U.S. Department of Labor

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

BRB No. 18-0433 BLA

DARRELL C. LOVELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	
and	)	
	)	
Self-insured through WESTMORELAND COAL COMPANY, c/o HEALTHSMART CASUALTY CLAIMS SOLUTIONS	)	DATE ISSUED: 03/19/2019
	)	
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 Awarding Benefits of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for employer/carrier.

Ann Marie Scarpino (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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05609) of Administrative Law Judge Morris D. Davis, rendered 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). This case involves a subsequent claim filed on November 15, 2013.[1]

The administrative law judge credited claimant with at least 15.56 years of underground coal mine employment and found the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). He therefore found claimant invoked the rebuttable 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 the administrative law judge lacked the authority to decide the case because he was not appointed in accordance with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] Employer therefore argues the administrative law

[1] This is claimant's second claim for benefits. His first claim, filed on November 25, 1994, was denied on February 2, 1995 by the district director for failure to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action until he filed the current subsequent claim. Director's Exhibit 3.

[2] Under 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he has 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); 20 C.F.R. §718.305.

[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

judge's decision should be vacated and the case remanded for reassignment to a properly appointed administrative law judge.[4] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds that, in light of recent case law from the United States Supreme Court, employer's contention has merit. Director's Brief at 4.

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).

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 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]." 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

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> 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 challenges the administrative law judge's length of coal mine employment determination and his finding that employer failed to rebut the Section 411(c)(4) presumption. Employer's Brief at 4-21. 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 Exhibits 1, 4, 6, 7; Hearing Transcript at 22.

Labor 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."[7] *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 issued a Notice of Hearing and Prehearing Order on November 2, 2016. Decision and Order at 2. He held a hearing on March 7, 2017, during which he admitted evidence and heard claimant's testimony. *Id*. Based on his review, the administrative law judge "restated, reaffirmed, and ratified" his previously issued orders. *Id*. at 2 n.2.

[7] Employer asserts the Secretary's December 21, 2017 ratification of Department of Labor administrative law judges was improper, untimely, and unconstitutional. Employer's Brief at 9-10. We decline to address this contention as premature.

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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge