U.S. Department of Labor

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

BRB No. 18-0330 BLA

CHARLES E. MOORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NATIONAL MINES CORPORATION	)	DATE ISSUED: 01/29/2019
	)	
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 Awarding Benefits of Peter B. Silvain, Jr., 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, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05278) of Administrative Law Judge Peter B. Silvain, Jr., 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 filed on February 14, 2013.[1]

The administrative law judge credited claimant with at least fifteen years of underground coal mine employment and found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). He therefore found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and 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) (2012).[2] The administrative law judge further found that employer did not rebut the presumption, and awarded benefits.

On appeal, employer argues 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.[3] Employer

[1] This is claimant's second claim for benefits. Director's Exhibit 3. His first claim, filed on February 3, 2010, was denied by the district director on September 29, 2010 because he failed to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action until filing this subsequent claim.

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

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

therefore argues that the administrative law judge's decision should be vacated and the case remanded for reassignment to a properly appointed administrative law judge.[4] Claimant responds that the United States Supreme Court's recent case law concerning the Appointments Clause does not apply to Department of Labor administrative law judges. Claimant's Response Brief at 4. Claimant alternatively argues that even if it applied, this case need not be remanded because the Secretary of Labor properly ratified the appointment of all Department of Labor administrative law judges on December 21, 2017. *Id*. The Director, Office of Workers' Compensation Programs (the Director), responds that, in light of the Supreme Court's recent case law, 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 5.

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 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.

[4] Employer also challenges the administrative law judge's finding that it is the properly named responsible operator, and asserts that liability for the payment of benefits should be transferred to the Black Lung Disability Trust Fund. Employer's Brief at 12-15. Employer argues further that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption. Employer's Brief at 15-23.

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 12-13, 22, 28.

The Supreme Court recently held that Securities and Exchange Commission administrative law judges were not appointed in accordance with the Appointments Clause of the Constitution. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018). 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 the 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) [Department of Labor administrative law judge]."[6] Director's Brief at 3. 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 administrative law judges on December 21, 2017.[7] *Id.* at 2 n.2, 3. Claimant argues that, in light of this ratification, a remand is not required in this case. Claimant's Response Brief at 4. Because the administrative law judge took significant actions before the Secretary's ratification on December 21, 2017,[8] however, the Secretary's ratification did not foreclose the Appointments Clause argument raised by employer. 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

[6] We reject claimant's argument that the Supreme Court's holding does not apply to Department of Labor (DOL) administrative law judges. Claimant's Response Brief at 4. As the Director, Office of Workers' Compensation Programs (the Director), notes, DOL has expressly conceded its applicability. Director's Brief at 3, *citing Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Br. for the Fed. Resp. at 14 n.6.

[7] In his Decision and Order the administrative law judge noted that on December 21, 2017, the Secretary of Labor, R. Alexander Acosta, ratified his appointment as an administrative law judge. Decision and Order at 4 n.13. Addressing the substantive and procedural actions he took before this date, the administrative law judge found them to be "appropriate" and therefore ratified them. *Id.*

[8] The administrative law judge held a hearing on May 25, 2016, during which he admitted evidence and heard claimant's testimony.

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 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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[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 8-10. We decline to address this contention as it is not necessary to do so.