U.S. Department of Labor

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

BRB No. 19-0360 BLA

ROBERT M. COMBS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CUMBERLAND RIVER COAL COMPANY	)	
	)	DATE ISSUED: 05/27/2020
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 Awarding Benefits of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (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.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-05845) of Administrative Law Judge Patrick M. Rosenow rendered on a claim filed on February

9, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with at least twenty-three years of surface coal mine employment[1] in conditions substantially similar to those in an underground mine and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). He further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] Employer therefore argues the administrative law judge's findings should be vacated and the case remanded for reassignment to a properly appointed administrative law judge.[4] Claimant has not filed a

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[1] Claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3. 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).

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] 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.

U.S. Const. art. II, § 2, cl. 2.

[4] Employer also challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, it contends the administrative law judge improperly invoked the presumption based on erroneous findings that claimant's coal mine employment is

response brief. The Director, Office of Workers' Compensation Programs (the Director), responds that in light of recent case law from the United States Supreme Court, employer's contention has merit. Director's Brief at 3-4.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits 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, 362 (1965).

After the June 30, 2017 telephonic hearing in this case, the United States Supreme Court decided *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), holding that Securities and Exchange Commission administrative law judges 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 challenge to the constitutional validity of the appointment of the administrative law judge, he was entitled to a new hearing before a properly appointed administrative law judge. *Id*.; *see also Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc). That administrative law judge must be able "to consider the matter as though he [or she] had not adjudicated it before." *Lucia*, 138 S.Ct. at 2055. 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 different (and now properly appointed) [Department of Labor administrative law judge]." Director's Brief at 3.

The Department of Labor (DOL) has expressly conceded that the Supreme 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 Head of a Department under the Appointments Clause, ratified the appointment of all sitting DOL administrative law judges on December 21, 2017. The administrative law judge, however, held a telephonic hearing in this case on June 30, 2017, during which he admitted evidence and heard claimant's testimony. Decision and Order at 1.

The appropriate remedy for an adjudication tainted with an appointments violation under such circumstances is a new hearing before a properly appointed official. *Lucia*, 138

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qualifying and he is totally disabled. Employer finally argues he erred in finding it did not rebut the presumption. In light of our disposition of this appeal below, we decline to reach these issues.

S.Ct. at 2055, *citing Ryder v. United States*, 515 U.S. 177, 182-83 (1995). The official must be able to consider the matter as though he had not adjudicated it before. *Lucia*, 138 S.Ct. at 2055. The administrative law judge's presiding over the June 30, 2017 telephonic hearing, receiving evidence, and hearing claimant's testimony involved consideration of the merits, and would be expected to color the administrative law judge's consideration of the case. This therefore tainted the administrative law judge's adjudication with an Appointments Clause violation requiring remand to a different, properly appointed adjudicator. 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, constitutionally appointed administrative law judge."[5] *Miller*, BRB No. 18-0323 BLA, slip op. at 4.

[5] Employer first raised its Appointments Clause argument to the administrative law judge in a January 16, 2018 motion to hold the claim in abeyance. The administrative law judge denied the motion.

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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge