U.S. Department of Labor

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

BRB No. 18-0582 BLA

WILLIE A. SOWARDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TROJAN MINING, INCORPORATED, DBA SUN GLO COAL COMPANY, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 09/25/2019
	)	
OLD REPUBLIC 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 Larry A. Temin, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Jeffrey S. Goldberg (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-05611) of Administrative Law Judge Larry A. Temin rendered 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 claim filed on June 17, 2010.

In the initial decision, the administrative law judge credited claimant with "almost 17 years" of underground coal mine employment,[1] found he has a totally disabling respiratory or pulmonary impairment, and concluded he invoked the Section 411(c)(4) presumption.[2] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §§718.204(b)(2), 718.305. The administrative law judge determined employer failed to rebut the presumption and awarded benefits.

Pursuant to employer's appeal, the Board affirmed, as unchallenged, the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption and rejected employer's arguments that the administrative law judge erred in finding it failed to rebut the presumption. *Sowards v. Trojan Mining, Inc*., BRB No. 16-0644 BLA slip op. at 2 n.3, 3-5 (Aug. 30, 2017) (unpub.). The Board further held the administrative law judge rationally found benefits should commence as of June 2010, the month in which claimant filed this claim. *Id* at 5-6. The Board remanded the case for the administrative law judge to consider whether claimant's work as a federal mine inspector was comparable to his previous coal mine employment, thus requiring a suspension of

[1] The record reflects claimant's last coal mine employment was in Kentucky. Hearing Transcript at 15. 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] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled 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.

benefits from June 2010 through October 2011, when claimant left the inspector position.[3] 20 C.F.R. §725.504(c); *Id*. at 6.

On remand, the administrative law judge found claimant's work as a federal mine inspector, while gainful, was not comparable to his work as a coal miner and his benefits therefore should not be suspended during the time he worked as a federal mine inspector.[4]

On appeal, employer argues the administrative law judge lacked the authority to hear and decide the case because he was not properly appointed consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer also asks the Board to reconsider its prior decision affirming the administrative law judge's determination it did not rebut the Section 411(c)(4) presumption. Additionally, employer challenges the administrative law judge's determination claimant's work as a mine inspector was not comparable to his coal mine employment. Finally, employer requests that the Board hold this claim in abeyance due to pending litigation concerning the constitutionality of the Affordable Care Act.

Claimant and the Director, Office of Workers' Compensation Programs (the Director) respond that employer waived its Appointments Clause challenge by failing to raise it when the case was previously before the Board and the Board should not revisit the issues decided in the prior appeal. The Director also urges the Board to reject employer's request to hold this claim in abeyance.[5] In a consolidated reply brief, employer reiterates

[3] Claimant worked as a federal mine inspector from August 25, 1991 to October 31, 2011. Hearing Transcript at 17-18. The administrative law judge accurately noted that work as a federal mine inspector does not constitute coal mine employment. *Navistar, Inc. v. Forester*, 767 F. 3d 638, 647 (6th Cir. 2014); Decision and Order at 4.

[4] The administrative law judge found the record supported claimant's testimony that he worked as a maintenance man and electrician, and that both jobs required a higher level of physical exertion and more specialized skills than did his work as a mine inspector. Decision and Order on Remand at 5-6.

[5] The Director states that all of employer's arguments, including those relating to whether claimant's federal mine inspector job was comparable to his coal mine employment, are without merit. Director's Brief at 2. Neither the Director nor claimant, however, sets forth any specific argument concerning the administrative law judge's findings on this issue.

its contentions. We deny employer's motion to hold the claim in abeyance and further affirm the administrative law judge's decision.[6]

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

In light of the Supreme Court's holding in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018),[7] employer argues that the manner in which the administrative law judge was

[6] Employer argues that the Board should hold this case in abeyance pending resolution of the legal challenges to the constitutionality of the Affordable Care Act (ACA), Public Law No. 111-148, in *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018), *decision stayed pending appeal,* 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), *appeal docketed*, No. 19-10011 (5th Cir. Jan. 7, 2019). As the Director described, the district court in *Texas* ruled that the ACA individual mandate is unconstitutional and the remainder of the legislation was not severable. Director's Response at 3. The United States Court of Appeals for the Fifth Circuit held oral argument in the case on July 9, 2019 but has not issued a decision. As the Director also points out, the United States Court of Appeals for the Fourth Circuit has held that the ACA amendments to the Black Lung Benefits Act are severable on the basis that they have "a stand-alone quality" and are "fully operative as a law." *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), as amended (Dec. 21, 2011). Further, the United States Supreme Court upheld the constitutionality of the ACA, *Nat'l Fed'n of Indep. Bus. v. Sebulius*, 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).

[7] Shortly after the administrative law judge issued his decision on remand, the Supreme Court decided *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), in which it held that Securities and Exchange Commission administrative law judges were not appointed in accordance with the Appointments Clause of the Constitution. *Lucia*, 138 S.Ct. at 2055. The Court further held that because the petitioner timely raised his Appointments Clause challenge, he was entitled to a new hearing before a new and properly appointed administrative law judge. *Id.*

appointed violates the Appointments Clause of the Constitution, Art. II §2, cl. 2.[8] Employer first raised this issue in a motion for reconsideration after the administrative law judge issued his Decision and Order on Remand. The administrative law judge denied reconsideration, finding that employer "waived" its argument by failing to raise the issue when the case was previously before him or the Board.[9] Employer contends the administrative law judge erred in finding that it "waived" its Appointments Clause challenge, arguing that an Appointments Clause violation "enjoy[s] a level of significance that overcomes ordinary considerations of waivers." Employer's Brief at 15.

We agree with the administrative law judge and the Director that employer forfeited its Appointments Clause argument by failing to raise it when the case was previously 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.") (citation omitted); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its opening brief); Order Denying Employer's Motion for Reconsideration at 1-2; Director's Response Brief at 3.

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*

[8] 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.

U.S. Const. art. II, § 2, cl. 2.

[9] Order Denying Employer's Motion for Reconsideration at 1-2.

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"). 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

Employer asks the Board to reconsider its prior decision affirming the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption. Employer's Brief at 16-24. Because employer has not shown that the Board's decision was clearly erroneous, or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Commencement Date for Benefits

The Board previously held that the administrative law judge rationally determined there was no evidence indicating when claimant became totally disabled due to pneumoconiosis and he was therefore entitled to benefits as of June 2010, the month in which he filed the claim.[10] 20 C.F.R. §725.503(b); *Sowards*, slip. op. at 6. However, because claimant continued to work as a federal mine inspector through October 2011, the Board remanded this case for the administrative law judge to determine whether claimant's work as a federal mine inspector was gainful and comparable to his previous coal mine

[10] Once entitlement to benefits is established, the commencement date is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600(3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month in which the claim was filed, unless evidence the administrative law judge credited establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

employment so that payments should have been suspended during the time he worked as a federal mine inspector. 20 C.F.R. §725.504(c);[11] *Id.* at 6. On remand, the administrative law judge found that claimant's work as a mine inspector was gainful but not comparable to his coal mine employment and therefore benefits were payable beginning June 2010, with no period of suspension of benefits. Decision and Order on Remand at 6.

Employer argues the administrative law judge relied solely on the exertional requirements of claimant's jobs in determining his federal inspector work was not comparable and his "failure to consider the remaining factors constitutes legal error." Employer's Brief at 24-26. Contrary to employer's argument, the administrative law judge considered several factors, including exertional requirements, skills required to perform the jobs, earnings and dust conditions. He found that claimant's employment as a mine inspector was gainful based upon his earnings. Decision and Order at 3. Although both jobs took place underground, exposing claimant to similar dust conditions, the administrative law judge found claimant's coal mining job as an electrician and maintenance man required more specialized skills than did his work as an inspector,[12] and required significantly higher levels of physical exertion on a regular basis.[13] *Id*. After considering the relevant factors, the administrative law judge permissibly found that while claimant's job as an inspector was gainful, it was not comparable to his work as a coal miner due to both the significantly more demanding exertional requirements and specialized skills necessary for that job. Substantial evidence supports his finding. *See*

[11] Under 20 C.F.R. §725.504(c), "where the miner returns to coal mine or comparable and gainful work, the payments to such miner shall be suspended and no benefits shall be payable . . . for the period during which the miner continues to work."

[12] As a miner, claimant was certified as a surface and underground electrician and as a mine foreman. Director's Exhibit 4; Hearing Transcript at 19. To become a mine inspector, he shadowed a senior inspector for three weeks and then spent three weeks in training. Hearing Transcript at 23-24. The administrative law judge found that, while claimant's knowledge from his coal mining was likely helpful in performing his mine inspection work, there is no evidence that he had to obtain a specialized license or certification for that job. Decision and Order on Remand at 6. We affirm this determination as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[13] We affirm, as unchallenged, the administrative law judge's determination that claimant's coal mine work required frequent heavy and occasional very heavy labor while his work as a mine inspector required light and some medium exertion. *Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 5-6.

Ratliff v. Benefits Review Board, 816 F.2d 1121, 1125-26 (6th Cir. 1987); *see also Harris v. Director, OWCP*, 3 F.3d 103, 105-06 (4th Cir. 1993); *Big Horn Coal Co. v. Director, OWCP* [*Alley*], 897 F.2d 1052, 1056 (10th Cir. 1990); *Pate v. Director, OWCP*, 834 F.2d 675, 677 (7th Cir. 1987). We therefore affirm the determination claimant's benefits should not be suspended during the period in which he worked as a federal mine inspector. 20 C.F.R. §725.504(c).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge