U.S. Department of Labor

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

BRB Nos. 18-0313 BLA,
18-0314 BLA, 18-0353 BLA,
and 18-0431 BLA

EMMA JEAN STILTNER (o/b/o and Widow of DANNY A. STILTNER)	)	
Claimant-Respondent	)	
v.	)	
SUPERIOR MINING AND MINERALS	)	DATE ISSUED: 04/30/2019
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
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 on Remand and the Supplemental Decision and Order – Award of Attorney's Fees and Costs of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Ann Marie Scarpino (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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order on Remand and the Supplemental Decision and Order – Award of Attorney's Fees and Costs (2015-BLA-05333 and 2016-BLA-05605) of Administrative Law Judge Daniel F. Solomon, rendered on claims filed pursuant to the provisions of 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 May 18, 2011 and a survivor's claim[1] filed on November 20, 2014, and both are before the Board for the second time.[2]

In a Decision and Order dated June 23, 2017, the administrative law judge credited the miner with seventeen years and one month of coal mine employment at an underground mine, and found he was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)

[1] Claimant is the widow of the miner, who died on November 2, 2014, while his claim was pending at the Office of Administrative Law Judges. Director's Exhibit 84. By letter dated October 15, 2015, claimant stated that she wished to pursue the miner's claim on his behalf, as well as her own claim filed on November 20, 2014. Director's Exhibit 85.

[2] On March 20, 2018, prior to issuing his Decision and Order on Remand, the administrative law judge issued a Supplemental Decision and Order awarding attorney fees and costs to claimant's counsel in both the miner's and survivor's claims. By Order dated July 12, 2018, the Board consolidated employer's appeal of the Supplemental Decision and Order, BRB Nos. 18-0313 BLA and 18-0314 BLA, with employer's appeal of the administrative law judge's Decision and Order on Remand, BRB Nos. 18-0353 BLA and 18-0431 BLA, for the purposes of decision only. *Stiltner v. Superior Mining & Minerals*, BRB Nos. 18-0313 BLA, 18-0314 BLA, 18-0353 BLA and 18-0431 BLA (July 12, 2018) (Order) (unpub.).

(2012).[3] The administrative law judge further found employer did not rebut the presumption and awarded benefits in the miner's claim. In the survivor's claim, the administrative law judge found that because the miner was entitled to benefits at the time of his death, claimant was automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[4]

Employer filed an appeal with the Board, arguing the administrative law judge lacked the authority to hear and decide the case because he had not been properly appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II §2, cl. 2.[5] Employer further challenged the awards of benefits on the merits of entitlement. Claimant responded urging affirmance of the awards of benefits.

The Director, Office of Workers' Compensation Programs (the Director), also responded, noting that the Secretary of Labor, exercising his power as the Head of a Department under the Appointments Clause, ratified the appointment of all Department of Labor (DOL) administrative law judges on December 21, 2017. Director's Motion to Remand at 2. Consequently, the Director asserted that actions taken by DOL administrative law judges after that date were not subject to challenge on Appointments

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[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis when the claimant establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] Under Section 422(*l*) of the Act, 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*) (2012).

[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.

Clause grounds. *Id.* Because Judge Solomon issued his decision in this case before December 21, 2017, however, the Director conceded that the Secretary's ratification did not foreclose the Appointments Clause argument raised by employer. *Id.* The Director therefore requested that the Board vacate the administrative law judge's Decision and Order and remand the case for the administrative law judge to "reconsider his decision and all prior substantive and procedural actions taken in regard to this claim, and ratify them if [he] believes such action is appropriate." *Id.* at 2-3. The Board granted the Director's motion, and remanded the case with instructions to "reconsider the substantive and procedural actions previously taken and to issue a decision accordingly." *Stiltner v. Superior Mining & Minerals*, BRB Nos. 17-0541 BLA and 17-0542 BLA (Mar. 13, 2018) (Order) (unpub.).

On April 10, 2018, the administrative law judge issued a Decision and Order in which he stated he had reconsidered his Decision and Order and "readjudicat[ed] and reaffirm[ed] all of the determinations rendered prior to December 12, 2017 in this case."[6] Decision and Order on Remand at 4-5.

On appeal, employer again argues the administrative law judge lacked the authority to hear and decide this case. Employer argues the administrative law judge's decision should be vacated and the case remanded for reassignment to a properly appointed administrative law judge.[7] Claimant responds in support of the award of benefits. The Director responds that, in light of recent case law from the Supreme Court, the Board should grant employer's request for a remand. Director's Brief at 4.

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

[6] In his decision, the administrative law judge also denied employer's Motion for Abeyance pending a decision from the United States Supreme Court in *Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *aff'd on reh'g*, 868 F.3d 1021 (Mem.) (2017), *cert. granted*, U.S. , 2018 WL 386565 (Jan. 12, 2018). Decision and Order on Remand at 2-5.

[7] Employer also challenges the findings on the merits in the miner's claim, asserting the administrative law judge erred in finding it failed to rebut the Section 411(c)(4) presumption. Employer's Brief 23-33. Employer further contends because the awards of survivor's benefits and attorney's fees were based on the award in the miner's claim, they too must be vacated. *Id*. at 33. In light of our disposition of this appeal *infra*, we decline to reach these issues.

evidence, and in accordance with applicable law.[8] 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).

After the Board's March 13, 2018 order remanding the case, the Supreme Court decided *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), holding that Securities and Exchange Commission administrative law judges were not appointed in accordance with the Appointments Clause of the Constitution. *Lucia*, 138 S.Ct. at 2055. The Court further held that because the petitioner timely raised his challenge to the constitutional validity of the appointment of the administrative law judge, the petitioner was entitled to a new hearing before a new and properly appointed administrative law judge. *Id.*

In light of *Lucia*, the Director acknowledges that "in cases in which an Appointments Clause challenge has been timely raised, and in which the [administrative law judge] took significant actions while not properly appointed, the challenging party is entitled to the remedy specified in *Lucia:* a new hearing before a different (and now properly appointed) DOL [administrative law judge]." Director's Brief at 4. Although the administrative law judge, on remand, followed the Board's directive to reconsider the substantive and procedural actions he had previously taken and to issue a new decision, the Supreme Court's *Lucia* decision makes clear that this was an inadequate remedy. As the Board recently held, "*Lucia* dictates that when a case is remanded because the administrative law judge was not constitutionally appointed, the parties are entitled to a new hearing before a new, constitutionally appointed administrative law judge."[9] *Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc).

Accordingly, we vacate the administrative law judge's Decision and Order on Remand and the Supplemental Decision and Order - Award of Attorney's Fees and Costs

[8] Because the miner's last coal mine employment was in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibits 3, 69 at 9-41.

[9] Employer asserts that the Secretary's December 21, 2017 ratification of Department of Labor (DOL) administrative law judges was insufficient to cure any constitutional deficiencies in their appointment. Employer's Brief at 19-23. Employer also argues that limits placed on the removal of administrative law judges "violate [the] separation of powers." *Id.* at 21. We decline to address these contentions as premature.

and remand this case to the Office of Administrative Law Judges for reassignment to a new administrative law judge and for further proceedings consistent with this opinion.[10]

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

[10] Our dissenting colleague's suggestion that the Board did not address the timeliness of employer's Appointments Clause challenge in its previous order remanding the case is simply inaccurate. As noted, employer raised its initial challenge prior to the Secretary of Labor's ratification of the appointment of all DOL administrative law judges. Agreeing with the agency that such circumstances warranted remand, the Board exercised its discretion to consider employer's challenge. That decision is the law of the case. *Arizona v. California*, 460 U.S. 605, 618 (1983) (a decision upon a question of law should continue to govern the same issue in subsequent stages of the same case); *LeShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (the doctrine of the law of the case means that the same issue presented a second time in the same court should lead to the same result). No party argues that Judge Solomon was properly appointed in this appeal, determining so would involve extensive fact finding, and the agency's acknowledgement that the proper remedy is remand and reassignment obviates any need for it to clarify its position with further briefing.

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the decision to overturn the award of benefits. Under the Appointments Clause of the U.S. Constitution, administrative law judges must be appointed by the President, "courts of law," or "heads of departments." *See Lucia v. Sec. & Exch. Comm'n*, 585 U.S. , 138 S.Ct. 2044 (2018). A litigant who makes a valid, timely challenge to the appointment of the administrative law judge who decides his case is entitled to a new hearing before a different, "properly appointed" adjudicator. *Lucia*, 138 S.Ct. at 2055. It thus goes without saying that if a litigant's challenge is untimely, or if the administrative law judge who decided the case was constitutionally appointed, there is no basis for overturning the award of benefits.

When this claim was first before the administrative law judge, employer did not contest the constitutional validity of his appointment. Only after he awarded benefits did employer argue to the Board that his appointment violates the Appointments Clause. Without addressing the timeliness of employer's challenge or deciding whether the administrative law judge's original appointment was in fact constitutional,[11] the Board "dismiss[ed] employer's appeal" and remanded the claim for him to "reconsider the substantive and procedural actions previously taken" in light of the argument from the Director, Office of Workers' Compensation Programs (the Director), that the Secretary of Labor subsequently "ratified" the appointment of all Department of Labor administrative law judges. *Stiltner v. Superior Mining & Minerals*, BRB Nos. 17-0541 BLA and 17-0542 BLA (Mar. 13, 2018) (Order) (unpub.).

On remand, the administrative law judge addressed the question of whether his appointment was made in a manner consistent with the Appointments Clause:

> I was first appointed July 16, 1989, by Dorcas Hardy, Commissioner of Social Security, who was the "head of a department" as that term is described in Article II of the Constitution, and later was transferred, approved by [the Office of Personnel Management], [the Social Security Administration (SSA)] and [the Department of Labor (DOL)], to the authority of Alexis Herman, the Secretary of Labor.

Decision and Order on Remand at 4. Thus, although the appointment of other administrative law judges at the DOL may be inconsistent with the Appointments Clause,

[11] Because the Board did not address these issues, they cannot be considered "the law of the case." *See Messenger v. Anderson*, 225 U.S. 436 (1912) (the "law of the case" doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided.").

the administrative law judge concluded that his specific appointment was constitutional. *Id*. "In an abundance of caution," he also complied with the Board's remand instruction to reconsider his previous decision, and he again awarded benefits. *Id*.

On appeal to the Board for the second time, the Director argues that the administrative law judge's award of benefits on remand is invalid in light of the Supreme Court's instruction in *Lucia* that an unconstitutionally appointed adjudicator is not permitted to re-decide a case even if he has since received a constitutional appointment. Director's Brief at 4, *referencing Lucia*, 138 S.Ct. at 2055. In suggesting that this claim must be remanded to a new administrative law judge, however, the Director ignores the critical question: whether *this* administrative law judge was constitutionally appointed even prior to the "ratification" by the Secretary of Labor. Employer agrees with the Director that this claim must be remanded to a new administrative law judge, but at least tacitly acknowledges the possibility that the Secretary of Labor, as the head of a department under the Appointments Clause, approved his transfer to the Department of Labor. Employer's Brief at 19 ("[Administrative Law Judge] Solomon does not say who at DOL approved the transfer. If the Chief [Administrative Law Judge] at Labor chose him, then he was chosen by an employee.").

At this juncture, the Board has insufficient information from which to conclude that the administrative law judge was not constitutionally appointed. The administrative law judge has since retired, precluding a remand for him to explain his appointment in more detail. The Director is in the best position to provide insight into the role, if any, of the Secretary of Labor in selecting the administrative law judge for transfer from the SSA to the DOL. Therefore, rather than summarily reversing the administrative law judge's finding that he was constitutionally appointed, I would instruct the Director to brief this issue to the Board. Additionally, in light of the Director's statement in this and other cases that failure to raise an Appointments Clause challenge to the administrative law judge in the first instance constitutes forfeiture, I would instruct the Director to address whether employer in this case forfeited the argument.[12] Director's Brief at 2 n.2; *see, e.g.*, Director's Briefs in *Powell v. Kellogg, Brown, and Root, Serv., Inc.*, BRB No. 18-0557

[12] The fact that the Supreme Court did not decide *Lucia* until after the administrative law judge issued his original decision awarding benefits is not itself a sufficient reason to overlook employer's potential forfeiture. As the Supreme Court stated, *Freytag v. Comm'r*, 501 U.S. 868 (1991), "says everything necessary to decide this case." *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. , 138 S.Ct. 2044, 2053 (2018).

BLA (appeal pending) and *Kiyuna v. Matson Terminals, Inc.*, BRB No. 19-0103 BLA (appeal pending).

I therefore respectfully dissent.

GREG J. BUZZARD
Administrative Appeals Judge