

U.S. Department of Labor

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



BRB Nos. 22-0531 BLA
and 22-0531 BLA-A

CATHY ROBINSON)
)
 Claimant-Petitioner)
 Cross-Respondent)
)
 v.)
)
 LONG BRANCH ENERGY)
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Respondents)
 Cross-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest)

DATE ISSUED: 02/27/2024

DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Dismissing Claim of Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for Claimant.

Chris M. Green, Charity K. Lawrence and Wesley A. Shumway (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for Employer and its Carrier.

David Casserly (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals and Employer and its Carrier (Employer) cross-appeal Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Dismissing Claim (2021-BLA-06024) rendered on a subsequent survivor's claim filed on January 30, 2020, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The relevant procedural history is as follows. On August 2, 2017, the district director denied Claimant's prior claim, filed on October 24, 2016, by reason of abandonment because she failed to provide documentation essential for processing the claim and did not respond to the district director's Order to Show Cause. Decision and Order at 3-4; Employer's May 16, 2020 Renewed Motion to Deny Subsequent Survivor's Claim.² A denial by reason of abandonment is "deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c). On January

¹ Claimant is the widow of the Miner, who died on July 12, 2012. Director's Exhibit 14. Because the Miner did not establish entitlement to benefits during his lifetime, Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, is not applicable in this case.

² Although "[a]ny evidence submitted in connection with any prior claim must be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim," 20 C.F.R. §718.309(c)(2), Claimant's prior claim was not made available as part of the record in this claim. However, Employer submitted the relevant documentation as part of its motion to dismiss the claim. Employer's May 16, 2020 Renewed Motion to Deny Subsequent Survivor's Claim.

28, 2021, the district director denied Claimant's current claim, filed on January 30, 2020, for failure to establish that the Miner's death was due to his pneumoconiosis. Director's Exhibits 4, 32.

Pursuant to Claimant's request for a hearing, this case was transferred to the Office of Administrative Law Judges, where it was assigned to the ALJ. Director's Exhibits 38, 40; ALJ's April 7, 2022 Notice of Assignment, Hearing, and Initial Prehearing Order. On May 16, 2022, Employer filed a Renewed Motion to Deny Subsequent Survivor's Claim, arguing that because Claimant's prior claim was denied as abandoned, she failed to establish that the Miner had pneumoconiosis or that his death was due to pneumoconiosis. Employer's Motion at 3. Because those conditions of entitlement related to the Miner's physical condition at the time of his death, Employer argued Claimant could not establish a change in an applicable condition of entitlement in her current claim. *Id.* Claimant opposed Employer's motion.

The ALJ conducted a limited hearing on August 16, 2022 to address the issue Employer raised. In an August 29, 2022 Decision and Order Dismissing Claim, which is the subject of this appeal, the ALJ found that Claimant cannot establish a change in a condition of entitlement and, therefore, her claim is barred.

On appeal, Claimant argues that the ALJ should have considered her claim on the merits because her prior claim was decided before the United States Supreme Court issued its decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018).³ She further argues the ALJ erred in dismissing the claim before she could present evidence to establish a change in an element of entitlement since the prior denial. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response arguing Claimant did not properly raise an Appointments Clause challenge. Employer has filed a response brief, urging the Benefits Review Board to affirm the denial of benefits. On cross-appeal, Employer challenges the ALJ's finding that the Miner had nineteen years of underground coal mine employment.

³ *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. 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. 237, 251 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) has 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.

The Board’s scope of review is defined by statute. We must affirm the ALJ’s 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, 362 (1965).

Appointments Clause

Claimant argues the ALJ should have allowed her to litigate her claim on the merits because “all decisions made in her original claim were prior to the *Lucia* decision.” Claimant’s Brief at 3. We decline to address this argument as it is inadequately briefed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

Lucia holds “inferior officers” lack authority to hear and decide cases if they are not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.⁵ 138 S. Ct. at 2055. Claimant does not contend ALJ Ramaley’s appointment violated the Appointments Clause. Nor does she argue that the district directors who denied this claim or her prior claim were “inferior officer[s]” who were not properly appointed.⁶ Consequently, we agree with the Director’s position that Claimant has not

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibit 5.

⁵ 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.

⁶ Claimant does not indicate that she challenged the appointment of the district director in her prior claim. *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”); *Edd Potter Coal Co. v. Dir., OWCP [Salmons]*, 39 F.4th 202, 207 (4th Cir. 2022) (because Appointments Clause challenges are not jurisdictional, “they are ‘subject to

adequately briefed the argument, and we decline to address it. *See Lucia*, 138 S. Ct. at 2055; *Cox*, 791 F.2d at 446; *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b).

Survivor's Subsequent Claim

Claimant argues the ALJ erred in dismissing her subsequent survivor's claim before she could attempt to establish a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Claimant's Brief at 3. We agree.

A subsequent survivor's claim, filed more than one year after the effective date of a prior order denying survivor's benefits, must also be denied unless new evidence establishes a change in an "applicable condition of entitlement" unrelated to the miner's physical condition at the time of his death. 20 C.F.R. §725.309(c)(4); *see Boden v. G.M. & W. Coal Co.*, 23 BLR 1-39, 1-40 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3).

The district director denied Claimant's prior claim by reason of abandonment. Decision and Order at 2; Employer's Renewed Motion to Deny Subsequent Survivor's Claim at 10-11. A denial by reason of abandonment "shall be deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c). The applicable conditions of entitlement for a surviving spouse are that 1) the surviving spouse is unmarried; 2) the spouse was dependent on the miner at the relevant time; and 3) the miner's death was due to pneumoconiosis, or the miner was awarded benefits and the surviving spouse is eligible for automatic entitlement under Section 422(l) of the Act. 20 C.F.R. §725.212(a)(1)-(3).

The ALJ found that Claimant could not establish a change in a condition of entitlement by invoking the Section 411(c)(4) presumption as it would require her to establish total disability, an element of entitlement related to the Miner's physical condition. Decision and Order at 5-6. He further noted that she did not timely request reconsideration of the denial of her prior claim or request a hearing in that claim. *Id.* at 6. Further, her new claim was filed more than a year after the denial of her prior claim, and therefore cannot be considered a request for modification. *Id.* Thus, he concluded her subsequent claim is barred pursuant to 20 C.F.R. §725.309(c)(4).⁷ *Id.*

ordinary principles of waiver and forfeiture") (quoting *Joseph Forrester Trucking v. Dir., OWCP [Davis]*, 987 F.3d 581, 587 (6th Cir. 2021)).

⁷ In finding Claimant could not establish a change in a condition of entitlement, the ALJ cited to cases applying regulations which have since been amended. *See* Order at 4

However, the ALJ erred in failing to consider whether Claimant could establish any element of entitlement unrelated to the Miner's physical condition. 20 C.F.R. §§725.212(a)(1), 725.309(c), 725.409; *see also Consolidation Coal Co. v. Dir., OWCP [Buris]*, 732 F.3d 723, 727 (7th Cir. 2013) (miner who abandoned his prior claim can meet his threshold burden by "establishing a change in *any* of the applicable conditions of entitlement") (emphasis added). Therefore, the ALJ erred by not affording Claimant the opportunity to establish a condition of entitlement previously adjudicated against her that is unrelated to the Miner's physical condition at the time of his death. *See* 20 C.F.R. §725.309(c)(4).

We therefore vacate the ALJ's Order dismissing Claimant's subsequent survivor's claim. On remand, the ALJ must consider whether Claimant established a change in any applicable condition of entitlement unrelated to the Miner's physical condition at the time of his death. 20 C.F.R. §725.309(c)(4). If Claimant is successful in doing so, the ALJ must consider her subsequent claim on the merits.

Length of Coal Mine Employment

We now address Employer's appeal of the ALJ's length of coal mine employment finding. After reviewing the evidence contained in the Director's Exhibits, the ALJ summarily concluded that Claimant established the Miner had nineteen years of coal mine employment. Decision and Order at 5. As Employer notes, the ALJ limited the hearing to addressing whether Claimant's subsequent survivor's claim should be summarily dismissed, and thus the parties were not given an opportunity to develop the record or present their arguments on the length of the Miner's coal mine employment. *See Arch of Ky., Inc. v. Director, OWCP [Hatfield]*, 556 F.3d 472, 478 (6th Cir. 2009) ("The basic elements of procedural due process are notice and opportunity to be heard."); *see also Consol. Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999); ALJ's August 4, 2022 Order Denying Motion for Continuance and Order Granting Motion to Compel Response to Discovery. Moreover, as the ALJ did not explain how he determined the Miner had nineteen years of underground coal mine employment, his findings do not comply with the

n.2. Indeed, the previous rule mandated automatic denial of all subsequent survivors' claims. *See* 20 C.F.R. §725.309(d) (1999) ("If an earlier survivor's claim filed under this part has been finally denied, the new claim filed under this part shall also be denied unless the deputy commissioner determines that the later claim is a request for modification and the requirements of §725.310 are met."). Conversely, the current applicable regulation allows surviving spouses to file subsequent claims if the threshold requirements of 20 C.F.R. §725.309(c) are met.

Administrative Procedure Act (APA).⁸ See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Consequently, we vacate the ALJ's determination that the Miner had nineteen years of underground coal mine employment.

On remand, if Claimant establishes a change in a condition of entitlement unrelated to the Miner's physical condition, the ALJ must reconsider his determination that the Miner had nineteen years of underground coal mine employment after the parties have had the opportunity to develop the record and present their arguments on the issue. *Hatfield*, 556 F.3d at 478; *Borda*, 171 F.3d at 184. In doing so, he must base his findings on a reasonable method of calculation, considering all relevant evidence, and fully explain his findings in accordance with the APA. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Wojtowicz*, 12 BLR at 1-165.

⁸ The Administrative Procedure Act provides that every adjudicatory decision must include "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 ALJ's Decision and Order Dismissing Claim is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge