U.S. Department of Labor

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

BRB No. 18-0231 BLA

KOMAS D. BRYANT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOVE COAL, INCORPORATED	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE/CHARTIS	)	DATE ISSUED: 10/30/2018
	)	
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 of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

H. Brent Stonecipher (Fogle Keller Walker, PLLC), Lexington, Kentucky, for employer/carrier.

Kathleen H. Kim (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, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2013-BLA-05710) of Administrative Law Judge Peter B. Silvain, Jr., 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[1] filed on July 12, 2012.

The administrative law judge credited claimant with twenty-four years of underground coal mine employment,[2] and found that the new evidence established that he has 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,[3] and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). He further determined that employer failed to rebut the presumption, and awarded benefits accordingly.

[1] Claimant filed two previous claims, both of which were finally denied. Director's Exhibit 1. Claimant's most recent prior claim, filed on May 12, 2008, was denied by the district director on February 6, 2009, because the evidence did not establish the existence of totally disabling respiratory or pulmonary impairment. *Id.* Although the case was forwarded to the Office of Administrative Law Judges for a formal hearing, an administrative law judge dismissed the claim on April 9, 2009, because claimant failed to cooperate with employer in the development of its evidence. *Id.* An order of dismissal has "the same effect as a decision and order disposing of the claim on its merits . . . ." 20 C.F.R. §725.466(a).

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibits 1, 4; Hearing Transcript at 22. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth 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 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.

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.[4] Employer argues that the administrative law judge's decision should be vacated and the case remanded for reassignment to a properly appointed administrative law judge.[5] 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 1-2.

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 the Court 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

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[4] 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.

[5] Employer also argues the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption. Employer's Brief at 17-28.

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, 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. However, because Judge Silvain took significant actions before the Secretary's ratification on December 21, 2017,[6] 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."[7] *Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc) (published).

[6] The administrative law judge held a hearing on May 25, 2016, during which he admitted evidence and heard claimant's testimony.

[7] 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 16. 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

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge