U.S. Department of Labor

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

BRB Nos. 18-0312 BLA
and 18-0381 BLA

WILLIAM C. CULBERTSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TDL COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 03/14/2019
	)	
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 on Remand and the Orders Granting Attorney Fees of William T. Barto, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Jennifer L. Feldman (Kate S. O'Scannlain, Solicitor of Labor; Barry 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: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2016-BLA-05498) of Administrative Law Judge William T. Barto, 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 January 25, 2018 Order and March 20, 2018 Order on Reconsideration (2016-BLA-05498) granting an attorney's fee.[1]

This case involves a subsequent claim filed on March 25, 2014.[2] In a Decision and Order dated September 11, 2017, the administrative law judge credited claimant with 10.12 years of coal mine employment, and found that the new x-ray evidence establishes the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). He further found the evidence establishes the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and claimant thus invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). He also found that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and awarded benefits.

[1] Employer's appeal of the administrative law judge's Decision and Order awarding benefits was assigned BRB No. 18-0381 BLA and employer's appeal of the administrative law judge's Orders granting an attorney fee was assigned BRB No. 18-0312 BLA. By Order dated August 9, 2018, the Board consolidated these appeals for purposes of decision only. *Culbertson v. TDL Coal Co.*, BRB Nos. 18-0312 BLA and 18-0381 BLA (Aug. 9, 2018) (Order) (unpub.).

[2] Claimant's initial claim for benefits, filed on March 24, 1994, was denied by the district director on October 4, 1995 because he failed to establish any element of entitlement. Director's Exhibit 1.

Employer filed an appeal with the Board, arguing 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]

In response, the Director, Office of Workers' Compensation Programs (the Director), asserted that the Secretary of Labor, as the Head of a Department under the Appointments Clause, ratified the appointment of all Department of Labor (DOL) administrative law judges on December 21, 2017. However, because the administrative law judge issued his decision in this case before that date, the Director conceded that the Secretary's ratification did not foreclose the Appointments Clause argument raised by employer. Director's Motion to Remand at 2. The Director therefore requested the Board vacate the administrative law judge's Decision and Order and remand the case for him to "reconsider his decision and all prior substantive and procedural actions taken with regard to this claim, and ratify them if [he] believes such action is appropriate." *Id.* at 3. The Board granted the Director's motion, and remanded the case with instructions to "reconsider the substantive and procedural actions previously taken and to issue a decision accordingly." *Culbertson v. TDL Coal Co.*, BRB No. 18-0001 BLA (Mar.13, 2018) (Order) (unpub.).

The administrative law judge issued a Decision and Order on Remand awarding benefits on May 7, 2018 and stated, "Having reconsidered my actions as directed, I hereby RATIFY my substantive and procedural actions taken in this matter on or before December 17, 2017." He thus "affirm[ed] that the claim . . . be, and hereby is, GRANTED." Decision and Order on Remand at 2.

On appeal, employer again contends the administrative law judge lacked the authority to hear and decide this case. Employer argues the administrative law judge's decision should be vacated and reassigned to a properly appointed administrative law judge. Claimant responds that employer waived its argument by failing to raise it before the administrative law judge. The Director responds that in light of Supreme Court

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[3] 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.

precedent, 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. In a reply brief, employer argues that it timely raised its challenge to the administrative law judge's authority.

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).

After the administrative law judge issued his Decision and Order on Remand, the Supreme Court decided *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), holding that Securities and Exchange Commission administrative law judges were not appointed in accordance with the Appointments Clause of the Constitution. 138 S.Ct. at 2055. The Court further held that because the petitioner timely raised his challenge he was entitled to a new hearing before a new and properly appointed administrative law judge. *Id*.

Although the administrative law judge, on remand, followed the Board's directive to reconsider the substantive and procedural actions that he had previously taken and to issue a new decision, the Supreme Court's *Lucia* decision makes clear that this was an inadequate remedy. *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.[4] *Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc) (published).

Because the underlying award of benefits must be vacated and a new 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.[5]

[4] Employer asserts 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 11-14. Employer also argues that limits placed on the removal of administrative law judges "are inconsistent with separation-of-powers principles." *Id.* at 13-14. We decline to address these contentions as premature.

[5] On June 19, 2018, claimant's counsel filed an attorney fee application, requesting a fee for services performed during employer's previous appeal to the Board in BRB No. 18-0001 BLA pursuant to 20 C.F.R. §802.203. We decline to consider claimant's counsel's request for legal fees at this time. Counsel is entitled to fees for services only if there has been a successful prosecution of the claim. 33 U.S.C. §928(a), as incorporated

Accordingly, we vacate the administrative law judge's Decision and Order on Remand awarding benefits and Orders granting attorney fees, 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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

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into the Act by 30 U.S.C. §932(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993). Because we have vacated the administrative law judge's award of benefits, there has not yet been a successful prosecution of this claim. If, on remand, the administrative law judge again awards benefits, claimant may submit a revised fee petition for attorney's fees for work performed before the Board. 20 C.F.R. §802.203(c).