U.S. Department of Labor

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

BRB Nos. 18-0182 BLA

EDDIE J. LAWSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MINGO LOGAN COAL COMPANY	)	
	)	
and	)	
	)	
ARCH COAL COMPANY, INCORPORATED	)	DATE ISSUED: 11/29/2018
	)	
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Scott A. White (White & Risse, LLP), Arnold, Missouri, for employer/carrier.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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-05878) of Administrative Law Judge Richard A. Morgan 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 miner's claim filed on January 7, 2015.

Immediately after the formal hearing that was held on June 14, 2017, employer challenged the administrative law judge's authority to adjudicate this claim and render a Decision and Order in this case. The administrative law judge addressed this issue in his Decision and Order and noted that, on December 21, 2017, the Secretary of Labor, R. Alexander Acosta, ratified his appointment as a District Chief Administrative Law Judge. Consequently, the administrative law judge ratified and reaffirmed "any and all prior actions [he had] taken in this case." Decision and Order at 1 n.2.

Addressing the merits of entitlement, the administrative law judge credited claimant with "at least" thirty-nine years of coal mine employment, including "fifteen years or more" in underground mines, and found that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption.[1] He further determined that employer failed to rebut the Section 411(c)(4) presumption, and awarded benefits accordingly.

On appeal, employer argues 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.[2] Employer

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the evidence establishes fifteen or more 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.

[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,

argues that 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 that employer waived its argument by failing to raise it at the earliest opportunity.[4] The Director, Office of Workers' Compensation Programs (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 "for reassignment to a new, properly appointed, [administrative law judge.]" Director's Brief at 1. Employer filed a reply brief, reiterating its arguments 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).

The Supreme Court recently decided *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), in which it held that Securities and Exchange Commission administrative law judges are inferior officers under the Appointments Clause of the Constitution. *Lucia*, 138

> 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.

[3] Employer also contends that the administrative law judge erred in finding that claimant established total disability, and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer's Reply Brief at 6. Further, employer argues that the administrative law judge erred in finding that it failed to rebut the presumption. Employer's Brief at 12-20.

[4] Claimant also filed a cross-appeal, which was dismissed at his request on August 31, 2018. *Lawson v. Mingo Logan Coal Co.*, BRB Nos. 18-0182 BLA and 18-0182 BLA-A (Aug. 31, 2018) (unpub.).

[5] The record reflects that claimant's last coal mine employment was in West Virginia. Accordingly, the Board will apply the law 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).

S.Ct. at 2055. The Court further held that, because the petitioner timely raised his challenge to the constitutional validity of the appointment of the administrative law judge (who had not been appointed in conformance with the Appointments Clause), the petitioner was entitled to a new hearing before a new and properly appointed administrative law judge. *Id.*

In light of *Lucia*, the Director acknowledges that "in cases in which the Appointments Clause challenge has been timely raised,[6] 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 new (and properly appointed) [administrative law judge]." Director's Brief at 2. 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 Labor (DOL) administrative law judges on December 21, 2017. *Id.* at 2 n.2. Because the administrative law judge took significant actions before the Secretary's ratification on December 21, 2017,[7] 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."[8] *Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc) (published).

[6] Claimant argues that employer waived its Appointments Clause challenge by failing to raise it when the claim was before the district director. Claimant's Brief at 7-9. We reject this argument. The administrative law judge did not have the authority to decide the issue of the constitutionality of his appointment. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018). Because new proceedings must take place before a new administrative law judge, it is not necessary for the Board to reach this issue in this appeal. *Id.*

[7] The administrative law judge held a hearing on June 14, 2017, during which he admitted evidence and heard claimant's testimony.

[8] 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 10-11; Employer's Reply Brief at 4-5. Employer also argues that limitations placed on the removal of administrative law judges "violate the separation of powers." Employer's Brief at 10-11; Employer's Reply Brief at 5-6. We decline to address these contentions 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