U.S. Department of Labor

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

BRB No. 18-0453 BLA

JAMES B. DUNCAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARTINKA COAL COMPANY	)	DATE ISSUED: 08/06/2019
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	
	)	
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 of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for claimant.

Cameron Blair (Fogle Keller Walker, PLLC), Lexington, Kentucky, for employer/carrier.

Michelle S. Gerdano (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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05074) of Administrative Law Judge Natalie A. Appetta 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 May 21, 2014.[1]

The administrative law judge credited claimant with sixteen years of underground coal mine employment and found claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). She therefore found claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found employer did not rebut the presumption, and awarded benefits.

On appeal, employer contends the administrative law judge lacked the authority to hear and decide the case because she had not been properly appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] Employer

[1] Claimant filed a prior claim but subsequently withdrew it. Director's Exhibit 1. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he has 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.

[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

therefore argues the administrative law judge's findings should be vacated and the case remanded for reassignment to a properly appointed administrative law judge.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that in light of recent case law issued by the United States Supreme Court, employer's contention has merit. Director's Brief at 3-4.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is 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 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 administrative law judge issued her Decision and Order Awarding Benefits, the Supreme Court held in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018), that Securities and Exchange Commission (SEC) administrative law judges are "inferior Officers" under the Appointments Clause of the Constitution. Because the SEC administrative law judge was not appointed in a manner consistent with the Constitution and the petitioner timely raised his challenge, the Court held he 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 prior to being properly appointed, the challenging party is entitled to the remedy specified in *Lucia:* a new hearing before a new (and now properly appointed) [Department of Labor (DOL) administrative law judge]." Director's Brief at 3.

> 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.

[4] Employer also challenges the administrative law judge's determinations regarding the responsible operator and whether employer rebutted the Section 411(c)(4) presumption. Employer's Brief at 17-37. In light of our disposition of this appeal, we need not address these arguments.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 5.

As the Director notes, the Secretary of Labor, exercising his power as the Head of a Department under the Appointments Clause, ratified the appointment of all DOL administrative law judges on December 21, 2017.[6] *Id.* Because the administrative law judge took significant actions before December 21, 2017,[7] however, the Secretary's ratification did not foreclose the Appointments Clause argument raised by employer.[8] Director's Brief at 3-4. 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).

[6] In the May 1, 2018 Decision and Order, the administrative law judge noted her appointment had been ratified and stated that she ratified and reaffirmed any and all prior actions she has taken in this case. Decision and Order at 1 n.1.

[7] The administrative law judge held a formal hearing on November 2, 2017, during which she admitted evidence and heard testimony by claimant. Additionally, on November 30, 2017, the administrative law judge issued an Order denying employer's motion to dismiss employer as the responsible operator.

[8] Employer first raised its Appointments Clause argument in a July 24, 2018 Motion to Remand. The Board denied employer's motion and provided employer 30 days to file its Petition for Review and brief. *Duncan v. Martinka Coal Co.*, BRB No. 18-0453 BLA (Sep. 25, 2018) (Order) (unpub.). Employer again raised its Appointments Clause argument in an October 15, 2018 motion requesting the Board take judicial notice of the adjudicatory fact that the administrative law judge was not properly appointed under the Appointments Clause throughout her adjudication of this claim. Prior to the Board's response, employer submitted its Petition for Review and brief, with claimant and the Director responding. By Order dated April 16, 2019, the Board accepted the parties' briefs and held that the Motion to Take Judicial Notice would be addressed when the Board issued its decision. *Duncan v. Martinka Coal Co.*, BRB No. 18-0453 BLA (Apr. 16, 2019) (Order) (unpub.). In light of our disposition of this appeal, employer's Motion to Take Judicial Notice is denied as moot.

[9] Employer asserts that the Secretary's December 21, 2017 ratification of Department of Labor administrative law judges was insufficient to cure any constitutional deficiencies in their appointment. Employer's Brief at 15-17. We decline to address this contention as premature.

Accordingly, we vacate the administrative law judge's Decision and Order Awarding Benefits, 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.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge