



BRB No. 18-0498 BLA

CLIDA J. WITT )  
(Widow of PAUL E. WITT) )

Claimant-Respondent )

v. )

BASIC MINING CORPORATION )

and )

OLD REPUBLIC INSURANCE COMPANY )

Employer/Carrier- )  
Petitioners )

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )

Party-in-Interest )

DATE ISSUED: 05/29/2019

DECISION and ORDER

Appeal of the Decision and Order on Remand and Order Denying Reconsideration of William T. Barto, Administrative Law Judge, United States Department of Labor.

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

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

Michelle S. Gerdano (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 awarding benefits and Order Denying Reconsideration (2015-BLA-05544) of Administrative Law Judge William T. Barto, 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 survivor's claim filed on September 12, 2005 and is before the Board for the second time.<sup>1</sup>

In the initial decision, Administrative Law Judge Pamela J. Lakes (Judge Lakes) credited the miner with over fifteen years of underground coal mine employment,<sup>2</sup> and found that he had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). She therefore found that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis.<sup>3</sup> 30 U.S.C. §921(c)(4) (2012). Judge Lakes further found that employer rebutted the presumption, however, by establishing that no part of the miner's death was due to pneumoconiosis. Turning to whether claimant established entitlement to survivor's benefits under 20 C.F.R. Part 718,

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<sup>1</sup> Claimant is the widow of the miner, who died on August 20, 2005. Director's Exhibit 10.

<sup>2</sup> The miner's coal mine employment was in Virginia. Director's Exhibits 4, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

<sup>3</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if claimant establishes that the miner had 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 impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

Judge Lakes found the evidence does not establish that the miner's death was due to pneumoconiosis, 20 C.F.R. §718.205(b), and she denied benefits.

Claimant timely requested modification on July 18, 2013. Director's Exhibit 83. The district director denied her request on November 7, 2013. Director's Exhibit 86. Claimant filed another request for modification on November 13, 2014. Director's Exhibit 87. The district director again denied benefits on March 5, 2015 because claimant failed to establish a mistake in a determination of fact. Director's Exhibit 88. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits 90, 93.

In a Decision and Order dated August 2, 2017, Administrative Law Judge William T. Barto (the administrative law judge) found that claimant invoked the Section 411(c)(4) presumption and employer did not rebut it. He therefore found that claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, and awarded benefits.

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.<sup>4</sup>

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. Because the administrative law judge issued his decision before that date, however, the Director requested the Board vacate his Decision and Order and remand the case for him to "reconsider his decision and all prior

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<sup>4</sup> 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.

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.” *Witt v. Basic Mining Corp.*, BRB No. 17-0619 BLA, slip op. at 1 (Mar. 30, 2018) (Order) (unpub.).

The administrative law judge issued a Decision and Order on Remand awarding benefits on May 9, 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 3. By Order dated June 19, 2018, he denied employer’s motion for reconsideration.

On appeal, employer again contends the administrative law judge lacked the authority to hear and decide this case and argues the 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’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 and Order Denying Reconsideration, the Supreme Court decided *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), holding that Securities and Exchange Commission administrative law judges are inferior “Officers” under the Appointments Clause. 138 S.Ct. at 2055. Because the administrative law judge in that case was not properly appointed 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.*

Although the administrative law judge followed the Board’s directive to reconsider the substantive and procedural actions he had previously taken and 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.<sup>5</sup> *Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc) (published).

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<sup>5</sup> Employer asserts the Secretary’s December 21, 2017 ratification of Department of Labor administrative law judges is 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 not “consistent with separation-of-powers principles.” *Id.* at 12-13. We decline to address these contentions as premature.

Accordingly, we vacate the administrative law judge's Decision and Order awarding benefits and Order Denying 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.<sup>6</sup>

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

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<sup>6</sup> 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. 17-0619 BLA. 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 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 new administrative law judge awards benefits, claimant may submit a revised fee petition for work performed before the Board. 20 C.F.R. §802.203(c).