U.S. Department of Labor

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

BRB No. 18-0171 BLA

CHARLES D. COLE (o/b/o the ESTATE OF DOUGLAS M. COLE)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 01/30/2019
WAMPLER BROTHERS COAL COMPANY, INCORPORATED	)	
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 Denying Employer's Request for Modification and Affirming Award of Benefits of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

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

Rita A. Roppolo (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 Judges, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier appeals the Decision and Order Denying Employer's Request for Modification and Affirming Award of Benefits (2011-BLA-05319) of Administrative Law Judge Larry A. Temin, rendered on a miner's subsequent claim filed on November 18, 2002, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] This claim has an extensive procedural history, and has been before the Board on two prior appeals.[2]

The claim was awarded by Administrative Law Judge Janice K. Bullard, and the Board affirmed the award on May 18, 2010. Employer requested modification on July 22, 2010, and submitted additional medical evidence. Pursuant to an Order issued on January 26, 2017, Judge Temin (the administrative law judge) canceled the scheduled hearing and granted the parties' request for a decision on the record. In his January 3, 2018 Decision and Order, the administrative law judge found that there was no mistake in a determination of fact with regard to Judge Bullard's award of benefits, and that employer failed to establish a change in conditions. Accordingly, he denied employer's request for modification pursuant to 20 C.F.R. §725.310.

On appeal, employer argues that the administrative law judge lacked the authority to hear and decide employer's modification request because he had not been properly appointed in a manner consistent with the Appointments Clause of the Constitution, U.S. Const. Art II, §2, cl. 2.[3] Alternatively, employer contends that the administrative law judge

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[1] The amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, because the miner's current claim was filed before January 1, 2005.

[2] We incorporate the procedural history of the case as set forth in *D.M.C.* [*Cole*] *v. Wampler Bros. Coal Co*., BRB No. 07-0969 BLA, slip op. at 5 (Aug. 28, 2008) (unpub.) and *Cole v. Wampler Bros. Coal Co*., BRB No. 09-0698 BLA, slip op. at 6 (May 18, 2010) (unpub.).

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

erred in denying its request for modification. Claimant[4] responds in support of the denial of modification and asserts that employer waived its Appointments Clause challenge. The Director, Office of Workers' Compensation Programs (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 this case to the Chief Administrative Law Judge for reassignment to a new, properly appointed administrative law judge for consideration of employer's modification request. Employer filed a reply, agreeing with the Director that the case should be remanded and reassigned to a new administrative law judge for consideration of employer's modification request.

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).

After employer filed its brief in this appeal, the Supreme Court issued *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), holding that Securities and Exchange Commission administrative law judges are inferior officers under 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 Appoints Clause), the petitioner was entitled to a new hearing before a new and properly appointed administrative law judge. *Id.*

> [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.

[4] Claimant, Charles D. Cole, is the Administrator of the estate of Douglas M. Cole, the deceased miner, who died on January 14, 2014. Mr. Cole was substituted as claimant on behalf of the miner. Director's Exhibit 79; Employer's Exhibit 16.

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. 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 Department of Labor (DOL) administrative law judges on December 21, 2017. *Id.* at 2 n.2. However, because the current administrative law judge took significant actions[5] before the Secretary's ratification on December 21, 2017, the Secretary's ratification did not foreclose the Appointments Clause argument timely raised by employer.[6] 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."[7] *Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc) (published).

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[5] On January 26, 2017, the administrative law judge issued an Order granting the parties' request for a decision on the record, and he issued an Order on December 20, 2017, addressing evidentiary challenges and admitting evidence into the record.

[6] We agree with the Director that "[t]he proceedings before [Judge] Bullard are immune from challenge on Appointments Clause grounds because [e]mployer did not raise that issue before [Judge] Bullard or before the Board when it appealed her decision." Director's Brief at 4 n.3. We also agree that "[e]mployer's waiver of any challenge to [Judge] Bullard's authority is largely symbolic since [Judge] Bullard's findings may be reconsidered in the normal course of modification." *Id*. With regard to the current administrative law judge, however, employer timely challenged his authority under the Appointments Clause to decide employer's modification request in its petition for review. Thus, we reject claimant's assertion that employer waived its Appointments Clause challenge as it applies to the current administrative law judge.

[7] Employer argues 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 12-13. Employer also argues that limits placed on the removal of administrative law judges "violate [the] separation of powers." *Id*. at 15. We decline to address these arguments as they relate to future actions by administrative law judges and are therefore premature.

Accordingly, we vacate the administrative law judge's Decision and Order Denying Employer's Request for Modification and Affirming Award of Benefits, and remand this case to the Office of Administrative Law Judges for reassignment to a different administrative law judge and for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge