

U.S. Department of Labor

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



BRB No. 18-0480 BLA

MUNCIE L. MULLINS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
LAMBERT COAL COMPANY)	
)	
and)	
)	
LIBERTY MUTUAL INSURANCE)	DATE ISSUED: 06/12/2019
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 Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Cody F. Fox (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

Rita A. Roppolo (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 Awarding Benefits (2015-BLA-05307) of Administrative Law Judge Paul R. Almanza rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on October 4, 2013.¹

The administrative law judge credited claimant with 27.5 years of underground coal mine employment based on the parties' stipulation, and found that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). He therefore found that 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),² and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further found 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 third claim for benefits. His most recent prior claim, filed on November 30, 2005, was denied by Administrative Law Judge Linda S. Chapman on August 2, 2007 because he failed to establish pneumoconiosis. Director's Exhibit 1. The Board affirmed Judge Chapman's denial of benefits. *M.L.M. v. Lambert Coal Co.*, BRB No. 07-0947 BLA (Aug. 22, 2008) (unpub.). Claimant took no further action until filing the present subsequent claim. Director's Exhibit 3.

² Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he establishes 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 or pulmonary 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 requests that the administrative law judge's decision be vacated and the case remanded for reassignment to a different, properly appointed administrative law judge.⁴ Claimant responds, urging the Board to reject employer's Appointments Clause arguments and to affirm the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), also responds that, in light of recent case law from the United States Supreme Court, employer's contention has merit. Director's Brief at 3-4.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order 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 was not appointed in a manner consistent with the Constitution 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.*

[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 contends that the administrative law judge erred in finding that it failed to establish rebuttal by disproving the existence of clinical and legal pneumoconiosis. Employer's Brief at 6-15. In light of our disposition of this appeal *infra*, we decline to reach these issues.

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

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].”⁶ Director’s Brief at 3. As the Director notes, the Secretary of Labor, 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, 2017,⁷ the Secretary’s ratification did not foreclose the Appointments Clause argument raised by employer.⁸ 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 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 Brief at 6. As the Director, Office of Workers’ Compensation Programs, 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, Br. for the Fed. Resp. at 14 n.6.

⁷ The administrative law judge held a hearing on May 5, 2016, during which he admitted evidence and heard claimant’s testimony.

⁸ Employer first raised its Appointments Clause argument to the administrative law judge in a February 22, 2018 motion to hold the claim in abeyance. The administrative law judge denied employer’s motion in his Decision and Order noting his appointment had been ratified. Decision and Order at 4.

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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge