U.S. Department of Labor

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

BRB No. 18-0347 BLA

HELEN KENDRICK (o/b/o the Estate of HASSEL KENDRICK) Claimant-Respondent v. CIMARON MINERALS, INCORPORATED and AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/05/2019 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Larry A. Temin, 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.

Kathleen H. Kim (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Remand (2013-BLA-05518) of Administrative Law Judge Larry A. Temin rendered on a claim 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 subsequent claim[1] filed on September 9, 2009, and is before the Board for the second time.

Initially, in a Decision and Order dated July 19, 2017, the administrative law judge credited the miner with seventeen years of underground coal mine employment,[2] and found that the new evidence established that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption[3] and

[1] The miner filed three prior claims for benefits, all of which were finally denied by the district director. Director's Exhibits 1, 2. His most recent prior claim, filed on April 5, 2002, was denied on September 7, 2006 for failure to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 2 at 9, 11, 165, 345. In his current claim, the miner filed multiple requests for modification of the district director's Proposed Decisions and Orders denying benefits before he ultimately requested a hearing. Director's Exhibits 42, 45, 61, 65, 68, 84.

[2] The miner's coal mine employment was in Kentucky. Director's Exhibit 5. Accordingly, 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, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis in cases where the evidence 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 impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). He further determined that employer failed to rebut the presumption and awarded benefits.

Employer filed an appeal with the Board, arguing that 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.[4]

In response, the Director, Office of Workers' Compensation Programs (the Director), noted 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. Consequently, the Director asserted that actions taken by DOL administrative law judges after that date were not subject to challenge on Appointments Clause grounds. However, because Judge Temin issued his decision in this case before December 21, 2017, the Director conceded that the Secretary's ratification did not foreclose the Appointments Clause argument raised by employer. Director's Motion to Remand at 2. 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." *Kendrick v. Cimaron Minerals, Inc.*, BRB No. 17-0595 BLA (Mar. 14, 2018) (Order) (unpub.).

The administrative law judge issued a Decision and Order on Remand awarding benefits on April 4, 2018. In that decision, the administrative law judge stated, "I have reviewed all substantive and procedural actions I have taken . . . and I find them to be appropriate. I therefore ratify all such actions." Decision and Order on Remand at 2. He then set forth, in full, his original Decision and Order Awarding Benefits as issued on July

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[4] Article II, Section 2, Clause 2, sets forth the appointing powers of the President:

> [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.

19, 2017. *Id.* at 2-40.

On appeal, employer again contends that the administrative law judge lacked the authority to hear and decide this case. Employer's Brief at 15-20. Employer argues that the administrative law judge's decision should be vacated and the case remanded for reassignment to a properly appointed administrative law judge. *Id*. Claimant[5] 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 vacate the administrative law judge's decision and remand the case "for reassignment to a new, properly appointed, [administrative law judge]." Director's Brief at 1. Employer filed a reply brief, reiterating its contentions on appeal.

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. 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 employer filed its brief in this appeal, 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 (who had not been appointed in conformance with the Appointments Clause), 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 new (and properly appointed) administrative law judge." Director's Brief at 2. Although the administrative law judge, on remand, followed the Board's directive to reconsider the substantive and procedural actions that 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

[5] Claimant is the widow of the miner, who died on June 23, 2015. Claimant is pursuing the miner's claim on his behalf as the administrator of his estate. Decision and Order on Remand at 3.

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."[6] *Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc) (published).

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

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[6] 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 15-20. Employer also argues that limits placed on the removal of administrative law judges "violate [the] separation of powers." *Id.* at 18. We decline to address these contentions as premature.