U.S. Department of Labor

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

BRB Nos. 19-0557 BLA
and 19-0558 BLA

DEBORAH M. BOGGS (o/b/o and Widow of RONNIE K. BOGGS) Claimant-Respondent v. DORCHESTER ENTERPRISES, INCORPORATED and GRAND CANYON MINING COMPANY/ CHARTIS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/18/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in Living Miner's and Survivor's Claims and the Order on Employer's Motion to Reconsider of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

R. Luke Widener (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

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: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier appeal Administrative Law Judge Morris D. Davis's Decision and Order Awarding Benefits in Living Miner's and Survivor's Claims and Order on Employer's Motion to Reconsider (2016-BLA-05774 and 2016-BLA-05775) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on May 27, 2011 and a survivor's claim filed on May 13, 2016.[1]

The administrative law judge credited the Miner with 17.59 years of coal mine employment, 15.5 years of which was underground, and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he determined Claimant invoked the rebuttable presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits. Based on the award in the Miner's claim, he found Claimant automatically entitled to survivor's benefits

[1] The Miner died on February 18, 2016 while his claim was pending. Living Miner's Director's Exhibit 43; Widow's Director's Exhibit 4. Claimant, the Miner's widow, is pursuing the Miner's claim on his behalf as well as her own survivor's claim. Living Miner's Director's Exhibits 44-46.

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

pursuant to Section 422(*l*)[3] of the Act.[4] 30 U.S.C. §932(*l*) (2018). Subsequently, the administrative law judge denied Employer's Motion for Reconsideration, finding in pertinent part that the Miner's employment qualifies for the Section 411(c)(4) presumption because he was regularly exposed to coal mine dust.

On appeal, Employer argues the administrative law judge lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[5] In addition, it challenges the constitutionality of the Section 411(c)(4) presumption, and in the alternative, contends the administrative law judge erred in finding the Miner had at least fifteen years of underground or substantially similar surface coal mine employment to invoke the presumption.[6] Claimant has not responded to Employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response asserting Employer waived its Appointments Clause challenge and urging the Benefits Review

[3] Section 422(*l*) provides that the 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 without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[4] Additionally, the administrative law judge found Claimant invoked the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis and that Employer failed to rebut the presumption. Decision and Order at 37-39; 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[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] We affirm, as unchallenged on appeal, the administrative law judge's finding 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 (1986).

Board to reject Employer's contention that the Section 411(c)(4) presumption is unconstitutional.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Orders if they are rational, supported by substantial evidence, and in accordance with applicable law.[7] 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).[8] Employer's Brief at 6-8. It acknowledges the Secretary of Labor (the Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[9] but maintains the

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

[8] *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. Comm'r*, 501 U.S. 868 (1991)).

[9] 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 Davis.

ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment. *Id*.

In response, the Director asserts Employer waived its Appointments Clause challenge. Director's Response Brief at 4-8. We agree.

Appointments Clause issues are "non-jurisdictional" and thus subject to the ordinary rules 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). Employer filed a February 28, 2018 motion requesting the administrative law judge hold the case in abeyance pending the United States Supreme Court's decision in *Lucia*.

After the administrative law judge denied its request, the Supreme Court decided *Lucia* on June 21, 2018. Thereafter the administrative law judge issued a September 11, 2018 Notice and Order directing Employer to file a statement within fourteen days indicating whether it sought to have the case reassigned. Sept. 11, 2018 Notice and Order at 2. The administrative law judge indicated that if Employer did not file a response, the remedy of reassignment and a new hearing would "be deemed waived and the case will proceed before the undersigned." *Id.* Employer did not respond to the Notice and Order. Decision and Order at 2 n.4.

Had Employer responded to the Notice and Order and requested reassignment, the administrative law judge could have addressed Employer's contentions and, if appropriate, referred the case for assignment to a different, properly appointed administrative law judge to hold a new hearing and issue a decision. *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019); *Kiyuna v. Matson Terminals Inc.*, 53 BRBS 9, 11 (2019). It chose not to do so. It therefore cannot resurrect its argument on appeal after receiving an unfavorable outcome on the merits below. Based on these facts, we conclude Employer waived its Appointments Clause challenge.[10] *In re DBC*, 545 F.3d 1373, 1380 (Fed. Cir. 2008) (declining to excuse

[10] "[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 (2017), *citing United States v. Olano*, 507 U. S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938)). Employer also waived its related argument that the Secretary of Labor's December 21, 2017 ratification of the administrative law judge's appointment was invalid because it had the opportunity

waived Appointments Clause challenge to discourage "sandbagging"). We therefore deny the relief requested.

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Board should hold this appeal in abeyance because the Affordable Care Act (ACA), Public Law No. 111-148, §1556 (2010), which reinstated the Section 411(c)(4) presumption, is unconstitutional. Employer's Brief at 5. It relies upon the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*.

The United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional but vacated and remanded the district court's determination that the remainder of the law must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held that the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative as a law. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214-15 (2010), *aff'd*, *Stacy*, 671 F.3d at 383 n.2, 391; *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). We therefore reject employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case, and deny its request to hold this case in abeyance.

The Section 411(c)(4) Presumption

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines or in "substantially similar" dust conditions in surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years the Miner worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR

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to also raise this issue in response to the administrative law judge's Notice and Order, but failed to do so.

1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination based on a reasonable method of calculation and if supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

Length of coal mine employment

Based on the Miner's SSA records, the administrative law judge credited him with a full calendar quarter of coal mine employment for each quarter in which he earned at least $50.00 from coal mine operators for his pre-1978 employment. *See Shrader v. Califano*, 608 F.2d 114, 117 n.3 (4th Cir. 1979) (crediting a miner with a full quarter of coal mine employment when the miner earned $50.00 or more during that time period is "an appropriate yardstick for determining quarters which will be fully credited to a black lung claimant"); *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); Decision and Order at 5-6; Living Miner's Director's Exhibit 6. Using this method, the administrative law judge credited the Miner with 3.75 years of coal mine employment between 1972 and 1977. Decision and Order at 6.

Citing *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019), Employer asserts that, given the variation in the miner's earnings, the administrative law judge erred in using the quarter method and should have instead used the method of calculation at 20 C.F.R. §725.101(a)(32)(iii),[11] for the entirety of the Miner's employment. Employer's Brief at 12-14.

We disagree. Application of the formula at 20 C.F.R. §725.101(a)(32)(iii) is permissive, not mandatory. 20 C.F.R. §725.101(a)(32)(iii) (administrative law judge "may" use formula if beginning and ending dates cannot be determined or last less than a calendar year). In *Shepherd*, the Sixth Circuit did not outright reject use of the quarter method as Employer suggests. It held the method cannot be used if the evidence establishes that "the miner was not employed by a coal mining company for a full calendar quarter."[12]

[11] 20 C.F.R. §725.101(a)(32)(iii) provides that, if the beginning and ending dates of the Miner's coal mine employment cannot be ascertained, or the Miner's coal mine employment lasted less than a calendar year, the administrative law judge may determine the length of the Miner's work history by dividing the Miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics.

[12] Unlike *Shepherd*, which involved specific evidence that the miner did not work all three months during some quarters, Employer's identification of the Miner's income as being lower in some quarters than others does not establish error in the administrative law judge's crediting him with full quarters of coal mine employment. *Shepherd*, 915 F.3d at

Shepherd, 915 F.3d at 406. Moreover, as the administrative law judge noted, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, which has specifically upheld the use of the quarter method in calculating the length of coal mine employment when the miner's income exceeds $50.00. *Shrader*, 608 F.2d at 117 n.3; Order on Employer's Motion to Reconsider at 4.

As it is supported by substantial evidence and comports with the law, we affirm the administrative law judge's finding of 3.75 years of coal mine employment from 1972 to 1977. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 668 (4th Cir. 2017); *Shrader*, 608 F.2d at 117 n.3; *Tackett*, 6 BLR at 1-841; Decision and Order at 6; Order on Employer's Motion to Reconsider at 2-4. Adding that 3.75 years to the 13.84 years the administrative law judge found from 1978 to 1998, which Employer does not challenge, the administrative law judge permissibly found the Miner had a total of 17.59 years of coal mine employment, sufficient to invoke the Section 411(c)(4) presumption if at least 15 years of it is qualifying.

Nature of coal mine employment

Coal mine employment is "qualifying" for the purpose of invoking the Section 411(c)(4) presumption if it is performed in either underground coal mines or surface mines in "substantially similar" dust conditions to those in an underground mine. 20 C.F.R. §718.305(b)(1)(i). "The conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

On his Employment History Form CM-911(a) (Form CM-911(a)), the Miner listed seven different employers and indicated whether each job was underground or surface mining.[13] Living Miner's Director's Exhibit 3. Correlating the Miner's CM-911(a) descriptions and Claimant's testimony regarding the Miner's employment history and working conditions with his calculations of the years of coal mine employment, the

406. Nor does Employer allege the Miner's income "approaches that floor of $50.00" to warrant a finding that he "did not work in the mines most days in the quarter." *Id*. Thus, Employer has not identified any error even if we were to apply *Shepherd*.

[13] The Miner identified Betty B Coal Co. and J K & G as surface mines, and the other five employers—Elkins Coal Co., T & N Coal Co., M & S Coal Co., Phil Strouth Coal, and Dorchester Coal Co.—as underground coal mines. Living Miner's Director's Exhibit 3.

administrative law judge found at least 15.5 years of the Miner's coal mine employment were qualifying. Decision and Order at 8-9; Order on Employer's Motion to Reconsider at 4; Hearing Transcript at 28-30; Living Miner's Director's Exhibit 3.

Employer argues the administrative law judge erred because four of the employers he included in his calculations—Rita Ann Coal Corporation (Rita), Dale Energy Corporation (Dale), Indian Fuel Corporation (Indian Fuel), and T J & T Corporation (T J & T)—were not listed by the Miner on his Form CM-911(a). Employer's Brief at 10-12. Employer therefore argues there is insufficient evidence to determine whether the Miner's work for these companies constituted qualifying coal mine employment. We disagree.

As the administrative law judge found, Claimant testified she and the Miner were married for forty-one years, he worked for more than twenty years in the coal mines, primarily as a roof bolter, he was "covered in black" when he returned from work, and he worked in low coal most of the time.[14] Order on Employer's Motion to Reconsideration at 4; Hearing Transcript at 28-30. The administrative law judge noted the period Claimant's testimony covered was consistent with the times in which the Miner was employed by Rita, Dale, Indian Fuel and T J & T. He also noted that, because Claimant was married to the Miner while he was employed as coal miner, she was in the best position, other than the Miner himself, to testify as to the conditions he worked in while working for these employers. Order on Employer's Motion to Reconsideration at 4. He further noted Claimant's testimony was unrebutted regarding the Miner's job duties during the periods he worked for Rita, Dale, Indian Fuel, and T J & T.[15] *Id.*

Contrary to Employer's contention, the administrative law judge permissibly relied on Claimant's uncontested testimony, which he found credible, detailing the Miner's

[14] According to Claimant, for twenty years the Miner "ate coal dust while pinning top or crawling on his belly in low coal." Hearing Transcript at 35.

[15] A review of the record reflects that Claimant's hearing testimony is consistent with the employment history that his examining physicians recorded. Dr. Alam reported twenty years of coal mine employment "as a roof bolter, bolting the top of the coal of the mine." Decision and Order at 13; Living Miner's Director's Exhibit 40. Dr. Fino reported twenty-one and one-half years of underground coal mine employment. Living Miner's Employer's Exhibit 1. Dr. Rosenberg reported the Miner mostly worked underground as a roof bolter for twenty-one or twenty-two years. Living Miner's Director's Exhibit 15; Living Miner's Employer's Exhibit 12. Dr. Smiddy's treatment notes recorded the Miner "worked in mines from 1974 to 1998 and had significant exposure to coal dust and rock dust." Living Miner's Claimant's Exhibit 6 at 24.

working conditions to find the Miner "was regularly exposed to coal mine dust" during his employment with Rita, Dale, Indian Fuel, and T J & T. Order on Employer's Motion to Reconsider at 4; *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999); *see also Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664 (6th Cir. 2015) (claimant's "uncontested lay testimony" regarding the miner's dust conditions "easily supports a finding" of regular dust exposure); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490 (6th Cir. 2014) (claimant's testimony that the conditions of his employment were "very dusty" was sufficient to establish regular exposure); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc) (the administrative law judge has discretion to assess witness credibility and the Board will not disturb his or her findings unless they are inherently unreasonable). Thus even if, as Employer speculates, employment with these four employers may have represented periods of surface coal mine employment, Employer's Brief at 10-11, the administrative law judge reasonably found the Miner's work there nevertheless would still qualify to invoke the 411(c)(4) presumption.[16] *See Kennard*, 790 F.3d at 664. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant established at least fifteen years of qualifying coal mine employment and invoked the Section 411(c)(4) presumption.

We also affirm, as unchallenged on appeal, the administrative law judge's finding Employer failed to rebut the presumption and affirm the award of benefits in the Miner's claim. *Skrack*, 6 at 1-711; Decision and Order at 37. Because we have affirmed the award of benefits in the Miner's claim and Employer raises no specific challenge to the survivor's claim, we affirm the administrative law judge's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

[16] Employer's speculation that these employers operated surface coal mines is belied by Claimant's testimony that during the Miner's twenty-year career he primarily worked as a roof bolter and in low coal. Hearing Transcript at 30-31; *see* Decision and Order at 8-9 (finding the Miner had 15.5 years of underground coal mine employment). Regardless, as the administrative law judge found, she testified that "[f]or [twenty] years, he ate coal dust while pinning top or crawling on his belly in low coal" and returned home from work "covered in black," thus supporting a finding of substantial similarity of dust conditions. Hearing Transcript at 30-31.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in Living Miner's and Survivor's Claims and the Order on Employer's Motion to Reconsider are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge