

U.S. Department of Labor

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



BRB Nos. 18-0469 BLA
and 18-0511 BLA

LARRY MOORE)	
)	
Claimant-Respondent)	
)	
v.)	
)	
BODIE MINING COMPANY)	
)	
and)	
)	
AMERICAN MINING INSURANCE)	DATE ISSUED: 05/21/2019
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 on Remand, Order on Reconsideration, and Supplemental Decision and Order of Alan L. Bergstrom, 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.

Jeffery S. Goldberg (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 on Remand and Order on Reconsideration (2016-BLA-05006) of Administrative Law Judge Alan L. Bergstrom, 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 June 28, 2018 Supplemental Decision and Order (2016-BLA-05006) denying its request for reconsideration of the administrative law judge’s award of an attorney’s fee.¹

This case involves a claim filed on February 25, 2014. In a Decision and Order dated July 17, 2017, the administrative law judge credited claimant with less than fifteen years of qualifying employment and therefore found that claimant did not invoke the rebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.² 30 U.S.C. §921(c)(4) (2012). Turning to whether claimant established entitlement to benefits under 20 C.F.R. Part 718, the administrative law judge

¹ Employer’s appeal of the administrative law judge’s Decision and Order on Remand and Order on Reconsideration was assigned BRB No. 18-0469 BLA and its appeal of the administrative law judge’s Supplemental Decision and Order denying reconsideration of an attorney’s fee award was assigned BRB No. 18-0511 BLA. By Order dated October 10, 2018, the Board consolidated these appeals for purposes of decision only. *Moore v. Bodie Mining Co.*, BRB Nos. 18-0469 BLA and 18-0511 BLA (Oct. 10, 2018) (Order) (unpub.).

² Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

found claimant has clinical pneumoconiosis,³ and legal pneumoconiosis,⁴ in the form of obstructive lung disease and chronic bronchitis caused by coal mine dust exposure. 20 C.F.R. §718.202(a). He further found that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c), and awarded benefits.⁵

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. 2.⁶

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)

³ "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

⁴ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

⁵ By Supplemental Decision and Order dated December 7, 2017, the administrative law judge awarded claimant's counsel an attorney's fee of \$9,324.56.

⁶ 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.

administrative law judges on December 21, 2017. Because the administrative law judge issued his decision in this case before that date, however, 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." *Moore v. Bodie Mining Co.*, BRB No. 17-0594 BLA, slip op. at 1 (Mar. 14, 2018) (Order) (unpub.).

In a Decision and Order on Remand dated April 30, 2018, the administrative law reconsidered his initial decision, adopted and incorporated it by reference, and again awarded benefits. By Order dated May 31, 2018, the administrative law judge denied employer's motion for reconsideration.⁷

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 the administrative law judge properly adjudicated the case. The Director responds that in light of Supreme Court 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.

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'Keefe 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

⁷ By Supplemental Decision and Order dated June 28, 2018, the administrative law judge also denied employer's motion for reconsideration of his December 7, 2017 attorney's fee award. The administrative law judge, however, denied claimant's counsel's request for a fee for work performed between March 28, 2018 and May 4, 2018.

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 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.⁸ *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.

⁸ 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 10-12. Employer also argues that limits placed on the removal of administrative law judges "are inconsistent with separation-of-powers principles." *Id.* at 13-16. We decline to address these contentions as premature.

Accordingly, we vacate the administrative law judge's Decision and Order on Remand awarding benefits and his Order granting an attorney fee, 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