U.S. Department of Labor

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

BRB No. 18-0465 BLA
and 18-0465 BLA-A

TEDDY ALVIN ROBINETTE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
BEVINS ENERGY, INCORPORATED c/o AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED	)	
	)	DATE ISSUED: 05/24/2019
Employer/Carrier-Petitioners Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order upon Reconsideration on Remand–Awarding Benefits and the Order Denying Employer's Motion for Reconsideration of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

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

Ann 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/carrier (employer) appeals and claimant cross-appeals the Decision and Order upon Reconsideration on Remand–Awarding Benefits and the Order Denying Employer's Motion for Reconsideration (2013-BLA-05378) of Administrative Law Judge Alan L. Bergstrom, rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim[1] filed on April 9, 2012, and is before the Board for the second time.

In a Decision and Order dated August 2, 2017, the administrative law judge credited claimant with thirteen years of coal mine employment, upon stipulation of the parties, and found the new evidence established the existence of pneumoconiosis and a change in an applicable condition of entitlement. The administrative law judge further found the evidence established total disability and total disability due to pneumoconiosis, and awarded benefits.

Employer filed an appeal with the Board, arguing 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.[2]

[1] This is claimant's third claim for benefits. His most recent prior claim, filed on January 23, 2001, was denied on August 15, 2002 by the district director for failure to establish any element of entitlement. Director's Exhibit 1-69. By Order dated June 17, 2003, the claim was dismissed by Administrative Law Judge Daniel J. Roketenetz for failure of claimant or a representative to appear at the scheduled hearing or to respond to his Order to "show cause why this claim should not be dismissed." Director's Exhibit 1-2.

[2] 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

Employer further challenged the award of benefits on the merits of entitlement. Claimant responded urging the Board to reject employer's constitutional challenge as waived and affirm the award of benefits.

In response, the Director, Office of Workers' Compensation Programs (the Director), noted that 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 (DOL) administrative law judges on December 21, 2017. Director's Motion to Remand at 2. Consequently, the Director asserted that actions taken by DOL administrative law judges after that date were not subject to challenge on Appointments Clause grounds. Because Judge Bergstrom issued his decision in this case before December 21, 2017, however, the Director conceded that the Secretary's ratification did not foreclose the Appointments Clause argument raised by employer. *Id.* at 2-3. The Director therefore requested the Board vacate the administrative law judge's Decision and Order and remand the case for the administrative law judge to "reconsider his decision and all prior substantive and procedural actions taken in 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." *Robinette v. Bevins Energy, Inc.*, BRB Nos. 17-0626 BLA and 17-0626 BLA-A (Mar. 13, 2018) (Order) (unpub.).

On April 30, 2018, the administrative law judge issued a Decision and Order in which he performed "a thorough review of the evidence in this case, the positions of the parties, and the initial Decision and Order Awarding Benefits" and reaffirmed his prior determinations. Decision and Order on Remand at 5-6. Subsequently, he denied employer's motion for reconsideration. Order dated May 31, 2018.

On appeal, employer again contends the administrative law judge lacked the authority to hear and decide this case. Employer's Brief at 13-18. Employer argues the administrative law judge's decision should be vacated and the case remanded for reassignment to a properly appointed administrative law judge.[3] Claimant responds in

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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.

[3] Employer also challenges the administrative law judge's findings that the evidence established total disability, total disability due to pneumoconiosis, and a change in an

support of the award of benefits and asserts that this issue has been waived.[4] 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 to be "reassigned to a new [administrative law judge] for a new hearing." Director's Brief at 3. Employer filed a combined response and reply brief, reiterating its contentions on appeal.

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 Board's March 13, 2018 order remanding the case, the Supreme Court held in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) that the Securities and Exchange Commission administrative law judges were not appointed in accordance with Appointments Clause of the Constitution. The Court further held that because the petitioner timely raised his challenge, the petitioner was entitled to a new hearing before a properly appointed administrative law judge.

In light of *Lucia*, the Director argues that "in cases in which the 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) DOL [administrative law judge]." Director's Brief at 3. Although the administrative law judge followed the Board's directive to reconsider the substantive and procedural actions he had previously taken and to issue a new decision, the Supreme Court's *Lucia* decision makes clear that this was an inadequate remedy. As the Board recently held, "*Lucia* dictates that when a case is remanded because the administrative law judge was not

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applicable condition of entitlement. Employer's Brief at 19-29. In light of our disposition of this appeal *infra*, we decline to reach these issues.

[4] Claimant also cross-appeals arguing that the administrative law judge erred in considering Dr. Kendall's reading of the September 12, 2012 CT scan as it was not admitted into evidence. Claimant's Brief at 18-19. In light of our disposition of this appeal *infra*, we decline to reach this issue.

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

constitutionally appointed, the parties are entitled to a new hearing before a new, constitutionally appointed administrative law judge.[6] *Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc) (published).

Accordingly, we vacate the administrative law judge's Decision and Order upon Reconsideration on Remand - Awarding Benefits and his Order Denying Employer's Motion for Reconsideration 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

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[6] Employer asserts that 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 14-16. Employer also argues that limits placed on the removal of administrative law judges "violate [the] separation of powers." *Id.* at 16. We decline to address these contentions as premature.