U.S. Department of Labor

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

BRB No. 21-0219 BLA

KANOVA SUE KINGSLEY (Widow of THOMAS KINGSLEY) Claimant-Respondent v. KC ROGERS COAL COMPANY, INCORPORATED and AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/24/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

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

Michael A. Pusateri (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Peter B. Silvain, Jr.'s Decision and Order Awarding Benefits (2019-BLA-05626) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim filed on May 24, 2018.

The ALJ credited the Miner with 15.42 years of underground coal mine employment, but found he did not have a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.204(b)(2). He therefore found Claimant[1] did not invoke the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018). The ALJ then considered whether Claimant could establish entitlement under 20 C.F.R. Part 718 without the benefit of the presumption. He determined Claimant established the Miner had legal and clinical pneumoconiosis arising out of coal mine employment and his death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.205(c). He therefore awarded benefits.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the

[1] Claimant is the widow of the Miner, who died on March 17, 2018. Director's Exhibit 11. The Miner never successfully established a claim for benefits during his lifetime. Thus Claimant is not entitled to benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides a survivor of a miner determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

Constitution, Art. II § 2, cl. 2.[3] It also argues the removal provisions applicable to ALJs rendered his appointment unconstitutional. Furthermore, it argues he erred in finding the Miner suffered from legal pneumoconiosis and his death was due to pneumoconiosis. 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 forfeited its Appointments Clause challenge by failing to raise it before the ALJ. In two separate reply briefs, Employer reiterated its contentions.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer urges the Board to vacate the award and remand the case to be heard by a constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[5] Employer's Brief at 10.

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[3] 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.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5; Hearing Tr. at 9.

[5] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) has

We agree with the Director's argument that Employer forfeited its Appointments Clause challenge by failing to raise it when the case was before the ALJ.[6] Appointments Clause issues are "non-jurisdictional" and thus subject to the doctrines of waiver and forfeiture. *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"); *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 588 (6th Cir. 2021); *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). *Lucia* was decided over one-year-and-two-months before this case was assigned to the ALJ, over one-year-and-five-months before the hearing in this case, and two-years-and-six-months before the ALJ issued his Decision and Order. Employer, however, failed to raise its argument while the case was before the ALJ. At that time, he could have addressed Employer's arguments and, if appropriate, taken steps to have the case assigned for a new hearing before a different ALJ. *Kiyuna v. Matson Terminals Inc.*, 53 BRBS 9, 11 (2019). Instead, Employer waited to raise the issue until after the ALJ 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 ALJ. *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging); *Davis*, 987 F.3d at 588; *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018); *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019).

Removal Provisions

Employer also challenges the constitutionality of the removal protections which the Administrative Procedure Act, 5 U.S.C. §7521, affords ALJs. Employer's Brief at 10. The only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-38 (9th Cir. 2021) (holding 5 U.S.C. §7521 constitutional as applied to DOL ALJs). Regardless, the removal argument is subject to issue preservation requirements similar to those addressed above, and Employer likewise forfeited this issue by not raising it before the ALJ. *See, e.g.*,

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conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[6] "[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.'" *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 n.1, U.S. (2017), *citing United States v. Olano*, 507 U. S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

Fleming v. USDA, 987 F.3d 1093, 1097 (D.C. Cir. 2021) (constitutional arguments concerning §7521 removal provisions are subject to issue exhaustion; because petitioners "did not raise the dual for-cause removal provision before the agency," the court was "powerless to excuse the forfeiture"); *Davis*, 987 F.3d at 588 ("[T]he Benefits Review Board's governing regulations require that legal questions be raised before the ALJ to be reviewable by the Board."). Because Employer has not identified any basis for excusing its forfeiture of the issue, we see no reason to further entertain its arguments. *See Davis*, 987 F.3d at 588; *Jones Bros.*, 898 F.3d at 677.

Entitlement under 20 C.F.R. Part 718

In a survivor's claim where the statutory presumptions are not invoked, a claimant must establish the miner had pneumoconiosis[7] arising out of coal mine employment and his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Death is considered due to pneumoconiosis if the evidence establishes pneumoconiosis caused or was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a substantially contributing cause if it hastens the miner's death. 20 C.F.R. §718.205(b)(6). Failure to establish any one of the requisite elements of entitlement precludes an award of benefits. *See Trumbo*, 17 BLR at 1-87-88.

Existence of Pneumoconiosis

The ALJ found Claimant established the Miner had both clinical and legal pneumoconiosis.[8] 20 C.F.R. §718.202(a); Decision and Order at 11-21. Employer argues the ALJ erred in finding Claimant established the Miner had legal pneumoconiosis.

[7] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "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." 20 C.F.R. §718.201(a)(1).

[8] We affirm the ALJ's finding that Claimant established the Miner had clinical pneumoconiosis arising out of coal mine employment as it is unchallenged on appeal. 20

To establish legal pneumoconiosis, Claimant must prove the Miner had 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(b). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held a claimant may establish a miner's lung impairment was significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014).

The ALJ considered Dr. Handshoe's opinion that the Miner had legal pneumoconiosis and Drs. Rosenberg's and Vuskovich's opinions that he did not. He found Drs. Rosenberg's and Vuskovich's opinions not reasoned and documented. Decision and Order at 20-21. Conversely, he found Dr. Handshoe's opinion well-reasoned and documented. *Id.* at 19, 21. Thus he found Claimant established the Miner had legal pneumoconiosis based on Dr. Handshoe's opinion.

Employer argues the ALJ's analysis of the medical opinions "involved explicit, illegal burden-shifting" as he "faulted [its] experts when they 'did not explain why' [the Miner's] obesity and heart problems 'would necessarily exclude coal dust as a contributing cause.'" Employer's Brief at 12. We disagree. Contrary to Employer's argument, the ALJ correctly stated "Claimant must establish by a preponderance of the evidence that the Miner had pneumoconiosis." Decision and Order at 10. Moreover, the ALJ provided valid reasons for finding Dr. Handshoe's opinion that the Miner had legal pneumoconiosis more persuasive than Drs. Rosenberg's and Vuskovich's contrary opinions, as discussed below. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *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).

Employer argues Dr. Handshoe's opinion is "too equivocal and generalized to support entitlement." Employer's Brief at 12-14. This argument has no merit. Dr. Handshoe noted he treated the Miner "about every [six] months" from September 30, 2010, until his death in 2018. Claimant's Exhibit 1. Although he primarily treated the Miner's atrial fibrillation, Dr. Handshoe also diagnosed chronic obstructive pulmonary disease (COPD) and interstitial lung disease related to coal mine dust exposure. *Id.* He explained the Miner's significant interstitial lung disease "played a role in his development of atrial fibrillation and . . . pulmonary hypertension and biventricular failure." *Id.* He opined the

C.F.R. §§718.202(a)(2), (4), 718.203(b); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 11-12, 16-18.

Miner's "exposure [to coal dust] as an underground miner likely contributed to his development of COPD and interstitial lung disease." *Id.*

The ALJ stated Dr. Handshoe's opinion "is well supported by the evidence he reviewed, including the various treatment records, as well as the objective evidence of record." Decision and Order at 19. Specifically, he stated "[Dr. Handshoe's] treatment notes, as well as the records from Pikeville Medical Center, document the Miner's chronic respiratory symptoms." *Id.*, *citing* Director's Exhibit 19; Claimant's Exhibits 1, 2. He permissibly found Dr. Handshoe's opinion "was in better accord with the evidence underlying his conclusions, the overall weight of the medical evidence of record, and the premises of the regulations." Decision and Order at 21; *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185.

We also reject Employer's arguments that the ALJ should have discounted Dr. Handshoe's opinion because he prepared it in anticipation of litigation and that his treatment began after the Miner filed his claim. Employer's Brief at 13-14. In the absence of specific evidence of bias, party affiliation is not a dispositive factor in determining the weight to be assigned to the medical evidence of record.[9] *See Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20, 1-23 n.4 (1992); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35-36 (1991) (en banc) (it is error to discredit, as biased, a medical report prepared for litigation absent a specific basis for finding the report to be unreliable).

The ALJ further provided valid reasons for discrediting the contrary opinions of Drs. Rosenberg and Vuskovich. Dr. Rosenberg opined the Miner had a mild restrictive impairment with hypoxemia related to his obesity and cardiomegaly with vascular congestion. Director's Exhibit 20; Employer's Exhibit 1 at 26, 27. He also opined the Miner did not have a respiratory or pulmonary impairment related to his coal dust exposure. Employer's Exhibit 1 at 27. Further, he stated the Miner "developed acute problems

[9] In weighing the medical evidence of record relevant to whether a miner had pneumoconiosis, the adjudicator "must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the adjudicator shall take into consideration the following factors: nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). Although the treatment relationship may constitute substantial evidence in support of the adjudicator's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded "shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

towards the end of his life with respiratory failure" and opined his respiratory failure was not related to his coal dust exposure but "acute onset of pneumonia and probably heart failure." Employer's Exhibit 2 at 6. Similarly, Dr. Vuskovich opined the Miner's coal mine dust exposure "did not cause, significantly contribute to, or substantially aggravate [his] obesity, atrial fibrillation, mild centrilobular emphysema, pneumonia, anemia and pulmonary hypertension." Employer's Exhibit 11 at 28.

The ALJ permissibly found that although Drs. Rosenberg[10] and Vuskovich[11] attributed the Miner's conditions to his obesity and smoking, they did not adequately explain why his coal mine dust exposure did not substantially contribute to his hypoxemia or pulmonary condition.[12] *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 20. The ALJ's rejection of their opinions thus did not depend on the application of any particular standard; instead, it was founded on their failure to explain their own conclusions.

It is the ALJ's prerogative to draw inferences from the evidence and determine the weight to accord the medical opinions. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319 (4th Cir. 2013); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753 (4th Cir. 1999) ("the reliability of a given opinion is not necessarily revealed by the forcefulness of the speaker's language"). As the ALJ's determination that Dr. Handshoe credibly diagnosed legal pneumoconiosis under the regulations is rational and supported by substantial evidence, we affirm it as sufficient to establish the disease. *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185. Thus, we affirm the ALJ's finding that Claimant established the Miner had legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 21.

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[10] The ALJ stated "Dr. Rosenberg tried to account for the Miner's hypoxemia by speculating it was caused by obesity." Decision and Order at 20. He determined "[Dr. Rosenberg] did not explain why this would necessarily exclude coal dust as a contributing cause." *Id.* In addition, he determined Dr. Rosenberg did not explain why the Miner's respiratory symptoms of cough, sputum, wheezing, and shortness of breath were not related to his coal dust exposure. *Id.*

[11] The ALJ noted that although Dr. Vuskovich attributed the Miner's pulmonary conditions to his obesity and smoking, he did not explain why either would necessarily exclude coal dust as a contributing cause. Decision and Order at 20.

[12] Because the ALJ provided a valid reason for discrediting Drs. Rosenberg's and Vuskovich's opinions, we need not address Employer's remaining arguments regarding the weight he accorded their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 11-12.

Cause of Death

The Sixth Circuit has explained pneumoconiosis may be found to have hastened the miner's death only if it does so "through a specifically defined process that reduces the miner's life by an estimable time." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518 (6th Cir. 2003). A physician who opines pneumoconiosis hastened death through a "specifically defined process" must explain how and why it did so. *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303-04 (6th Cir. 2010).

The ALJ considered the Miner's death certificate that Ashley L. Robertson-Watson, DNP, APRN signed and the medical opinions of Drs. Handshoe, Rosenberg, and Vuskovich. The death certificate identifies the immediate cause of the Miner's death as acute hypoxic and hypercapnic respiratory failure as a consequence of biventricular congestive heart failure, bilateral pneumonia, and COPD with coal workers' pneumoconiosis. Director's Exhibit 11. Dr. Handshoe opined the Miner's pneumoconiosis contributed to his death, and Drs. Rosenberg and Vuskovich opined it did not. The ALJ found the death certificate, by itself, is not reliable evidence of the Miner's death because the record does not indicate whether the physician signing it possessed relevant qualifications or personal knowledge to assess the cause of the Miner's death.[13] Decision and Order at 23. He also found Drs. Rosenberg's and Vuskovich's opinions not well-reasoned. *Id*. Finding Dr. Handshoe's opinion well-reasoned, the ALJ determined Claimant established the Miner's pneumoconiosis substantially contributed to his death. *Id*. at 24.

We reject Employer's argument that the ALJ applied the wrong legal standard and did not adequately explain why Dr. Handshoe's opinion is sufficient to establish the Miner's pneumoconiosis substantially contributed to his death. Employer's Brief at 15-20. Dr. Handshoe opined the Miner had interstitial lung disease with pulmonary fibrosis and COPD related to coal dust exposure. Claimant's Exhibit 1. He further opined the Miner's "pulmonary fibrosis was progressive [and] leading to progressively worsening hypoxia and frequent pulmonary infections and ultimately was the cause of his death in spite of aggressive medical therapy." *Id*. The ALJ stated "Dr. Handshoe adequately explained how the Miner's lung disease with pulmonary fibrosis, which he found present in the form of both clinical and legal pneumoconiosis, led to the Miner's hypoxemia, which directly caused his death." Decision and Order at 22. He further stated that because he found "the Miner had clinical and legal pneumoconiosis arising out of his coal mine employment, and

[13] We affirm the ALJ's finding that the Miner's death certificate is "entitled to little probative weight" as it is unchallenged. Decision and Order at 22-23; *see Skrack*, 6 BLR at 1-711.

Dr. Handshoe's medical opinion established that the Miner's pneumoconiosis caused his death within the meaning of the statute and regulations, . . . Dr. Handshoe's opinion that the Miner's death was substantially contributed to by pneumoconiosis" is entitled to probative weight. *Id.* at 22-23.

The determination of whether a medical opinion is adequately reasoned and documented is for the ALJ as the factfinder, *Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012); *Clark*, 12 BLR at 1-155, and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As substantial evidence supports the ALJ's determination that Dr. Handshoe's opinion is well-reasoned and adequately explains how the Miner's pneumoconiosis "significantly contributed to and hastened [his] death," we affirm it.[14] Decision and Order at 22; *see* 20 C.F.R. §718.205; *Conley*, 595 F.3d at 303-04; *Williams*, 338 F.3d at 518; *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005).

[14] As we affirm the ALJ's finding that Claimant is entitled to survivor's benefits under 20 C.F.R. Part 718, we need not address Employer's assertions regarding the ALJ's length of coal mine employment finding. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 11-12.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge