U.S. Department of Labor

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

BRB No. 19-0242 BLA

MICHAEL D. KEENE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
K & R CONTRACTORS, LLC	)	DATE ISSUED: 04/23/2020
	)	
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 Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Thomas R. Scott, Jr. (Street Law Firm, LLP), Grundy, Virginia, for employer.

William M. Bush (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 appeals the Decision and Order Granting Benefits (2018-BLA-05457) of Administrative Law Judge Francine L. Applewhite rendered on a claim filed pursuant to

the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on February 28, 2017.

Judge Applewhite credited claimant with 34.08 years of surface coal mine employment in conditions substantially similar to those in an underground mine and found he has a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). She therefore determined claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4). She further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues Administrative Law Judge William T. Barto, who presided over the hearing, and Judge Applewhite, who decided the claim, lacked the authority to hear and decide the case because they were not appointed consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2. It also challenges their authority in light of the provisions for removing administrative law judges. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's arguments. Employer filed a reply brief, reiterating its contentions.

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.[2] 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). The Board reviews questions of law de novo. *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116 (6th Cir. 1984).

Appointments Clause Challenge

This case was initially assigned to Judge Barto, who presided over the formal hearing on August 28, 2018. Hearing Tr. at 4. At the hearing, he denied employer's July

[1] 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant'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.

3, 2018 Motion to Cancel Hearing and Reassignment of the Claim,[3] finding the Secretary of Labor's ratification of his appointment on December 21, 2017, foreclosed employer's Appointments Clause challenge. *Id.* at 6-7. Moreover, he noted he had not performed "any substantial action at all in this case" prior to the ratification. *Id.* This case was reassigned to Judge Applewhite, who issued a Decision and Order Granting Benefits on January 29, 2019.[4]

Employer argues Judge Barto was appointed in the same manner as Securities and Exchange Commission administrative law judges that the United States Supreme Court found inconsistent with the Appointments Clause[5] in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018). Employer's Brief at 3-6; *see also* Employer's Reply Brief at 1-5. It further maintains the Secretary of Labor's ratification of the prior appointments of all sitting Department of Labor administrative law judges[6] was insufficient to cure the constitutional

[3] In its motion, employer argued in light of the United States Supreme Court's decision in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), Judge Barto lacked the authority to preside over this case. Employer raised similar arguments in its July 10, 2018 Operator's Response to Notice of Hearing and Pre-Hearing Order.

[4] Judge Barto was appointed Chair of the Department of Labor's Administrative Review Board in January 2019.

[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.

Art. II, § 2, cl. 2.

[6] The Secretary of Labor issued a letter to Judge Barto 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,

defect because it merely "rubberstamped" the original improper procedure. Employer's Reply Brief at 3. Employer also generally asserts Judge Applewhite's appointment was similarly flawed.[7] Employer's Brief at 3-6; *see also* Employer's Reply Brief at 1-5. The Director responds the Secretary's ratification brought Judge Barto's appointment into compliance with the Appointments Clause "before [he] took any action on the case."[8] Director's Brief at 4-6. In addition, the Director states Judge Applewhite's appointment is also valid. Director's Brief at 6 n.6. We agree with the Director.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 4, *quoting Marbury v. Madison*, 5 U.S. 137, 157 (1803). 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 Hosp. Co. v. NLRB*, 857 F.3d 364, 372 (D.C. Cir. 2017); *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). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the

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> 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 Barto.

[7] The Secretary of Labor issued a letter to Judge Applewhite on September 12, 2018, stating:

> Pursuant to my authority as Secretary of Labor, I hereby appoint you as an Administrative Law Judge in the U.S. Department of Labor, authorized to execute and fulfill the duties of that office according to law and regulation and to hold all the powers and privileges pertaining to that office. U.S. Cons. Art. II, § 2, cl. 2; 5 U.S. C. §3105. This action is effective upon transfer to the U.S. Department of Labor.

Secretary's September 12, 2018 Letter to Administrative Law Judge Applewhite. Her appointment became effective on October 28, 2018. Director's Brief at 4.

[8] As the Director noted, Judge Barto's appointment was ratified in December 2017; he issued his Prehearing Order on June 28, 2018, notifying the parties he had been assigned to preside over the case.

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

Congress 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. Thus, under the presumption of regularity, we presume 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. The Secretary did not generally ratify the appointment of all administrative law judges in a single letter. Rather, he specifically identified Judge Barto and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Barto. The Secretary further stated he was acting in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Barto "as an Administrative Law Judge." *Id*.

Employer does not assert that the Secretary had no "knowledge of all the material facts" or that he did not make a "detached and considered judgement" when he ratified Judge Barto's appointment. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary's ratification of Judge Barto's appointment was therefore proper. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals valid where Secretary of Transportation issued a memorandum "adopting" the General Counsel's assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d 592, 604-05 (National Labor Relations Board's retroactive ratification appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" its earlier invalid actions was proper).

Employer's general assertion that Judge Applewhite's appointment is not valid is also without merit. Employer's Brief at 4-6. Prior to Judge Applewhite's assignment to this case, the Secretary specifically appointed her to "execute and fulfill the duties of that office according to law and regulation and to hold all the powers and privileges pertaining to that office. U.S. Cons. Art. II, § 2, cl. 2; 5 U.S. C. §3105." Secretary's September 12, 2018 Letter to Administrative Law Judge Applewhite. Thus, employer again has failed to meet its burden to overcome the presumption of regularity.[9] *Butler*, 244 F.3d at 1340.

[9] We further 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 at 5-6. The Executive Order does not state that the prior appointment procedures

Consequently, we reject employer's argument that this case should be remanded for a new hearing before a different administrative law judge.

Removal Provisions

Employer argues that Judges Barto and Applewhite lacked authority to adjudicate this case because "the limitations on their removal violate the separation of powers" doctrine. Employer's Brief at 6-7; *see also* Employer's Reply Brief at 5-6. Employer has failed to adequately brief this issue. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

The Board's procedural rules impose threshold requirements for alleging specific error before it will consider the merits of an issue. In relevant part, a petition for review "shall be accompanied by a supporting brief, memorandum of law or other statement which . . . [s]pecifically states the issues to be considered by the Board." 20 C.F.R. §802.211(b). The petition for review must also contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result." *Id*. Further, to "acknowledge an argument" in a petition for review "is not to make an argument" and "a party forfeits any allegations that lack developed argument." *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018), *citing United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009). A reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (refusing to consider the merits of argument that the Federal Trade Commission is unconstitutional because its members exercise executive powers yet can be removed by the President only for cause).

While employer states Judges Barto's and Applewhite's appointments were improper in view of the removal provisions contained in the Administrative Procedure Act, 5 U.S.C. §7521, it has not specified how those provisions violate the separation of powers doctrine or explained how *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010) undermines their authority to preside over this case.[10]

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were impermissible or violated the Appointments Clause. It 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).

[10] Employer cites the Supreme Court's decisions in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010) and Justice Breyer's concurrence and dissent in *Lucia*. Employer's Brief at 6-7; Employer's Reply Brief at 5-

Employer's Brief at 6-7; Employer's Reply Brief at 5-6. Thus, we decline to address the issue. *Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

Employer has not raised any specific allegations of error with respect to Judge Applewhite's findings on the merits of entitlement. Therefore, we affirm her determinations that, because claimant established at least fifteen years of qualifying coal mine employment and total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), he invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 5-6, 7-10. We also affirm, as unchallenged, her finding employer did not rebut this presumption and therefore the award of benefits.[11] *See Skrack*, 6 BLR at 1-711; Decision and Order at 10-15.

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6. It notes that in *Free Enterprise*, the Supreme Court invalidated a statutory scheme that provided the Public Company Accounting Oversight Board two levels of "for cause" removal protection and thus interfered with the President's duty to ensure the faithful execution of the law. Employer's Brief at 6-7. The Supreme Court in *Free Enterprise* stated, however, that its holding "does not address that subset of independent agency employees who serve as administrative law judges" and "perform adjudicative rather than enforcement or policymaking functions." *Free Enter. Fund*, 561 U.S. at 507 n.10. Moreover, the majority opinion in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1.

[11] In its brief, employer stated: "As set forth more fully below, the [administrative law judge's] Decision and Order should be vacated because, among other errors, she found that [employer] was the responsible operator." Employer's Brief at 1. Employer did not provide any additional information on the responsible operator issue. The Board's procedural rules require the brief accompanying a petition for review to contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result that the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result." 20 C.F.R. §802.211(b). Thus, we decline to address this allegation as insufficiently briefed. *See Cox v. Director, OWCP*, 791 F.2d 445, (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

Accordingly, the Decision and Order Granting Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge