U.S. Department of Labor

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

BRB No. 18-0207 BLA

JANICE MORRIS (o/b/o the Estate of MALCOLM MORRIS, JR.)	)	
Claimant-Respondent	)	
v.	)	
BIG ELK CREEK COAL COMPANY, INCORPORATED	)	
and	)	DATE ISSUED: 11/08/2018
OLD REPUBLIC INSURANCE 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 of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

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

Sarah M. Hurley (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 on Remand (2013-BLA-05867) of Administrative Law Judge Larry A. Temin, 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). This case involves a subsequent claim filed on June 22, 2012,[1] and is before the Board for a second time.[2]

In the initial decision, the administrative law judge credited the miner with 10.71 years of coal mine employment, insufficient to invoke the rebuttable presumption of total disability due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4) (2012). Turning to whether the miner could establish entitlement to benefits under 20 C.F.R. Part 718, the administrative law judge found that the new evidence established the existence of legal pneumoconiosis,[4] a totally disabling respiratory impairment, and a change in an applicable condition of entitlement. 20 C.F.R. §§718.202(a)(4), 718.204(b)(2), 725.309. The administrative law judge found that the miner failed to establish that his total disability was due to

[1] The miner filed three prior claims for benefits, all of which were finally denied by the district director. Director's Exhibits 1-3. His most recent claim, filed on March 2, 2009, was denied by the district director on December 23, 2009 for failure to establish the existence of pneumoconiosis. Director's Exhibit 3.

[2] The miner's coal mine employment was in Kentucky. Director's Exhibit 6. 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).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[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).

pneumoconiosis pursuant to 20 C.F.R. §718.204(c), however, and he denied benefits accordingly.

Pursuant to the miner's appeal, the Board affirmed the administrative law judge's determination that the miner had 10.71 years of coal mine employment, and that the miner therefore did not invoke the Section 411(c)(4) presumption. *See Morris v. Big Elk Creek Co., Inc.*, BRB No. 16-0371 BLA (May 24, 2017) (unpub.). The Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), however. *Id.* The Board also held that the administrative law judge applied an erroneous standard in his consideration of whether the evidence established that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and remanded the case for further consideration. *Id.*

On remand, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and reaffirmed his prior determination that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge further found that the evidence established that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and he awarded benefits.

On appeal, employer argues that the administrative law judge lacked the authority to hear and decide the case because he had not been appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[5] Employer argues that the administrative law judge's decision should be vacated and the case remanded for

[5] 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 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.

reassignment to a properly appointed administrative law judge.[6] Claimant[7] responds that employer waived its argument by failing to raise it before the administrative law judge. 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 4. In a reply brief, employer urges the Board to reject claimant's contention that it waived its Appointments Clause argument.

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 employer filed its brief in this appeal, the Supreme Court 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 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 an Appointments Clause challenge has been timely raised,[8] and in which the [administrative

[6] Employer also challenges the administrative law judge's findings that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer's Brief at 16-29.

[7] Claimant, the widow of the miner who died on October 20, 2016, is pursuing the miner's claim on behalf of his estate. Decision and Order on Remand at 3.

[8] Claimant argues that employer waived its Appointments Clause challenge by failing to raise it before the administrative law judge. Claimant's Brief at 2-3 (unpaginated). We decline to address 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

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 2-3. 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 Labor (DOL) administrative law judges on December 21, 2017. *Id.* at 3 n.2. Because the administrative law judge took significant actions before the Secretary's ratification on December 21, 2017,[9] 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."[10] *Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc) (published).

a new administrative law judge, it is not necessary for the Board to reach this issue in this appeal. *Id.*

[9] The administrative law judge held a hearing on December 10, 2015, during which he admitted evidence and heard the miner's testimony.

[10] 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 10-14. 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