U.S. Department of Labor

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

BRB No. 17-0682 BLA
Case No. 2013-LHC-05231

WILLIAM L. BELT	)	
	)	
	)	
v.	)	
	)	DATE ISSUED: 09/12/2019
ISLAND CREEK KENTUCKY MINING	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	ORDER on MOTION
Party-in-Interest	)	for RECONSIDERATION

Employer has timely moved for reconsideration of the Board's Decision and Order in this case, *Belt v. Island Creek Kentucky Mining*, BRB No. 17-0682 (Dec. 13, 2018). 33 U.S.C. §921(b)(5); 20 C.F.R §802.407(a). In its decision, the Board affirmed the administrative law judge's finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b), established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and invoked 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). As the administrative law judge also found that employer failed to rebut the presumption, the Board affirmed the award of benefits commencing in March 2012, the month of the filing of the claim.

Employer contends the Board should have vacated sua sponte the administrative law judge's decision and remanded for a new hearing pursuant to *Lucia v. SEC*, 585 U.S. ___, 138 S.Ct. 2044 (2018) and *Jones Bros, Inc. v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018), because he was not properly appointed under the Appointments Clause of the Constitution, Art. II § 2, cl. 2, and thus lacked the authority to decide this case. The Director, Office of Workers' Compensation Programs, and claimant respond that employer forfeited this contention by failing to raise the issue in a timely manner.

We agree that the issue is forfeited.[1] *Island Creek Coal Co. v. Bryan*, ___ F.3d ___, Nos. 18-3680, 18-3909, 18-4022, 2019 WL 4282871 (6th Cir. Sept. 11, 2019). Contrary to employer's contention, the Appointments Clause issue is "non-jurisdictional," and thus is subject to the doctrines of waiver and forfeiture. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009). Because employer first raised its Appointments Clause argument sixteen months after it filed its appeal, one year after it filed its opening brief, and only after the Board issued its decision on the merits, employer forfeited the issue. *See Lucia*, 138 S. Ct. at 2055 (one who makes "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case" is entitled to relief); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254 (6th Cir. 2018) (Appointments Clause challenge forfeited because it was not raised in opening brief); *Motton v. Huntington Ingalls Industries, Inc.*, 52 BRBS 69 (2018) (Appointments Clause issue forfeited when raised in motion to vacate filed after initial petition for review and brief); *Luckern v. Richard Brady & Associates*, 52 BRBS 65 (2018) (Appointments Clause issue raised in reply brief will not be addressed); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111 (1995) (Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal).

In asserting its challenge is timely, employer contends the Board lacks the authority to address issues of constitutionality and thus it was unnecessary to raise the issue prior to the decision in *Lucia*. However, employer overlooks that judicial precedent and Board practice confirm that Congress vested the Board with the statutory power to decide substantive questions of law. 33 U.S.C. §921(b)(3); *see Bryan*, 2019 WL 4282871 at *9; *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112 (6th Cir. 1984) (because the Board performs the identical appellate function previously performed by the district courts, Congress intended to vest it with the same judicial power to rule on substantive legal questions). Indeed, the Board has long addressed constitutional issues generally. *See Shaw v. Bath Iron Works Corp.*, 22 BRBS 73 (1989) (addressing the constitutionality of the 1984 amendments to the Longshore Act); *Herrington v. Savannah Machine & Shipyard*, 17 BRBS 196 (1985) (addressing constitutional validity of statutes and regulations within its jurisdiction); *Smith v. Aerojet General Shipyards*, 16 BRBS 49 (1983) (addressing due process issue); *cf. Jones Bros.*, 898 F.3d 669, 677 (6th Cir. 2018) (Federal Mine Safety and Health Review Commission has authority to entertain and remedy as-applied Appointments Clause challenges, but may not have such authority with respect to facial constitutional challenges). If employer had timely presented the issue, the Board could

[1] Forfeiture is "the failure to make the timely assertion of a right." *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 n.1 (2017) (citations omitted).

have addressed it and provided a remedy. *Miller v. Pine Branch Coal Sales, Inc.*, __ BLR ___, BRB No. 18-0323 BLA (Oct. 22, 2018) (en banc) (vacating award by improperly appointed administrative law judge and remanding for reassignment). We further note that employer failed to raise the issue after *Lucia* was decided, but prior to the Board's December 2018 decision.

We thus decline to excuse employer's forfeiture. *Wilkerson*, 910 F.3d at 257 ("No precedent prevented the company from bringing the constitutional claim before [the Supreme Court's decision in *Lucia*]."); *In re DBC*, 545 F.3d 1373 (Fed. Cir. 2008) (declining to excuse waived Appointments Clause challenge); *see Freytag v. Comm'r*, 501 U.S. 868, 879 (1991) ("rare" case where discretion was exercised to address untimely Appointments Clause challenge). Unlike *Jones Bros.*, employer here did not preserve the constitutional issue by raising it before the Board in its Petition for Review and brief.[2] *See Bryan*, 2019 WL 4282871 at *10; *Turner Bros., Inc. v. Conley*, 757 F. App'x 697, 699-700 (10th Cir. 2018) (unpublished) (distinguishing *Jones Bros.* and declining to excuse forfeiture on the basis that the issue was first mentioned in a motion to the court after the briefing was complete). Therefore, we reject employer's contention on this issue.[3]

Employer also contends the Board erred in affirming the administrative law judge's finding the evidence sufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(iv).

Employer avers the Board erred in affirming the administrative law judge's use of the Dictionary of Occupational Titles (DOT) to assess whether claimant is disabled. The administrative law judge used the DOT, as incorporated into the Social Security Administration regulation at 20 C.F.R. §404.1567, to assess the exertional requirements of claimant's usual coal mine work as a cutting machine/continuous miner operator. *See* Decision and Order at 14 n.18. It was not error, per se, for the administrative law judge to

[2] In *Jones Bros.*, the petitioner raised the Appointments Clause issue before the Federal Mine Safety and Health Review Commission, but did not "press" it.

[3] Employer's reliance on *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942 (6th Cir. 1999), is misplaced as well, because it involved a petition for modification of the administrative law judge's decision. In *Milliken*, the court rejected the argument that the claimant had waived the issue upon which she premised her modification petition. The court stressed that reliance on waiver is misplaced where a timely request for modification is filed. *Id*. at 955; *see also Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 547 (7th Cir. 2002) (a modification request cannot be denied solely because it contains an argument that could have been presented at an earlier stage in the proceedings).

use the DOT for defining lifting requirements as heavy/medium/light, as it is a government publication. *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). Moreover, the Board's decision makes clear that the administrative law judge relied on claimant's testimony and medical evidence to assess the actual requirements of his job duties and that substantial evidence supports his conclusion that claimant's job required work at medium and heavy levels of exertion. *Belt*, slip op. at 4-5.

Employer correctly notes that the Board inaccurately cited the superseded "official notice" regulation at 29 C.F.R. §18.45, rather than the current regulation at 29 C.F.R. §18.84.[4] However, this error is harmless because, in its appeal to the Board, employer did not object to the administrative law judge's use of the DOT on the ground that it did not have a chance to respond to it. *Shinseki v. Sanders*, 556 U.S. 396 (2009). Employer cannot now complain on reconsideration that it lacked advance notice of the administrative law judge's intent to cite the DOT. *See Ravalli v. Pasha Maritime Services*, 36 BRBS 91 (2002); *see also Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Jordan v. James G. Davis Constr. Corp.*, 9 BRBS 528.9 (1978).

Finally, we reject employer's contention that the Board erred in affirming the finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Contrary to employer's contention, the administrative law judge did not use any judicially-noticed facts to determine claimant's capability of working from a respiratory or pulmonary standpoint. His use of a combination of lay evidence concerning claimant's job duties and medical

---

[4] 29 C.F.R. §18.45 provided**:**

> Official notice may be taken of any material fact, not appearing in evidence in the record, which is among the traditional matters of judicial notice: Provided, however, that the parties shall be given adequate notice at the hearing *or by reference in the administrative law judge's decision*, of the matters so noticed, and shall be given adequate opportunity to show the contrary.

(emphasis added).

29 C.F.R. §18.84, titled "Official Notice," provides:

> On motion of a party or on the judge's own, official notice may be taken of any adjudicative fact or other matter subject to judicial notice. The parties must be given an adequate opportunity to show the contrary.

evidence concerning claimant's ability to perform those duties comports with law. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703 (6th Cir. 2002). As employer has not demonstrated reversible error in the Board's consideration of its appeal, we deny its motion for reconsideration.

Accordingly, we deny employer's motion for reconsideration.[5] 20 C.F.R. §802.409. The Board's decision is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[5] As Chief Administrative Appeals Judge Betty Jean Hall has retired and Administrative Appeals Judge Ryan Gilligan is no longer a member of the Board, Chief Administrative Appeals Judge Judith S. Boggs and Administrative Appeals Judge Greg J. Buzzard are substituted on this panel. 20 C.F.R. §802.407(a).