U.S. Department of Labor

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

BRB No. 18-0571 BLA

RICHARD N. YONTS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL OF KENTUCKY, INCORPORATED	)	DATE ISSUED: 09/26/2019
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Stephen A. Sanders (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, 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: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2013-BLA-05282) of Administrative Law Judge Jennifer Gee 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 miner's claim filed on April 2, 2012, and is before the Board for a second time.

In her initial decision, the administrative law judge credited claimant with 36.94 years of coal mine employment, 27.94 years of which took place in underground mines, and accepted the parties' stipulation that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Thus, 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 original appeal, the Board affirmed, as unchallenged, the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption. The Board also affirmed her finding that employer did not rebut the presumed existence of clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i). The Board agreed with employer, however, that the administrative law judge erred in her weighing of the medical opinions concerning the presumed existence of legal pneumoconiosis and total disability causation at 20 C.F.R. §718.305(d)(1)(i)(A), (ii). Thus, the Board vacated the administrative law judge's findings on these issues and remanded the case for further consideration. *Yonts v. Consol. of Kentucky, Inc.*, BRB No. 16-0516 BLA (June 21, 2017) (unpub.).

On remand, the administrative law judge again found that employer did not rebut the presumed existence of legal pneumoconiosis or total disability causation and awarded benefits.

In the present 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

[1] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption that he is totally disabled 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).

consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[2] Employer also contends 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 and asserts that employer's Appointments Clause challenge is not timely. The Director, Office of Workers' Compensation Programs, filed a limited response arguing employer forfeited its Appointments Clause challenge by failing to raise it in its previous appeal to the Board and that exceptional circumstances do not exist to excuse its failure to timely raise this issue.

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

Appointments Clause Challenge

We agree with claimant and the Director that employer forfeited its Appointments Clause argument by failing to raise it when the case previously was before the Board. *See Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (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); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not

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[2] 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.

[3] Because claimant's coal mine employment was in Kentucky, 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); Director's Exhibit 4.

consider new issues raised by the petitioner after it has filed its opening brief); Claimant's Brief at 13-14; Director's Brief at 2-6.

The exception for considering a forfeited argument due to extraordinary circumstances recognized in *Jones Brothers v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018) is inapplicable because, unlike the Federal Mine Safety and Health Review Commission, the Board has the long-recognized authority to address properly raised questions of substantive law. *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); *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 previously performed by the district courts, Congress intended to vest in the Board the same judicial power to rule on substantive legal questions as was possessed by the district courts); *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").

Moreover, after the issuance of *Lucia*, employer failed to raise the issue before the administrative law judge on remand. At that time, the administrative law judge could have addressed employer's arguments and, if appropriate, granted a request for assignment for a new hearing before a new judge. *See Kiyuna v. Matson Terminals, Inc.*, BRBS , BRB No. 19-0103, slip op. at 4 (June 25, 2019). Therefore, we reject employer's argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different administrative law judge.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish claimant has neither clinical nor legal pneumoconiosis[4] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as

[4] Clinical pneumoconiosis is defined as "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1). "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).

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.

To rebut legal pneumoconiosis, employer must demonstrate claimant does not have 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); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the opinions of Drs. Fino and Dahhan, both of whom opined claimant does not have legal pneumoconiosis.[5] Decision and Order on Remand at 3-10; Employer's Exhibits 1, 3, 6, 7. Dr. Fino diagnosed obstructive lung disease with emphysema due to cigarette smoking. Decision and Order on Remand at 8; Employer's Exhibits 1 at 9-10; 7 at 19. Dr. Dahhan diagnosed an obstructive impairment due to smoking and possibly bronchiectasis and/or hyperactive airways disease. The administrative law judge found their opinions not sufficiently reasoned to support employer's burden of proof. Decision and Order on Remand at 7-10. Employer challenges the administrative law judge's rejection of the opinions of Drs. Fino and Dahhan, but we see no error in her credibility findings.

Dr. Fino opined that coal mine dust exposure can cause obstructive lung disease, even with a negative x-ray. But he opined that claimant's obstructive impairment is associated with emphysema and that when coal mine dust exposure causes pulmonary emphysema, there should be evidence of significant coal mine dust deposition in the lungs, i.e., pathology evidence or x-ray readings greater than 1/0.[6] Decision and Order on Remand at 7-8; Employer's Exhibits 1 at 9-10; 7 at 19-21, 33. Contrary to employer's argument, the administrative law judge permissibly found Dr. Fino's reasoning inconsistent with the Department of Labor's recognition that legal pneumoconiosis, in the form of a clinically significant obstructive impairment, can exist in the absence of clinical pneumoconiosis.[7]

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[5] The administrative law judge also considered Dr. Alam's opinion, diagnosing legal pneumoconiosis, and found it to be well-reasoned, well-documented and consistent with the scientific evidence credited by the Department of Labor in the preamble to the 2001 regulations. Decision and Order on Remand at 7.

[6] Dr. Fino testified that coal dust was not a cause of claimant's obstructive impairment because he "could not document a significant coal content retention within the lungs, which is the factor that causes coal dust induced emphysema and reduction in FEV1." Employer's Exhibit 7 at 33.

[7] Employer generally asserts the administrative law judge failed to consider that Dr. Fino relied on studies published after the preamble to support his opinion regarding the

20 C.F.R. §718.202(a)(4), (b); 65 Fed. Reg. 79,920, 79,940-43 (Dec. 21, 2000); *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488-89 (6th Cir. 2012) (opinion that emphysema could not have been caused by coal mine dust exposure because insufficient dust retention was shown on the miner's x-rays permissibly discounted as counter to the studies underlying the preamble); Decision and Order on Remand at 7-8.

Drs. Fino and Dahhan also opined claimant does not suffer from legal pneumoconiosis based, in part, on studies showing the average expected losses in FEV1 values due to coal dust exposure. Decision and Order on Remand at 8-9; *see* Employer's Exhibits 1; 3; 6 at 35-37; 7 at 21-22. Dr. Fino relied on medical literature to conclude that because claimant did not have x-ray evidence of pneumoconiosis, he could only have "a [seven] percent additional reduction in FEV1 due to coal mine dust." Employer's Exhibit 7 at 20. Dr. Dahhan stated that claimant "has lost more than 1200cc of his FEV1 which is an amount not consistent with a pure obstructive impact of coal dust on his respiratory system." Employer's Exhibit 3. The administrative law judge permissibly found their opinions not well reasoned because they relied on generalizations regarding the effects of coal mine dust exposure on the lungs and failed to adequately explain why claimant could not be one of the susceptible miners who develops clinically significant obstructive lung disease from coal mine dust exposure. *See* 20 C.F.R. §718.201(b); *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); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order on Remand at 8-9.

Further, in light of the additive nature of smoking and coal dust exposure, the administrative law judge permissibly found that neither physician adequately explained why, even assuming claimant's obstruction is primarily due to smoking, his thirty-six years of coal dust exposure did not also significantly contribute to or aggravate his impairment. *See* 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. at 79,940; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Rowe*, 710 F.2d at 255; Decision and Order on Remand at 7, 10. As the administrative law judge permissibly discredited the only opinions supportive of a finding claimant does not have legal pneumoconiosis,[8] we affirm her

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significance of coal content in the lungs. Employer's Brief at 25. Employer concedes, however, that these more recent studies corroborate, rather than contradict, the studies the Department of Labor found credible in promulgating its regulations. *Id.* Thus employer fails to establish how this alleged error could have made any difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

[8] Employer asserts the administrative law judge erred in crediting Dr. Alam's opinion diagnosing legal pneumoconiosis. Employer's Brief at 8-18. We decline to

finding that employer failed to rebut the Section 411(c)(4) presumption by establishing claimant does not have pneumoconiosis.[9] 20 C.F.R. §718.305(d)(1)(i)(A).

The administrative law judge next addressed whether employer satisfied the second method of rebuttal by establishing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. Decision and Order on Remand at 10-12. She again permissibly discredited the opinions of Drs. Fino and Dahhan because neither physician diagnosed legal pneumoconiosis, contrary to her finding employer failed to disprove the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order on Remand at 11-12. We therefore affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii).

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis and employer did not rebut the presumption, claimant has established entitlement to benefits.

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address this argument as his opinion does not assist employer in rebutting the Section 411(c)(4) presumption. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Moreover, the administrative law judge explained that regardless of her consideration of Dr. Alam's opinion, the medical evidence employer submitted is insufficient to rebut legal pneumoconiosis. Decision and Order on Remand at 7.

[9] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Fino and Dahhan, we need not address employer's remaining arguments regarding their opinions concerning rebuttal of legal pneumoconiosis. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge