U.S. Department of Labor

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

BRB No. 19-0030 BLA

Estate of EDWARD C. WOODARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LONE MOUNTAIN PROCESSING INCORPORATED, Self-Insured Through ARCH COAL, INCORPORATED	)	DATE ISSUED: 11/20/2019
	)	
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 of Carrie Bland, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer/carrier.

Edward Waldman (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/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-05026) of Administrative Law Judge Carrie Bland, rendered on a miner's claim filed on December 10, 2012,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found the miner had at least sixteen years of underground coal mine employment and was totally disabled. 20 C.F.R. §718.204(b)(2). Thus, she found claimant invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis at the time of his death at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). She further found employer failed to rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge lacked the authority to hear and decide the case because she was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] Alternatively, employer argues

[1] The miner died on July 12, 2016, while his claim was pending. On June 2, 2017, counsel for his estate notified the administrative law judge that he was survived by three children who wanted to pursue his claim. The administrative law judge noted, however, that counsel did not identify the names of the children or the Executor. She considered the claim justiciable because the Black Lung Disability Trust Fund is paying interim benefits. Decision and Order at 2 n.2, *citing Baird v. Westmoreland Coal Co.*, BRB Nos. 16-0532 BLA and 16-0533 BLA (July 19, 2017) (unpub.). Claimant in this decision is the estate of the miner.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where the evidence establishes at least fifteen years of underground or substantially similar 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.

[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.

the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption.[4] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting employer waived its Appointments Clause argument by failing to raise it before the administrative law judge. Employer filed a reply brief and the Director filed a surreply, which the Board accepted by Order dated June 14, 2019.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order Awarding Benefits must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 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).

Constitutionality of the Affordable Care Act

Employer asks the Board to 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). Employer's Reply Brief at 8. We deny employer's request. As the Director notes, although the district court in *Texas* ruled that the ACA individual mandate is unconstitutional and the remainder of the legislation was not severable, the court has stayed its judgment pending appeal. Director's Response Brief at 8. 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. *Id*. Further, the United States Supreme Court upheld the constitutionality of the ACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). The Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA, and we see no exception here. *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). We also reject

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U.S. Const. art. II, § 2, cl. 2.

[4] We affirm, as unchallenged on appeal, the administrative law judge's determination that the miner was totally disabled. 20 C.F.R. §718.204(b)(2); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The miner's last coal mine employment was in Kentucky. Director's Exhibit 5. 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).

employer's argument that the Director and the Board are bound by the Department of Justice's briefing in *Texas v. United States*, as it points to no authority for such a proposition. Employer's Reply Brief at 8.

Appointments Clause

Employer next urges the Board to vacate the administrative law judge's Decision and Order Awarding Benefits and remand the case for assignment to a different constitutionally appointed administrative law judge for a new hearing pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[6] Employer argues remand pursuant to *Lucia* is required because the administrative law judge took significant actions before the Secretary of Labor's ratification of her appointment on December 21, 2017.[7] Employer's Brief In Support of Petition for Review at 5-7. The Director asserts employer forfeited its Appointments Clause challenge by failing to timely raise the issue before the administrative law judge and that exceptional circumstances do not exist to excuse its failure. Director's Response Brief at 3-7. Employer replies that constitutional issues are "beyond the realm of administrative law judges" and therefore an Appointments Clause issue can only be waived if a party fails to raise it in the initial briefing before the Board. Employer's Reply Brief at 3-7. We agree with the Director that employer forfeited its Appointments Clause challenge.

The Appointments Clause issue is "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"); *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). As the Director notes, the Secretary of Labor ratified the administrative law judge's appointment on December 21, 2017, nine months prior to the issuance of her Decision and Order on September 24, 2018.

[6] In *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), the Supreme Court 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.*

[7] Employer does not challenge that the administrative law judge was properly appointed as of the Secretary of Labor's ratification of her appointment. *See Skrack*, 6 BLR at 1-711.

Director's Response Brief at 4. *Lucia* was decided three months before her decision. *Id*. at 5. Two months before her decision, the Department of Labor (DOL) expressly conceded that the Court's holding in *Lucia* applies to the DOL's administrative law judges. *Id., citing Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

If employer had raised *Lucia* before the administrative law judge, she could have addressed employer's arguments and, if appropriate, taken steps to have the case assigned for a new hearing before a new judge. *See Kiyuna v. Matson Terminals, Inc.*, __ BRBS __, BRB No. 19-0103 at 4 (June 25, 2019). Instead, employer waited to raise the issue until after the administrative law judge issued an adverse decision.

Based on these facts, we conclude that employer forfeited its Appointments Clause challenge by not timely raising it before the administrative law judge. *See Powell v. Service Employees Int'l, Inc.*, __ BRBS __, BRB No. 18-0557 (Aug. 8, 2019); *Kiyuna,* BRB No. 19-0103 at 4. Furthermore, employer has not given us any basis for excusing its forfeiture. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging). We will therefore consider employer's arguments on the merits of the administrative law judge's Decision and Order Awarding Benefits.

Invocation of the Section 411(c)(4) Presumption – Coal Mine Employment

Because the miner was totally disabled, claimant is entitled to the Section 411(c)(4) presumption if the miner had at least fifteen years of underground or substantially similar surface coal mine employment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. Conditions at a surface coal mine are "substantially similar" if the miner was "regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

On his CM-911a Employment History form, the miner alleged thirty-three years of underground coal mine employment. Director's Exhibit 3. He indicated that he worked for: Peabody Coal Company (Peabody) from 1976 to 1991; Powell Mountain Coal Company (Powell) from September 5, 1995 to November 15, 2007; Cumberland Resources Coal Company (Cumberland) from February 2, 2008 to June 7, 2011; and employer from June 15, 2011 to June 21, 2012. *Id*.

The administrative law judge found the miner's statements on his claim form did not correspond with the miner's Social Security Administration (SSA) earnings records. Decision and Order at 10. She noted the SSA earnings records reflect employment with Powell from 1995 to 2008 and again in 2011. Director's Exhibit 6. She found no reported earnings, however, for Peabody, Cumberland, or employer. *Id*. She considered it "[m]ost

troubling" that claimant's confirmed employment with employer[8] was not reported in the miner's SSA earnings record. Decision and Order at 10. She therefore found that the miner's CM-911a form was the most reliable source of information regarding his employment from 1995 to 2012. *Id*.

The administrative law judge found the miner's pre-1995 employment was "difficult to calculate" and declined to do so. Decision and Order at 11. Relying on the CM-911a form and employer's verification of the miner's employment, she found he had at least sixteen years of coal mine employment from 1995 to 2012. *Id*. She stated "the miner's indication on his claim forms that this work occurred in the underground coal mining industry establishe[d] that this work occurred at underground mines." *Id*. at 16.

We affirm, as unchallenged, the administrative law judge's finding that the miner had at least sixteen years of coal mine employment after 1995. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We agree with employer, however, that the administrative law judge did not adequately explain her finding that all of the miner's work from 1995 to 2012 was underground. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Employer's Brief in Support of Petition for Review at 7-11.

The miner testified that he worked "on the surface" in a "prep plant" for the last seven years of his coal mine employment with Powell, from approximately 2002 to 2008. Director's Exhibit 7 at 6. The administrative law judge did not address whether the miner's employment with Powell occurred at an underground mine site or a surface coal mine site in conditions substantially similar to those of an underground mine. *See Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013) (no showing of comparability of conditions is necessary for an aboveground employee at an underground coal mine); *Muncy*, 25 BLR at 1-29. Because we are unable to discern the bases for the administrative law judge's findings, we vacate her determination the miner had sixteen years of underground coal mine employment from 1995 to 2012. *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 407 (6th Cir. 2019); *Aberry Coal, Inc. v. Fleming*, 843 F.3d 219, 224 (6th Cir. 2016), *amended on reh'g*, 847 F.3d 310, 315-16 (6th Cir. 2017). Additionally, the administrative law judge erred in declining to calculate the miner's pre-1995 coal mine employment based on the available evidence in the record. *See Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1024-25 (10th Cir. 2010). Thus we vacate her finding that

[8] Employer confirmed the miner worked for it as an "underground equipment operator" from June 15, 2011 to June 21, 2012. Director's Exhibit 5.

claimant invoked the Section 411(c)(4) presumption and we therefore vacate the award of benefits.[9]

On remand, the administrative law judge is instructed to reconsider whether the miner had at least fifteen years of qualifying coal mine employment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. If the administrative law judge finds the miner had at least fifteen years of qualifying coal mine employment, she may consider employer's arguments with respect to rebuttal.[10] Alternatively, if the presumption is not invoked, the administrative law judge must consider the miner's entitlement under 20 C.F.R. Part 718. S*ee Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc). In reaching her determinations on remand, the administrative law judge must explain the bases for all of her findings in accordance with the Administrative Procedure Act.[11] *See Wojtowicz*, 12 BLR at 1-165.

[9] Because we have vacated the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, we decline to address, as premature, employer's arguments pertaining to the administrative law judge's rebuttal findings.

[10] If the administrative law judge reinstates the award of benefits based on her determination employer did not rebut the Section 411(c)(4), employer may appeal.

[11] The Administrative Procedure Act requires that every adjudicatory decision 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).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge