U.S. Department of Labor

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

BRB No. 18-0500 BLA

TEDDY L. BARGER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LAUREL RUN MINING COMPANY	)	
	)	
and	)	
	)	
ISLAND CREEK COAL COMPANY c/o HEALTHSMART CCS	)	DATE ISSUED: 08/28/2019
	)	
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 Dana Rosen, Administrative Law Judge, United States Department of Labor.

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

R. Luke Widener (Penn, Stuart & Eskridge), Bristol, Virginia, 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.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05178) of Administrative Law Judge Dana Rosen rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on May 14, 2014.[1]

The administrative law judge credited claimant with 21.43 years of coal mine employment at underground mines and found he has a totally disabling respiratory or pulmonary impairment. She therefore found claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and invoked the 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] This is claimant's third claim. His most recent prior claim, filed on June 17, 2004, was denied by the district director on March 4, 2005 because he failed to establish total respiratory disability. Director's Exhibit 2. Claimant took no further action until filing the current claim. Director's Exhibit 4.

[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

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, arguing the administrative law judge had the authority to adjudicate the claim. The Director, Office of Workers' Compensation Programs (the Director), responds that in light of recent case law from the United States Supreme Court, employer's contention has merit. Director's Brief at 2-3.

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.[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 (2018), that Securities and Exchange Commission (SEC) administrative law judges were not appointed in accordance with the Appointments Clause of the Constitution. The Court further held that because the petitioner timely raised his Appointments Clause challenge, 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 while not properly appointed, the challenging party is entitled to the remedy specified in *Lucia* - a new hearing before a different (and now

---

> 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] Employer also contends the administrative law judge erred in finding claimant established total respiratory disability, and thus erred in finding he invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Employer's Brief at 5-13. In light of our disposition of this appeal *infra*, we decline to reach these issues.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

properly appointed) [Department of Labor administrative law judge]."[6] Director's Brief at 3. As the Director notes, the Secretary of Labor, exercising his power as Head of a Department under the Appointments Clause, ratified the appointment of all Department of Labor administrative law judges on December 21, 2017. *Id.* at 2. Claimant argues that in light of this ratification, a remand is not required. Claimant's Brief at 6. 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 2-3. 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] We reject claimant's assertion that the United States Supreme Court's holding does not apply to Department of Labor (DOL) administrative law judges. Claimant's Brief at 6. As the Director, Office of Workers' Compensation Programs, notes, the DOL has expressly conceded its applicability. Director's Brief at 2-3, *citing Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[7] The administrative law judge held a telephonic hearing on June 6, 2017, during which she admitted evidence and heard testimony by claimant.

[8] Employer first raised its Appointments Clause argument to the administrative law judge in a February 16, 2018 motion to hold the claim in abeyance. The administrative law judge did not rule on the motion.

[9] Employer asserts the Secretary's December 21, 2017 ratification of DOL administrative law judges was insufficient to cure any constitutional deficiencies in their appointment. Employer's Brief at 3-4. 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

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge