U.S. Department of Labor

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

BRB No. 19-0340 BLA

BILLIE RAY SLONE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COASTAL COAL COMPANY, LLC.	)	DATE ISSUED: 07/23/2020
	)	
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 Awarding Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Gilbertson Law, LLC) Columbia, Maryland, 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: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2018-BLA-05262) of Administrative Law Judge Peter B. Silvain, Jr. rendered on a claim filed on February

25, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §901-944 (2012) (the Act).

The administrative law judge found Claimant established 21.93 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer contends the administrative law judge lacked the authority to hear and decide the case because he had not been properly appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[2] On the merits, Employer contends the administrative law judge erred in finding the Section 411(c)(4) presumption unrebutted.[3] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response brief, contending Employer forfeited its Appointments Clause argument by failing to timely raise it before the administrative law judge.

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[1] Under Section 411(c)(4), Claimant is entitled to a rebuttable presumption he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[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.

U.S. Const. art. II, § 2, cl. 2.

[3] Employer challenges the validity of the Section 411(c)(4) presumption, enacted as part of the Affordable Care Act (ACA). Employer's Brief at 8-9. The Board addressed and rejected employer's identical arguments in a motion denying Employer's request to hold this case in abeyance pending resolution of the constitutionality of the ACA. *Slone v. Coastal Coal Co.*, BRB No. 19-0340 BLA (Feb. 12, 2020) (unpub. Order).

The Board's scope of review is defined by statute. We must affirm the administrative law judge'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 Associates, 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 different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[5] Employer's Brief at 5. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017, but maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment.[6] *Id*. at 5-6. The Director contends the Secretary's ratification was proper under the Appointments Clause but she also argues Employer forfeited its right to challenge the administrative law judge's authority to hear and decide this case.

We agree with the Director that Employer forfeited its Appointments Clause argument by failing to raise it when the case was before the administrative law judge. *See*

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[5] *Lucia* involved a challenge to the appointment of an administrative law judge 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 administrative law judges are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

[6] The Secretary of Labor issued a letter to the administrative law judge on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to Administrative Law Judge Silvain.

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).

Lucia was decided over nine months before the administrative law judge issued his Decision and Order, but Employer failed to raise its arguments while the claim was before the administrative law judge. At that time, the administrative law judge could have addressed Employer's arguments and, if appropriate, taken steps to have the case assigned for a new hearing before a different administrative law judge. *See Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 10 (2019). Instead, Employer waited to raise the issue until after the administrative law judge 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 administrative law judge. *See See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging); *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019).

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

Because Claimant invoked the Section 411(c)(4) presumption,[7] the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis[8] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as 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.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated

[7] We affirm, as unchallenged, the administrative law judge's finding Claimant established 21.93 years of coal mine employment and total disability, thereby invoking the Section 411(c)(4) presumption *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 28.

[8] "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). "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).

by, dust exposure in coal mine employment." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The United States Court of Appeals for the Sixth Circuit has held this standard requires Employer to establish Claimant's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020).[9]

Employer relies on Dr. Jarboe's opinion to disprove legal pneumoconiosis. Dr. Jarboe opined Claimant has "bronchial asthma" and "severe obstructive airways disease" caused by smoking and unrelated to coal mine dust exposure. Employer's Exhibit 1 at 4. The administrative law judge found Dr. Jarboe's opinion not credible to satisfy Employer's burden of proof.

Employer initially contends the administrative law judge "applied an erroneous legal standard" by requiring Dr. Jarboe to "definitively rule out" coal mine dust exposure as a causative factor for Claimant's respiratory disease, thereby conflating the standards of proof for legal pneumoconiosis and disability causation. Employer's Brief at 13-14. We disagree.

The administrative law judge correctly noted Employer has the burden to establish Claimant does not have legal pneumoconiosis as defined in the regulations. Decision and Order at 21, *citing* 20 C.F.R. §718.201. The administrative law judge found Dr. Jarboe did not adequately explain why he ruled out coal mine dust exposure as a causative or aggravating factor in claimant's respiratory disease. As discussed below, the administrative law judge rejected Dr. Jarboe's opinion because he found it inadequately reasoned, not because it did not satisfy a particular legal standard.[10] We therefore deny Employer's request to remand this case for application of a correct legal standard.

Employer also asserts the administrative law judge erred in finding Claimant had a smoking history of "26.5 pack-years." Employers Brief at 15, *quoting* Decision and Order at 12. We disagree. The length and extent of Claimant's smoking history is a factual

[9] The Sixth Circuit further explained that "an employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Island Creek Coal Co. v. Young*, 947 F.3d 399 (6th Cir. 2020) *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

[10] Any error by the administrative law judge would nonetheless be harmless, s*ee Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984), since Dr. Jarboe did not conclude coal mine exposure contributed to claimant's respiratory impairment but had only an insignificant or *de minimis* impact. *Young*, 947 F.3d at 405; Employer's Exhibit 1. Rather, he excluded coal mine dust exposure entirely as a causative factor. *Id*. Thus, the only issue before the administrative law judge was whether his opinion was credible.

determination for the administrative law judge. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). The administrative law judge specifically outlined all of the varying smoking histories set forth in Claimant's treatment notes and by Dr. Jarboe. Decision and Order at 10-11. He found that with the exception of one treatment note indicating Claimant smoked for fifty years, the majority of Claimant's histories described that he smoked for thirty-six years. *Id*. at 11. He also noted Claimant testified to smoking from a half a pack a day to one pack a day up until two years before he quit smoking when he only smoked a few cigarettes a day. *Id*. The administrative law judge found that "taken together," Claimant "smoked an average of three-quarters of a pack a day for 34 years and a half a pack a day for two years," which "amounts to a smoking history of 26.5 pack-years." *Id*. at 12. Because we see no error in the administrative law judge's calculation and it is supported by substantial evidence, we affirm the administrative law judge's determination Claimant has a 26.5 pack-year smoking history.

Moreover, the administrative law judge specifically noted Dr. Jarboe "considered a length of coal mine employment of 20 years and a smoking history of 30 years, which were each similar to [his] own findings of 21.93 years of coal mine employment and 26.5 pack years." Decision and Order at 33. Employer has not shown how the administrative law judge's smoking history determination adversely affected his evaluation of Dr. Jarboe's opinion. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (the appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

Employer further contends the administrative law judge did not give any valid reasons for discounting Dr. Jarboe's opinion that Claimant does not have legal pneumoconiosis. Employer's Brief at 17. It asserts the administrative law judge selectively analyzed Dr. Jarboe's rationale and did not explain his credibility findings in accordance with the Administrative Procedure Act.[11] Employer's Brief at 17-20. Employer's contentions lack merit.

As the administrative law judge accurately noted, Dr. Jarboe attributed Claimant's severe obstructive lung disease to Claimant's long history of smoking and bronchial asthma based on "risk factors" identified in the medical literature for progressive and irreversible obstructive lung impairment: "Older age, male gender, current or past smoking and longer asthma duration." Employer's Exhibit 1 at 5. Contrary to Employer's contention, we see no error in the administrative law judge's finding that while Claimant may satisfy

[11] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

certain "risk factors" for irreversible obstruction caused by smoking or asthma, Dr. Jarboe did not adequately explain why he excluded coal mine dust exposure as a contributing or aggravating factor in Claimant's respiratory impairment. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 33.

Dr. Jarboe further opined Claimant has "an extremely high residual [lung] volume" on pulmonary function testing, which is "a finding not seen from inhalation of coal mine dust[,]" citing statistics to support his rationale. Employer's Exhibit 2 at 5. However, the administrative law judge noted "most of the statistics Dr. Jarboe relied upon focused on non-smoking miners versus smoking non-miners, both of which fail to encompass the Claimant's status as a smoking miner."[12] Decision and Order at 33. The administrative law judge therefore permissibly found Dr. Jarboe's opinion less credible because he relied on statistics and medical studies that were not specific to Claimant. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). The administrative law judge also permissibly concluded that even if statistics show smoking causes greater decrements in lung function, Dr. Jarboe's opinion does not account for the possibility of an "additive" effect from coal mine dust exposure to Claimant's respiratory impairment. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); Decision and Order at 34.

As the trier-of-fact, the administrative law judge has the discretion to assess the credibility of the medical opinions and to assign those opinions appropriate weight, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because the administrative law judge explained his credibility findings in accordance with the APA and they are supported by substantial evidence, we affirm the administrative law judge' determination Employer did not disprove legal pneumoconiosis based on Dr. Jarboe's opinion. *See Napier*, 301 F.3d at 713-714; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Employer's failure to disprove legal

[12] Dr. Jarboe stated that studies show "non-smoking coal miners with or without coal workers pneumoconiosis have only mild increases in residual volume." Employer's Exhibit 1.

pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[13] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge found Employer did not rebut the Section 411(c)(4) presumption by establishing that "no part of [Caimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); *see* Decision and Order at 36. The administrative law judge permissibly rejected Dr. Jarboe's opinion on disability causation because he did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding Employer did not rebut the existence of the disease. *See Ogle*, 737 F.3d at 1074; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 36. We therefore affirm the administrative law judge's determination that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. Decision and Order at 36.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[13] Because Employer did not disprove legal pneumoconiosis, we need not address Employer's arguments regarding the administrative law judge's finding it did not disprove clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 29-32.