



BRB No. 18-0447 BLA

LOUISE G. CRESS)	
(Widow of ROBERT E. CRESS))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WESTMORELAND COAL COMPANY)	DATE ISSUED: 09/30/2019
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

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

Louise G. Cress, Big Stone Gap, Virginia.

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for employer.¹

Ann Marie Scarpino (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.

¹ By letter dated August 13, 2019, Paul E. Frampton withdrew as counsel for employer in this claim.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant² appeals, without the assistance of counsel,³ the Decision and Order Denying Benefits (2014-BLA-05424) of Administrative Law Judge William T. Barto 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 survivor's claim filed on June 8, 2013. By letter dated July 25, 2019, the Board informed claimant that a recent Supreme Court decision, *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018), may apply to her case. The Board explained that it would consider whether *Lucia* applies to claimant's case only if claimant asked the Board to do so. Therefore, the Board asked claimant to respond whether she wanted the *Lucia* issue to be considered. The Board further explained that, should *Lucia* be found to apply, the case would be remanded for a new hearing before a different administrative law judge. Claimant responded that she wanted the Board to consider whether *Lucia* applies.

By Order dated August 23, 2019, the Board informed the other parties of claimant's request and provided time to respond. The Director responded that based on the particular facts of this case, she does not object to remand and reassignment to another, properly

² Claimant is the widow of the miner, who died on March 17, 2013. Director's Exhibit 8.

³ Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Napier is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

appointed administrative law judge.⁴ Director's Response at 2. Employer did not file a response to claimant's request for review pursuant to *Lucia*.⁵

After the administrative law judge issued his Decision and Order Denying Benefits, the Supreme Court held that Securities and Exchange Commission administrative law judges not appointed by the head of the agency were not appointed in accordance with the Appointments Clause of the Constitution. *Lucia*, 138 S.Ct. at 2055. The Court further held that because the petitioner timely raised his Appointments Clause challenge, he was entitled to a new hearing before a new and properly appointed administrative law judge. *Id.*

The Department of Labor (DOL) has expressly conceded that the Court's holding in *Lucia* applies to DOL administrative law judges. See *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6. The Secretary of Labor, exercising his power as the Head of a Department under the Appointments Clause, ratified the appointment of all DOL administrative law judges on December 21, 2017, prior to the issuance of the administrative law judge's decision in this case. The administrative law judge held a hearing in this case on June 30, 2016, during which he admitted evidence and heard claimant's testimony. Decision and Order at 3. Because the administrative law judge took significant actions before the Secretary ratified his appointment, his subsequent actions are tainted by the Appointments Clause violation. As the Board has 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,

⁴ The Director concedes that because the Board does not require unrepresented petitioners to file an opening brief and identify the issues on appeal, claimant's affirmative response to the Board's July 25, 2019 letter asking if she wanted the *Lucia* issue to be considered is sufficient to timely raise an Appointments Clause challenge. Director's Response at 1 n.1. Although claimant filed her response to the Board's letter after the Board's August 4, 2019 deadline, she explained that she did not receive the letter in the mail until August 7, 2019, and she mailed her response to the Board the same day. Given claimant's explanation for the delayed filing and her prompt action, the Director has declined to argue that claimant forfeited her opportunity to request *Lucia* review. Director's Response at 2.

⁵ On August 13, 2019, employer's counsel filed a Notice of Bankruptcy and Withdrawal of Counsel. Counsel stated that employer has filed for bankruptcy protection, and will no longer have assets available to pay black lung benefits or related expenses or charges. In her response to claimant's request that the Board consider *Lucia*, the Director concedes that the Black Lung Disability Trust Fund would be liable for any benefits that might be awarded in this claim. Director's Response at 2.

constitutionally appointed administrative law judge.” *Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc).

Accordingly, we vacate the administrative law judge’s Decision and Order Denying 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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge