U.S. Department of Labor

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

BRB No. 22-0379 BLA

BETTY PACK (Widow of RONNIE PACK)	)	
Claimant-Respondent	)	
v.	)	
EASTERN ASSOCIATED COAL COMPANY	)	
and	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 04/21/2023
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 Granting Claimant's Motion for Summary Decision and Cancelling Hearing, Order Granting Claimant's Motion for Reconsideration and Denying Employer's Petition for Reconsideration, and Order Denying Employer's Second Petition for Reconsideration of Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, 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, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Granting Claimant's Motion for Summary Decision and Cancelling Hearing, Order Granting Claimant's Motion for Reconsideration and Denying Employer's Petition for Reconsideration, and Order Denying Employer's Second Petition for Reconsideration (2021-BLA-05475) rendered on a survivor's claim filed on December 1, 2020, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

Pursuant to Claimant's[1] unopposed Motion for Summary Decision, the ALJ found Claimant automatically entitled to benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), based on the award of benefits in the miner's claim.[2] The ALJ granted Claimant's subsequent Motion for Reconsideration, vacating the onset date of December 2020 and ordering Employer to pay benefits commencing in November 2020. He further rejected Employer's Petition for Reconsideration, finding Employer had waived its right to contest Peabody Energy Corporation's (Peabody's) designation as the responsible carrier.

[1] Claimant is the widow of the Miner, who died on November 18, 2020. Director's Exhibit 4.

[2] Section 422(*l*) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). ALJ Lystra A. Harris awarded benefits in the miner's claim in a Decision and Order on Remand issued on January 31, 2022. *Pack v. E. Assoc. Coal*, OALJ No. 2017-BLA-05753 (Jan. 31, 2022). On December 16, 2022, the Benefits Review Board affirmed ALJ Harris's decision. *Pack v. E. Assoc. Coal*, BRB No. 22-0173 BLA (Dec. 16, 2022) (unpub.).

Pursuant to Employer's second Petition for Reconsideration, the ALJ rejected as untimely Employer's request to vacate the award of benefits and transfer the case to ALJ Lystra A. Harris for consolidation with the miner's claim.

On appeal, Employer contends the ALJ and the district director are inferior officers who were not appointed in a manner consistent with the Appointments Clause of the U.S. Constitution, Art. II § 2, cl. 2.[3] It further argues that it was deprived of due process because it did not receive proper notice and service of the claim. Thus, it argues that Eastern Associated Coal Company (Eastern) should be dismissed as the responsible operator in this claim, and the Black Lung Disability Trust Fund (the Trust Fund) should be liable for any benefits payable to Claimant. In addition, it argues the ALJ erred in finding Peabody is the liable carrier.[4] In response, Claimant and the Director, Office of Workers' Compensation Programs (the Director), assert the ALJ properly determined Employer is responsible for the payment of benefits.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Orders if they are 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 Assocs., Inc.*, 380 U.S. 359, 362 (1965).

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[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.

U.S. Const. art. II, § 2, cl. 2.

[4] We affirm, as unchallenged, the ALJ's determination that Claimant is entitled to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] 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); *Pack*, BRB No. 22-0173 BLA, slip op. at 3 n.3.

Appointments Clause Challenge – Administrative Law Judge

Employer urges the Board to vacate the award and remand the case to be heard by a different, constitutionally appointed ALJ[6] pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[7] Employer's Brief at 32-39 (unpaginated). In response, the Director asserts Employer waived its Appointments Clause challenge. Director's Response Brief at 2. We agree with the Director.

Appointments Clause issues are "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).

Lucia was decided years prior to the filing of this claim. Employer, however, failed to raise its Appointments Clause argument at any time before the ALJ. Had Employer timely raised the argument before the ALJ, he could have addressed it and, if appropriate, taken steps to have the case assigned for a new hearing before a different ALJ. *Kiyuna v. Matson Terminals Inc.*, 53 BRBS 9, 11 (2019). Instead, Employer waited to raise the issue until after the ALJ issued an adverse decision.

Employer raises no basis for excusing its forfeiture of the issue. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962); *Kiyuna*, 53 BRBS at 11 (Appointments Clause argument is an "as-applied" challenge that the ALJ can address and thus can be waived or forfeited). Because Employer has not set forth any basis for excusing its forfeiture, we see no reason to entertain its forfeited argument. *See Joseph Forrester Trucking v. Director,*

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[6] Employer argues that ALJ Harris, who was the ALJ in the miner's claim, took action in this case while not properly appointed. Employer's Brief at 32 (unpaginated). To the extent Employer is attempting to relitigate the authority of ALJ Harris to hear the miner's claim, we reject its argument as the miner's claim is not before us and the Board has already held this argument to be waived. *Pack*, BRB No. 20-0095 BLA, slip op. at 4-5.

[7] *Lucia* involved an Appointments Clause challenge to the selection 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. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

OWCP [*Davis*], 937 F.3d 581, 591 (6th Cir. 2021); *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019); *Kiyuna*, 53 BRBS at 11.

Notice of Claim

Employer further argues that the district director's failure to issue a Notice of Claim and allow Employer "to address the liability issues" requires liability to be shifted to the Trust Fund. Employer's Brief at 8 (unpaginated). However, we agree with Claimant and the Director that Employer forfeited this argument because it failed to raise it before the ALJ. *See Edd Potter Coal Co. v. Dir., OWCP* [*Salmons*], 39 F.4th 202, 208 (4th Cir. 2022) (parties forfeit arguments before the Board not first raised to the ALJ); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-4-7 (1995); Director's Response Brief at 2; Claimant's Response at 4-5.

Moreover, as the ALJ found, in cases where the claimant is a survivor entitled to benefits under Section 422(*l*), the district director may designate the responsible operator in a proposed decision and order without first notifying the responsible operator of its potential liability. 20 C.F.R. §725.418(a)(3); Order on First Petition for Reconsideration at 2-4. The employer thereafter may challenge that designation by "timely requesting revision of the proposed decision and order and specifically indicating disagreement with that finding." *Id.* It is then afforded 30 days to submit liability evidence, after which the district director would issue a new proposed decision and order. *Id*. Thus, contrary to Employer's contention, the district director's issuance of the Proposed Decision and Order, without first having issued a formal Notice of Claim or Schedule for the Submission of Additional Evidence, was appropriate.[8] 20 C.F.R. §725.418(a)(3). Moreover, the regulations provided an opportunity to obtain due process, but Employer failed to avail itself of that opportunity.

Liability for Payment of Benefits

In its Petition for Reconsideration, Employer agreed that there was no genuine issue of fact regarding the medical issues in Claimant's survivor's claim. Employer's Petition for Reconsideration at 1. Employer also stated that it was currently contesting Peabody's designation as the responsible carrier before the Board in the miner's claim, and that it believed liability was also a derivative issue.[9] *Id*. However, Employer asked the ALJ to

[8] We note that Employer failed to take advantage of this procedure available to it under the pertinent regulations.

[9] At the time of Employer's Motion, the miner's claim was pending before the Board.

determine if this issue was in fact derivative and, if not, asked that the ALJ's Decision and Order be vacated and the parties be allowed to address Peabody's liability. *Id*.

The ALJ rejected Employer's request to vacate the award of benefits, finding Employer did not properly preserve its liability challenges pursuant to 20 C.F.R. §725.418 (a)(3).[10] Order on First Petition for Reconsideration at 3. Alternatively, he found Employer waived its right to contest the issue by failing to respond to Claimant's Motion for Summary Decision. *Id.* at 4.

On appeal, Employer does not challenge the ALJ's finding that it waived its challenges to Peabody Energy's designation as the responsible carrier in this claim. Consequently, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Moreover, Employer's arguments are without merit. Employer does not challenge Eastern's designation as the responsible operator or its status as self-insured by Peabody on the last day Eastern employed the Miner. 20 C.F.R. §§725.494(e), 725.495, 726.203(a). Rather, Employer reasserts its challenges from the miner's claim that Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Trust Fund. Employer's Brief at 8-32 (unpaginated). The Director asks the Board to reject Employer's liability arguments as it did in the miner's claim. Director's Response Brief at 2-3.

For the reasons the Board previously rejected the liability arguments in the miner's claim, we also do so here. *Pack v. E. Assoc. Coal*, BRB No. 22-0173 BLA, slip op. at 3-4 (Dec. 16, 2022) (unpub.) (citing *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022) (en banc); *Howard v. Apogee Coal Co.*, BLR ,

[10] Pursuant to 20 C.F.R. §725.418(a)(3), in a case involving derivative survivor's benefits, the district director may issue a proposed decision and order without first notifying the responsible operator of its potential liability. In such cases, an employer may contest its liability by "timely requesting revision of the proposed decision and order and specifically indicating disagreement with that finding." 20 C.F.R. §725.418(a)(3). In this case, Employer "reject[ed]" the award of benefits and requested a formal hearing. While it stated it was contesting all issues, it only specifically challenged the existence of pneumoconiosis and total disability due to pneumoconiosis. Director's Exhibit 14. The ALJ determined that, because Employer failed to request revision of the Proposed Decision and Order and failed to specifically identify its challenges to its designation as the responsible operator and carrier, it waived its liability challenges. Order on First Petition for Reconsideration at 2-4.

BRB No. 20-0229 BLA, slip op. at 5-17 (Oct. 18, 2022); and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-295-99 (2022)).

Accordingly, the ALJ's Decision and Order Granting Claimant's Motion for Summary Decision and Cancelling Hearing, Order Granting Claimant's Motion for Reconsideration and Denying Employer's Petition for Reconsideration, and Order Denying Employer's Second Petition for Reconsideration are affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge