administrative law judge's finding all of claimant's work, including "at least" ten years with Ray Coal, occurred in conditions substantially similar to an underground coal mine. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490 (6th Cir. 2014).

As the administrative law judge noted, claimant testified, consistent with his Employment History form (CM-911a) and Description of Coal Mine Work (CM-913) form, he "was hired [by employer] mainly as a truck driver, a rock truck driver," but he also ran a bulldozer, an end loader, a road grader and a coal sweeper. Hearing Transcript at 14. She accurately stated, "neither the [c]laimant, his lay representative, nor

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administrative law judge accurately noted that claimant's Social Security Records show that he worked for Ray Coal between 1977 and 1989 and, therefore, permissibly determined that "[t]he notation on the Claimant's employment history is . . . more likely an error." Decision and Order on Remand at 4 n.2; *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Director's Exhibit 6A.

[9] Claimant testified about his work as a coal truck driver that "you can't see nothing for the dust," "you can't keep it out," and "[i]t's just like water. That dust is so fine and you can't keep it off your equipment." Hearing Transcript at 15-16. Claimant also indicated he drove coal trucks when there were no air conditioners so you had to keep the doors open "to keep from burning up." *Id*. Claimant next commented on his work operating a dozer and a road grader, clarifying the he "was kind of like a utility man. I could do it all. I could run any of it. . . . I cleaned coal and run a grader in the coal pit cleaning coal. I done about everything, loaded holes some and I never did run a drill, but I worked behind the drill." *Id*. at 17. Claimant explained that the dust exposure was similar to what he was exposed to driving a coal truck for each piece of equipment he operated, except for the coal sweeper and coal grader, which "is probably worse." *Id*. On cross examination, it was mentioned that claimant previously discussed some of the jobs that he performed and claimant reiterated that he did not work as a driller but instead worked as a blaster and on a coal clean crew that were in close proximity to the drill. *Id*. at 24-25. He stated that after the drill "pile[d] big piles of dust around the hole," he loaded the dynamite, or primer into the hole, and then "shove[d] all the dust back in the hole to prime [it]." *Id*.

[e]mployer's counsel made any further reference to the specific employer for which the [c]laimant performed any individual duties."[10] Decision and Order on Remand at 6; *see* Hearing Transcript at 14-18, 24-25. She found that while his testimony concerning the types of jobs he performed for employer occurred "near the beginning of his testimony," his subsequent testimony relating to dust conditions addressed more general questions about "dust exposure [on] each piece of equipment [he] operated" or duties that were specific to employment with Ray Coal. *Id*. at 7.

Given that claimant did not clearly limit each job he described to a particular employer, the administrative law judge acted within her discretion in relying on the descriptions he provided on forms CM-911a and CM-913 to clarify his hearing testimony. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511 (6th Cir. 2002); Decision and Order on Remand at 6. She then permissibly determined "[c]laimant's testimony about dust conditions at the hearing was clearly not limited to his work for [e]mployer," especially in light of his testimony about his work as a blaster for Ray Coal, which does not appear on CM-911a as a job he performed for employer but does correspond to his description on the form of work he did for Ray Coal.[11] Decision and Order on Remand at 7; *see Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Director's Exhibits 3-4.

The administrative law judge also rationally found the medical reports corroborated claimant's hearing testimony that he did not work as a driller but rather "filled the blasting

[10] At one point during claimant's testimony concerning his job duties, employer's counsel stated "[w]as that also for ---" but did not follow up to clarify which employer claimant was discussing. Hearing Transcript at 17.

[11] As the administrative law judge noted, claimant reported on his CM-911a form he worked for Ray Coal as a blaster, sweeper, road grader, and rock trucker and would fill drill holes, and clean coal. Decision and Order on Remand at 6; Director's Exhibit 3. Claimant indicated that while working for employer, he was a front end loader, road grader, rock truck driver, bulldozer, and sweeper. Director's Exhibit 3. The administrative law judge also stated that on claimant's Description of Coal Mine Work form (CM-913), detailing the physical and other requirements of his most recent job with employer, claimant described duties related to his jobs driving a rock truck and operating a road grader, front end loader, sweeper, bulldozer, and front end loader. Director's Exhibit 4. The administrative law judge noted that claimant did not reference work as a blaster or working with a drill team while working for employer. Decision and Order on Remand at 6.

holes after the hole was drilled."[12] Decision and Order on Remand at 7, *quoting* Employer's Exhibit 1; *see Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Director's Exhibits 11, 14. Given the nature of claimant's testimony and the fact he performed many of the same jobs for Ray Coal and employer, and worked as a blaster only for Ray Coal, the administrative law judge rationally found "[c]laimant's description of his work, whether specifically tied to a job he performed only for [Ray Coal] or for [e]mployer, paints a general picture of life and work in the open coal pit," which involved regular exposure to coal dust. Decision and Order on Remand at 7; *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664 (6th Cir. 2015) (claimant's "uncontested lay testimony" regarding his dust conditions "easily supports a finding" of regular dust exposure); *Sterling*, 762 F.3d at 490 (claimant's testimony that the conditions of his employment were "very dusty" sufficient to establish regular exposure); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989).

Because the administrative law judge permissibly found claimant's work for Ray Coal regularly exposed him to coal dust, she rationally determined it was in conditions substantially similar to an underground coal mine. *Sterling*, 762 F.3d at 489-90, 25 BLR at 2-642-43; Decision and Order on Remand at 8. Therefore, we affirm the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment.[13] Consequently, we also affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption and the reinstatement of her finding that employer did not rebut the presumption, and the award of benefits.

[12] Drs. Habre and Rosenberg stated that claimant worked as a high wall driller for between four to eight years. Director's Exhibit 11, 14. Dr. Sargent specifically followed up with claimant concerning whether he ran a drill on a high wall. Employer's Exhibit 1. Claimant stated he did not run a drill but rather filled the blasting holes after the hole was drilled. *Id.*

[13] The administrative law judge found that claimant's work for Ray Coal "for at least an additional [ten] years" combined with "the 9.75 years of work for [e]mployer in which the [c]laimant was regularly exposed to coal mine dust . . . establishes that the [c]laimant has sufficient qualifying coal mine employment to invoke" the Section 411(c)(4) presumption. Decision and Order on Remand at 8.

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits on Remand.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge