U.S. Department of Labor

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

BRB No. 19-0184 BLA

JOHN W. CUTRIGHT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEWELL COAL COMPANY	)	
	)	DATE ISSUED: 01/30/2020
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Sarah M. Hurley (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 JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2014-BLA-05807) of Administrative Law Judge Drew A. Swank, rendered on a subsequent claim filed on May 31, 2010, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[1] and that employer did not rebut it.[2]

Employer argues the administrative law judge lacked the authority to hear and decide the case because he had not been appointed in a manner consistent with the Appointments Clause of the U.S. Constitution, Art. II § 2, cl. 2.[3] Employer also challenges

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis when the miner has fifteen or more years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b), (c)(1).

[2] This is claimant's fifth claim for benefits and is before the Board for the second time. Director's Exhibits 1-5. On August 14, 2013, Administrative Law Judge Richard A. Morgan denied benefits. Claimant appealed to the Board, but later requested the appeal be dismissed to pursue modification. Director's Exhibits 41-42. On May 1, 2014, Administrative Law Judge Drew A. Swank (the administrative law judge) determined that claimant invoked the Section 411(c)(4) presumption and granted modification. On employer's appeal, the Board affirmed the administrative law judge's finding that claimant invoked the presumption but vacated the award because he improperly excluded some of employer's rebuttal evidence. *Cutright v. Sewell Coal Co.*, BRB No. 17-0442 BLA and 17-0442 BLA-A (June 18, 2018) (unpub.). The administrative law judge issued his Decision and Order on Remand Awarding Benefits on December 11, 2018, which is the subject of this appeal.

[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 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.

the constitutionality and applicability of the Section 411(c)(4) presumption because it was enacted as part of the Affordable Care Act (ACA). Claimant responds that employer's Appointments Clause challenge is not timely. The Director, Office of Workers' Compensation Programs (the Director), argues that employer forfeited its Appointments Clause challenge by failing to raise it in the prior appeal before the Board, or while the case was before the administrative law judge on remand. The Director also urges the Board to reject employer's contention that the Section 411(c)(4) presumption is unconstitutional.

The Board's scope of review is defined by statute. We must affirm the Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 361-62 (1965).

Appointments Clause Challenge

Employer urges the Board to vacate the administrative law judge's decision and remand the case to be heard by a different, constitutionally-appointed administrative law judge pursuant to *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. , 138 S.Ct. 2044 (2018).[5] Employer specifically contends that the Secretary of Labor's ratification of the administrative law judge's appointment on December 21, 2017 does not satisfy the Appointments Clause, as the administrative law judge issued an initial decision in this case prior to that date.[6]

We agree with claimant and the Director that employer forfeited its Appointments Clause argument by failing to raise it when the case was previously before the Board. *See Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (requiring "a timely challenge to

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 10, 11.

[5] *Lucia* involved a challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to the Special Trial Judges at the Tax Court, SEC administrative law judges are "inferior officers" subject to the Appointments Clause. *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

[6] On July 20, 2018, the Department of Labor (DOL) conceded that the Supreme Court's holding in *Lucia* applies to the DOL's administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (internal citation omitted); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its opening brief); Claimant's Brief at 19; Director's Brief at 4.

The exception for considering a forfeited argument due to extraordinary circumstances recognized in *Jones Brothers v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018) is inapplicable because, unlike the Federal Mine Safety and Health Review Commission, the Board has the long-recognized authority to address properly raised questions of substantive law. *Island Creek Coal Co. v. Bryan*, F.3d , Nos. 18-3680, 18-3909, 18-4022, 2019 WL 4282871, at *9-10 (6th Cir. Sept. 11, 2019); *see Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116-17 (6th Cir. 1984) (holding that because the Board performs the identical appellate function previously performed by the district courts, Congress intended to vest in the Board the same judicial power to rule on substantive legal questions as was possessed by the district courts); *Duck v. Fluid Crane & Constr. Co.*, 36 BRBS 120, 121 n.4 (2002) (the Board "possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its jurisdiction").

Moreover, after the issuance of *Lucia*, employer failed to raise the issue before the administrative law judge on remand. At that time, the administrative law judge could have addressed employer's arguments and, if appropriate, referred the case back to the Office of Administrative Law Judges for assignment for a new hearing before a different judge. *See Kiyuna v. Matson Terminals, Inc.*, BRBS , BRB No. 19-0103, slip op. at 4 (June 25, 2019). Therefore, we reject employer's argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different administrative law judge.

Constitutionality of the ACA and the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F.Supp.3d 579, *decision stayed pending appeal*, 352 F.Supp.3d 665, 690 (N.D. Tex. 2018), employer contends the ACA, which reinstated the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis, is unconstitutional. Employer asserts the district court in *Texas* ruled that the ACA individual mandate is unconstitutional and the remainder of the legislation is not severable. Employer's Brief at 11-13. The Director responds that the district court stayed its ruling striking down the ACA, *Texas*, 352 F.Supp.3d at 690; thus, she argues the decision does not preclude application of the amendments to the Act found in the ACA. Director's Brief

at 6. After the parties submitted their briefs, the United States Court of Appeals for the Fifth Circuit held the individual mandate in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down as inseverable from the mandate. *Texas v. United States*, No. 19-10011, 2019 WL 6888446, at *27-28 (5th Cir. Dec. 18, 2019) (King, J., dissenting).[7] Moreover, the United States Court of Appeals for the Fourth Circuit has held that the ACA amendments to the Act are severable because they have "a stand-alone quality" and are fully operative as a law. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the United States Supreme Court upheld the constitutionality of the ACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). We, therefore, reject employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case.

As employer raises no other legal issues, nor any substantive challenge to the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption and that employer did not rebut it, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[7] Furthermore, the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge