



BRB No. 23-0094 BLA

PATSY L. RYAN)
(Widow of JOE C. RYAN))

Claimant-Respondent)

v.)

REBEL COAL COMPANY,)
INCORPORATED)

and)

AMERICAN BUSINESS & MERCANTILE)
c/o OLD REPUBLIC INSURANCE)
COMANY)

DATE ISSUED: 8/24/2023

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 Awarding Benefits in a Survivor's Claim, Order Denying Motion to Hold Claim in Abeyance, and Order Cancelling the Hearing of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Michael A. Pusateri (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Sarah M. Hurley (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 ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Larry S. Merck's Decision [and] Order Awarding Benefits in a Survivor's Claim, Order Denying Motion to Hold Claim in Abeyance, and Order Cancelling the Hearing (2021-BLA-06016) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim filed on July 1, 2021.¹

The ALJ determined that because the Miner was found eligible to receive benefits at the time of his death,² Claimant is automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).³ Thus, the ALJ awarded benefits.⁴

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause

¹ Claimant is the widow of the Miner, who died on May 22, 2021, while his most recent claim was pending before ALJ Joseph E. Kane. Director's Exhibits 6, 7. She pursued the miner's claim on her husband's estate's behalf and her survivor's claim separately. Director's Exhibits 1, 11.

² ALJ Kane awarded benefits in the miner's claim on May 25, 2021. *Ryan v. Rebel Coal Co., Inc.*, Case No. 2018-BLA-05068 (May 25, 2021). Pursuant to Employer's appeal, the Benefits Review Board affirmed the award. *Ryan v. Rebel Coal Co., Inc.*, BRB No. 21-0478 BLA (Mar. 13, 2023) (unpub.).

³ Under Section 422(*l*) of the Act, 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 without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

⁴ On September 1, 2022, Employer filed a Motion to Cancel Hearing and Hold [Survivor's] Claim in Abeyance. In his Decision and Order Awarding Survivor's Benefits, the ALJ simultaneously issued an Order Denying Employer's Motion to Hold Claim in Abeyance and an Order Cancelling the Hearing.

of the Constitution, Art. II § 2, cl. 2.⁵ It also argues the removal provisions applicable to ALJs rendered his appointment unconstitutional. Further, it argues the ALJ erred in denying its Motion to Cancel Hearing and Hold [Survivor's] Claim in Abeyance pending a final decision in the miner's claim. It additionally argues the ALJ erred in awarding Claimant survivor's benefits under Section 422(l) because the miner's claim was pending on appeal before the Board and not final. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject Employer's Appointments Clause challenges and its argument that Claimant is not entitled to survivor's benefits under Section 422(l). Employer filed a reply brief reiterating its contentions.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.⁶ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause/Removal Protections

Employer urges the Board to vacate the ALJ's Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).⁷ Employer's Brief at 9-13; Employer's Reply Brief

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 This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); *see also Ryan*, BRB No. 21-0478 BLA, slip op. at 4 n.6.

⁷ *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. , 138 S. Ct. 2044, 2055 (2018) (citing

at 4. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,⁸ but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. *Id.* In addition, it challenges the constitutionality of the removal protections afforded DOL ALJs. *Id.* It generally argues the removal provisions for ALJs contained in the Administrative Procedures Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 9-13. Moreover, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). *Id.* For the reasons set forth in *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 3-6 (May 26, 2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023), and *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

Survivor's Claim

We initially note an award of benefits in a miner's claim need not be final nor effective for a claimant to receive survivor's benefits under Section 422(l). *See Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-145-47 (2014). Moreover, subsequent to Employer's filing of its brief in the present appeal, the Board affirmed ALJ Joseph E. Kane's decision awarding benefits in the miner's claim and finding Employer liable for those benefits. *Ryan v. Rebel Coal Co., Inc.*, BRB No. 21-0478 BLA (Mar. 13, 2023) (unpub.). Therefore, Employer's contentions that the ALJ erred in awarding automatic survivor's benefits and that we should hold the survivor's claim in abeyance or consolidate

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.

⁸ The Secretary of Labor (Secretary) issued a letter to the ALJ on December 21, 2017, stating:

In my capacity as head of the [DOL], and after due consideration, I hereby ratify the Department's prior appointment of you as an [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] of the U.S. [DOL] violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's Dec. 21, 2017 Letter to ALJ Merck.

it with the miner's claim because the miner's claim was pending before the Board are moot. Employer's Brief at 5-8; Employer's Reply Brief at 1-2.

The ALJ found Claimant established each element necessary to demonstrate entitlement under Section 422(l) of the Act: she filed her claim after January 1, 2005; she is an eligible survivor of the Miner; her claim was pending on or after March 23, 2010; and the Miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(l); Decision and Order at 2-3. Because the Board previously affirmed the award of benefits in the miner's claim and Employer raises no additional challenges to the award of benefits in the survivor's claim, we affirm it. 30 U.S.C. §932(l); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the ALJ's Decision [and] Order Awarding Benefits in a Survivor's Claim, Order Denying Motion to Hold Claim in Abeyance, and Order Cancelling the Hearing are affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge