



BRB No. 18-0405 BLA

ESTHER KAY KIRK)	
)	
Claimant-Respondent)	
)	
v.)	
)	
RUTH CONTRACTING CORPORATION)	DATE ISSUED: 07/03/2019
)	
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 Awarding Benefits of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

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

Matthew J. Zanetti (Ferrerri Partners, PLLC), Louisville, Kentucky, for employer.

Anne 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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-05836) of Administrative Law Judge Patrick M. Rosenow, rendered 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 survivor's claim filed on May 15, 2013.¹

Based on his determination that the miner had 8.8 years of coal mine employment, the administrative law judge found claimant did not invoke the rebuttable presumption of death due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).² As there is no evidence of complicated pneumoconiosis, he also found claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2012); 20 C.F.R. §718.304. Considering whether claimant established entitlement to benefits without the presumptions, the administrative law judge found that the evidence established both clinical and legal pneumoconiosis, and accepted employer's stipulation that the miner was totally disabled from a respiratory standpoint before his death. The administrative law judge further found that legal pneumoconiosis contributed to and hastened his death, and awarded benefits.

On appeal, employer argues the administrative law judge lacked the authority to hear and decide the case because he was not appointed in accordance with the Appointments Clause of the United States Constitution, Art. II, § 2, cl. 2.³ Employer

¹ Claimant is the widow of the miner, who died on October 12, 2006. Director's Exhibits 2, 11. The miner did not file a lifetime claim. *See* Decision and Order at 3.

² Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if claimant establishes that the miner had 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.

³ Article II, Section 2, Clause 2 of the United States Constitution 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

therefore requests that the case be remanded for reassignment to a different, properly appointed administrative law judge.⁴ Claimant responds in support of the award of benefits and asserts employer forfeited its Appointments Clause challenge by failing to raise it before the administrative law judge. Claimant alleges, in the alternative, there was no violation of the Appointments Clause because the administrative law judge did not take any meaningful action before the Secretary of Labor ratified his appointment. The Director, Office of Workers' Compensation Programs (the Director), responds that in light of recent case law from the United States Supreme Court, remand to a different administrative law judge is appropriate in this case.

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 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 his Decision and Order Awarding Benefits, the Supreme Court held in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018), that Securities and Exchange Commission (SEC) administrative law judges are "inferior Officers" under the Appointments Clause of the Constitution. Because the SEC administrative law judge's appointment was not consistent with the Appointments Clause and the petitioner timely raised his challenge, the Court held he was entitled to a new hearing before a new and properly appointed administrative law judge. *Id.*

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 challenges the administrative law judge's determinations that claimant established the existence of legal pneumoconiosis and death due to legal pneumoconiosis. Employer's Brief at 12-16. We need not address these arguments in light of our disposition of this appeal.

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 Exhibits 3, 6, 7.

In light of *Lucia*, the Director argues 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 properly appointed) [Department of Labor (DOL) administrative law judge].” 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 DOL administrative law judges on December 21, 2017. *Id.* Because the administrative law judge took significant actions before the Secretary’s ratification on December 21, 2017,⁶ 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 new, constitutionally appointed administrative law judge.” *Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc).

⁶ The administrative law judge held a hearing by telephone on August 24, 2017. Decision and Order at 1-2; 5-7. In the course of the hearing, the administrative law judge admitted evidence, accepted stipulations, and listened to claimant’s testimony, all of which he referenced in the Decision and Order Awarding Benefits. Decision and Order at 1-2, 5-7; Hearing Transcript at 4-6, 7-20. Thus there is no merit to claimant’s assertion that the administrative law judge did not take significant actions prior to the Secretary of Labor’s ratification. Claimant’s Brief at 14-17.

Accordingly, we vacate the Decision and Order Awarding Benefits and remand the 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

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge