U.S. Department of Labor

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

BRB No. 19-0554 BLA

J. C. MAIDEN Claimant-Respondent v. NEW HARLAN BLOCK COAL COMPNAY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/23/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for Claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for Employer/Carrier.

Kathleen H. Kim (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: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Jason A. Golden's Decision and Order Awarding Benefits (2018-BLA-05983) rendered on a subsequent claim filed on September 8, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with twelve years of underground coal mine employment. Because Claimant established fewer than fifteen years of coal mine employment, he is unable to invoke the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] However, the administrative law judge found Claimant established total disability due to legal pneumoconiosis[3] and a change in an applicable condition of entitlement, and thus he awarded benefits. 20 C.F.R. §§718.202(a)(4), 718.204(b)(2), (c); 725.309.

On appeal, Employer argues the administrative law judge lacked the authority to preside over the case because he had not been appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] Employer also argues that the

[1] Claimant filed three prior claims, each of which the district director denied. Director's Exhibits 1-3. In his last claim, Claimant established pneumoconiosis but not total disability. Director's Exhibit 3.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner 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) (2018); 20 C.F.R. §718.305.

[3] 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).

[4] 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

removal provisions applicable to the administrative law judge rendered his appointment unconstitutional. Alternatively, Employer challenges the administrative law judge's finding that Claimant established legal pneumoconiosis.[5] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing the administrative law judge had the authority to decide the case. Employer has filed a reply brief, reiterating its arguments.

The Benefits Review 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.[6] 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 requests the Board vacate the administrative law judge's Decision and Order and remand this case to be heard by a constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[7] Employer's Brief at

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> 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.

[5] We affirm, as unchallenged, the administrative law judge's finding that Claimant established total disability and a change in an applicable condition of entitlement. *See* 20 C.F.R. §§718.204(b)(2), 725.309; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] The Board will apply the law of the Sixth Circuit because Claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 12-13.

[7] *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 the Special Trial Judges at the United States Tax Court, SEC administrative law judges are "inferior officers" subject to the Appointments Clause, which requires that they be appointed by the President or the head of a department. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018), *citing Freytag v. Commissioner*, 501 U.S. 868 (1991). The Department of Labor has conceded that the Supreme Court's holding applies to its

8-13. Employer acknowledges the Secretary of Labor (the Secretary) ratified the prior appointment of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[8] but maintains it was insufficient to cure the defect in the administrative law judge's appointment as there was no prior valid appointment to ratify. *Id*.

The Director argues the administrative law judge had the authority to decide this case because the Secretary's ratification brought the appointment into compliance. Director's Brief at 3. She also maintains Employer failed to rebut the presumption of regularity that applies to the actions of public officers like the Secretary. *Id*. at 4. We agree with the Director's positions.

As the Director notes, an appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 3, *quoting Marbury v. Madison*, 5 U.S. 137, 157 (1803). Further, ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). Ratification is permissible so long as the agency head: 1) had at the time of ratification the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Thus, under the "presumption of regularity," courts presume that public officers have properly discharged their official duties, with "the burden

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administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[8] The Secretary 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 Golden.

shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

At the time he ratified the administrative law judge's appointment, the Secretary had the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603. Congress has authorized the Secretary to appoint administrative law judges to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105.

Under the presumption of regularity, it is thus presumed the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all administrative law judges in a single letter. Rather, he specifically identified Administrative Law Judge Golden and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Golden. The Secretary further acted in his "capacity as head of [DOL]" when ratifying the appointment of Judge Golden "as an Administrative Law Judge." *Id*. Having put forth no contrary evidence, Employer has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340.

Based on the foregoing, we hold that the Secretary's action constituted a valid ratification of the appointment of the administrative law judge.[9] *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" all its earlier actions was proper).

[9] We also reject Employer's argument that Executive Order 13843, which removes administrative law judges from the competitive civil service, "confirms" its Appointments Clause argument because incumbent administrative law judges remain in the competitive service pending promulgation of implementing regulations. Employer's Brief in Support of Petition for Review at 12; *see also* Employer's Reply Brief at 7-9. We agree with the Director's assertion that Employer's argument lacks merit because the Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. Director's Brief at 7. The Order also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999).

Employer also does not assert any pre-ratification circumstances that would be expected to color the administrative law judge's post-ratification consideration of the case, thus requiring a new hearing before a different administrative law judge. *See Noble v. B & W Res., Inc.*, BLR , BRB No. 18-0533 BLA, slip op. at 4 n.5 (Jan. 15, 2020).

Removal Provisions

Employer also contends the administrative law judge lacked the authority to adjudicate this claim after ratification because 5 U.S.C. §7521, governing the removal of administrative law judges, provides two levels of "for cause" protections. Employer's Brief in Support of Petition for Review at 12; Employer's Reply Brief at 5-7. Employer relies on the United States Supreme Court's invalidation of a similar statutory scheme in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).[10] Employer's Brief in Support of Petition for Review at 11-12.

As the Director correctly notes, the Supreme Court described the Public Company Accounting Oversight Board removal protections at issue in *Free Enterprise Fund* as "significant and unusual" and expressly stated its holding "does not address that subset of independent agency employees who serve as administrative law judges". 561 U.S. at 507 n.10; *see* Director's Brief at 7. Further, the majority in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1. Accordingly, we agree with the Director's argument that Employer has failed to establish that 5 U.S.C. §7521 is unconstitutional.

Entitlement under 20 C.F.R. Part 718

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[10] The Supreme Court determined that the two level removal protection provided to the members of the Public Company Accounting Oversight Board resulted in a constitutionally impermissible "diffusion of accountability." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010).

To establish legal pneumoconiosis, Claimant must demonstrate that he has 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); *see Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (a miner will be deemed to have a lung impairment "significantly related to" coal mine dust exposure, and thus legal pneumoconiosis, "by showing that his disease was caused 'in part' by coal mine employment").

The administrative law judge considered three medical opinions. All three agree Claimant is totally disabled by chronic obstructive pulmonary disease (COPD), but disagree as to its cause. The administrative law judge credited Dr. Baker's opinion that Claimant's COPD is due to smoking and coal mine dust exposure over the contrary opinions of Drs. Rosenberg and Vuskovich that Claimant's COPD is related solely to smoking.

Initially, we reject Employer's contention the administrative law judge erred in relying on the preamble to the revised regulations to determine the credibility of the medical opinions. Employer's Brief in Support of Petition for Review at 18-19. Several federal courts of appeals, and the Board, have held that an administrative law judge may evaluate expert opinions in conjunction with the preamble, as it sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement that a claimant must establish in order to secure an award of benefits. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008). Further, contrary to Employer's contention, the preamble does not constitute evidence outside the record requiring the administrative law judge to give notice and an opportunity to respond. *See Adams*, 694 F.3d at 802; *Looney*, 678 F.3d at 316.

Employer also contends the administrative law judge erred in finding Dr. Baker's opinion sufficient to meet Claimant's burden to establish legal pneumoconiosis. Employer's Brief at 16-22. It asserts that Dr. Baker's opinion is unreasoned to the extent he relied on an inaccurate smoking history and a discredited positive x-ray reading. *Id*. at 21. Employer further contends Dr. Baker's opinion establishes only the possibility that coal mine dust exposure contributed to Claimant's COPD. Employer's Brief at 18-20. Employer's arguments lack merit.

Dr. Baker conducted the DOL pulmonary evaluation on November 8, 2016. Director's Exhibit 15. He noted Claimant worked fourteen years in underground mines

and smoked one pack of cigarettes per year for approximately fifteen years. *Id*. Dr. Baker indicated Claimant had a history of chronic bronchitis and an x-ray showing coal workers' pneumoconiosis. *Id*. He further indicated that Claimant's pulmonary function study showed "COPD with a severe obstructive ventilatory defect on pre and post bronchodilators," and his blood gas study showed mild resting hypoxemia. *Id*. at 7. Dr. Baker attributed Claimant's COPD and blood gas impairment to coal mine dust exposure and "to some extent" smoking. He noted "medical literature states that when both exposures are present, the effects on the lungs may be either synergistic or additive." *Id*. Dr. Baker opined that Claimant's respiratory "condition has been significantly contributed to and substantially aggravated by dust exposure in his coal mine employment and represents legal pneumoconiosis." *Id*.

The administrative law judge determined Claimant has "about a 41-pack year smoking history." Decision and Order at 12. He found that while Dr. Baker reported only a fifteen year smoking history, "the difference is not significant enough to devalue Dr. Baker's opinion because neither smoking history precludes some contribution from coal mine dust." *Id*. He noted "[t]he preamble is clear that "[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis." *Id*. The administrative law judge concluded that "[i]n light of the additive and synergistic relationship of coal dust exposure and smoking, and the fact that smoking and coal dust exposure affect the lungs through similar mechanisms," Dr. Baker "adequately linked Claimant's condition to his coal mine employment." *Id*. at 13.

Contrary to Employer's contention, we see no error in the administrative law judge's determination that Dr. Baker relied on a sufficient smoking history in rendering his opinion on legal pneumoconiosis. *See Jericol Mining, Inc. v. Napi*er, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). Employer notes that Dr. Baker examined Claimant in conjunction with his prior claims and reported a much longer smoking history. Employer asserts the administrative law judge "undertook no effort to determine whether Dr. Baker's opinion was even consistent with the doctor's prior opinions where, when presented with a thirty-nine year smoking habit, Dr. Baker stated that a habit of that duration was significant and that [Claimant's] impairment was 'possibly [to a] greater extent [due] to his cigarette smoking history.'" Employer's Brief in Support of Petition for Review at 20, *quoting* Director's Exhibit 3 at 243.

Employer fails to explain, however, why Dr. Baker's prior opinion undercut his diagnosis of legal pneumoconiosis in the current claim since Dr. Baker also previously attributed Claimant's impairment, in part, to coal mine dust exposure. *See Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003) (physician need not specifically apportion extent to which various causal factors contribute to a respiratory or pulmonary impairment); Director's Exhibit 3.

Dr. Baker's specific statement in his 2016 report that Claimant's respiratory condition "has been significantly contributed to and substantially aggravated by dust exposure in his coal mine employment" is sufficient to satisfy Claimant's burden to establish legal pneumoconiosis. *See* 20 C.F.R. §718.201(b); *Groves*, 761 F.3d at 598-99.

Further, although the administrative law judge rejected Dr. Baker's opinion on clinical pneumoconiosis because it was based on a discredited x-ray, he permissibly found Dr. Baker's diagnosis of legal pneumoconiosis based on other factors - Claimant's work history and respiratory symptoms as well as the results of his pulmonary function and blood gas testing, and Dr. Baker's physical examination. *Crisp*, 866 F.2d at 185; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). We therefore affirm the administrative law judge's finding that Dr. Baker's opinion on legal pneumoconiosis is "well-reasoned, supported by the record, and consistent with prevailing views of the medical community as set forth in the preamble" regarding the additive effects of smoking and coal mine dust exposure in causing COPD. Decision and Order at 13; *see* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000) (concluding that the risk of clinically significant airways obstruction and chronic bronchitis associated with coal mine dust exposure is additive with cigarette smoking); *Rowe*, 710 F.2d at 255.

We also see no error in the administrative law judge's discrediting of Drs. Rosenberg's and Vuskovich's opinions that Claimant does not have legal pneumoconiosis. The administrative law judge noted correctly that Dr. Rosenberg excluded coal mine dust as a causative factor for Claimant's obstructive respiratory impairment because Claimant's pulmonary function studies showed a significant reduction in the FEV1/FVC ratio.[11] Decision and Order at 14; Director's Exhibit 21; Employer's Exhibit 3. The administrative law judge permissibly found Dr. Rosenberg's rationale unpersuasive because it is inconsistent with DOL's position that "coal miners have an increased risk of developing COPD . . . . [that] may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC." Decision and Order at 14, *quoting* 65 Fed. Reg. at 79,943 (internal citations omitted); *see Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014); *Westmoreland Coal Co. v. Stallard*, 876

[11] Dr. Rosenberg stated the "magnitude in the reduction of the FEV1 in comparison to the reduction in the FVC provides a basis for distinguishing between the effects of cigarette smoking and coal dust exposure." Employer's Exhibit 3 at 6. He cited to studies that assert "cigarette smoking drives the FEV1 down much farther than the FVC" while "coal dust reduces the FEV1 and FVC in equal measure." *Id*. at 5.

F.3d 663, 671-72 (4th Cir. 2017); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989).

Dr. Vuskovich indicated Claimant's coal mine dust exposure contributed to the decline in his lung function seen on his pulmonary function testing but stated the "loss from cigarette smoke exposure was at least ten times greater than his excess FEV1 loss from coalmine dust exposure." Employer's Exhibit 2. He further stated Claimant's "disabling pulmonary impairment did not arise in whole or in part out of coal dust exposure. . . ." *Id*. The administrative law judge permissibly found Dr. Vuskovich's statements contradictory on whether coal mine dust exposure contributed to Claimant's respiratory impairment and that he did not adequately explain his opinion. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 16.

Additionally, noting the additive effects of smoking and coal mine dust exposure, the administrative law judge permissibly found neither Dr. Rosenberg nor Dr. Vuskovich adequately explained their conclusions that Claimant's twelve years of coal mine dust exposure could not have contributed, in part, to Claimant's COPD and chronic bronchitis. *See Crisp*, 866 F.2d at 185; *Groves*, 761 F.3d at 598-99; Decision and Order at 17.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012). Employer's arguments on legal pneumoconiosis are a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). Thus, we affirm the administrative law judge's finding that Claimant established legal pneumoconiosis.[12] 20 C.F.R. §718.202(a)(4); *see Groves*, 761 F.3d at 597-98; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 17. As Employer raises no specific allegations of error regarding disability causation, other than to assert Claimant does not have legal pneumoconiosis, we affirm the administrative law judge's finding that Claimant established his total respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 20.

[12] Because the administrative law judge gave permissible reasons for discrediting Drs. Rosenberg's and Vuskovich's opinions, we need not address all of Employer's arguments as to the weight accorded their opinions on legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

Accordingly, the administrative law judge'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