U.S. Department of Labor

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

BRB Nos. 18-0525 BLA
and 18-0576 BLA

LOWELL DEAN ROBINSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GREEN FLY MINING, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 07/24/2019
	)	
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 and Attorney Fee Order of Joseph E. Kane, 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.

Michelle S. Gerdano (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 ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2015-BLA-05529) of Administrative Law Judge Joseph E. Kane, awarding benefits 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). Employer also appeals the administrative law judge's August 30, 2018 Attorney Fee Order (2015-BLA-05529) granting an attorney's fee and expenses.[1] This case involves a subsequent claim filed on May 14, 2014.[2]

In a Decision and Order dated June 21, 2018, the administrative law judge credited claimant with fifteen years of coal mine employment[3] in conditions substantially similar to those in an underground coal mine. He further found that the evidence established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and therefore found that claimant invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2012). The administrative law judge also found that employer did not rebut the presumption and

[1] Employer's appeal of the administrative law judge's Decision and Order awarding benefits was assigned BRB No. 18-0525 BLA and its appeal of the administrative law judge's Attorney Fee Order was assigned BRB No. 18-0576 BLA. The Board consolidated these appeals for purposes of decision only. *Robinson v. Green Fly Mining, Inc.*, BRB Nos. 18-0525 BLA and 18-0576 BLA (Dec. 12, 2018) (Order) (unpub.).

[2] Claimant filed two prior claims, both of which were denied. Director's Exhibits 1, 2. His most recent prior claim, filed on August 30, 2001, was finally denied by the district director on May 4, 2004, because the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 2.

[3] The record reflects that claimant's last coal mine employment was in West Virginia. Hearing Transcript at 19. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where he establishes at least fifteen years of underground or substantially similar coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

awarded benefits. In an August 30, 2018 Attorney Fee Order, the administrative law judge granted claimant's counsel a fee of $6,662.50 and $188.97 in expenses.

On appeal, employer contends 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.[5] Employer therefore argues that the administrative law judge's findings should be vacated and the case remanded for reassignment to a properly appointed administrative law judge.[6] Claimant responds in support of the award of benefits and attorney's fees, arguing that the administrative law judge had the authority to adjudicate the claim. 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 the case for reassignment to a new, properly appointed administrative law judge. Employer has filed a reply to claimant's response brief, reiterating its arguments.

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).

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[5] 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.

[6] Employer also challenges the administrative law judge's determinations regarding the responsible operator, total disability, the extent of claimant's smoking history, whether employer rebutted the Section 411(c)(4) presumption, and whether the requested fee was reasonable. Employer's Brief on the Merits at 14-21; Employer's Brief on Attorney Fees at 8-12. We need not address these arguments in light of our disposition of this appeal.

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 Appointments Clause challenge, he 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 prior to being 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]."[7] 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. *Id.* Claimant argues that in light of this ratification, a remand is not required. Claimant's Response Brief on the Merits at 4. Because the administrative law judge took significant actions before 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 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).

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

[8] The administrative law judge held a hearing on August 16, 2016, during which he admitted evidence and heard claimant's testimony. Decision and Order at 2.

[9] Employer asserts the Secretary's December 21, 2017 ratification of DOL administrative law judges was insufficient to cure any constitutional deficiencies in their appointment. Employer's Brief at 9-11. It also argues that the limits placed on the removal of administrative law judges "violate [the] separation of powers." *Id.* at 11-13. We decline to address these contentions as premature.

Because the underlying award of benefits must be vacated and a different administrative law judge will issue a new decision on the merits of claimant's entitlement, the administrative law judge's fee award must also be vacated.

Accordingly, we vacate the administrative law judge's Decision and Order awarding benefits and the Attorney Fee Order, 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. If benefits are awarded, the new administrative law judge should consider any attorney fee petitions filed at that time.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge