U.S. Department of Labor

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

BRB No. 18-0239 BLA

JACKIE LEE CORDELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 10/30/2018
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

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 appeals the Decision and Order (2016-BLA-05591) of Administrative Law Judge Daniel F. Solomon 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 November 10, 2014.

After crediting claimant with 12.8 years of coal mine employment,[2] the administrative law judge 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 established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). He further determined that the evidence established the existence of legal pneumoconiosis[3] pursuant to 20 C.F.R. §718.202(a) and that claimant's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, 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 properly appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] Employer

[1] Claimant's previous claim, filed on September 16, 2002, was denied as abandoned on June 12, 2003. Director's Exhibit 1.

[2] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction 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] "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).

[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

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 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 2-3. As the Director notes, the Secretary of Labor, exercising his power as the Head of a Department under the

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> 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 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) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer's Brief at 4-20.

Appointments Clause, ratified the appointment of all Department of Labor (DOL) administrative law judges on December 21, 2017. *Id.* at 3 n.1. However, because the administrative law judge 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 by telephone on June 28, 2017, 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 Supplemental Brief at 2-3. 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