

U.S. Department of Labor

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



BRB Nos. 18-0299 BLA
and 18-0300 BLA

CATHY L. GAMBLIN)
(Widow of and o/b/o DAROLD N.)
GAMBLIN))

Claimant-Respondent)

v.)

ISLAND CREEK KENTUCKY MINING)

and)

ISLAND CREEK COAL COMPANY)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 02/28/2019

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits In Living Miner's And
Survivor's Claims of Colleen A. Geraghty, Administrative Law Judge,
United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for
claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Jeffrey S. Goldberg (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 Awarding Benefits In Living Miner's And Survivor's Claims (2013-BLA-05981, 2014-BLA-05609) of Administrative Law Judge Colleen A. Geraghty, rendered on claims 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 miner's claim filed on October 15, 2012, and a survivor's claim filed on February 7, 2014.¹ The Board has consolidated these appeals for purposes of decision only.

In the miner's claim, the administrative law judge credited the miner with twenty-seven years of underground coal mine employment and found that he had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant invoked the presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).² She further determined that employer did not rebut the presumption and awarded benefits. In the survivor's claim, the administrative law judge found that

¹ The miner died on January 11, 2014, while his case was pending before the Office of Administrative Law Judges. Claimant's Exhibit 5. Claimant, the widow of the miner, is pursuing the miner's claim.

² Under Section 411(c)(4) of the Act, a miner's total disability or death is presumed to be due to pneumoconiosis if the miner had at least fifteen 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b).

claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l) (2012), and awarded benefits.³

On appeal, employer argues that the administrative law judge lacked the authority to hear and decide the case because she had not been properly appointed in a manner consistent with the Appointments Clause of the Constitution, U.S. Const. Art II, §2, cl. 2.⁴ Employer therefore maintains that the administrative law judge's decision awarding benefits should be vacated and the case remanded for reassignment to a properly appointed administrative law judge.⁵ Claimant responds that employer waived its right to assert this 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 precedent from the United States Supreme Court, employer's contention has merit. Employer filed a reply, agreeing with the Director that the case should be remanded and reassigned to a new administrative law judge.

³ Under Section 422(l) of the Act, a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2012); *see Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010).

⁴ Article II, Section 2, Clause 2, sets forth the appointing powers of the President:

[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.

⁵ Employer also challenges the administrative law judge's findings that: the miner was totally disabled and that claimant thereby invoked the Section 411(c)(4) presumption; employer did not rebut the presumption; claimant is entitled to automatic survivor's benefits; and employer is liable to pay expert witness fees. In light of our disposition of this appeal we decline to reach these issues.

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.⁶ 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).

The Supreme Court in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), held that Securities and Exchange Commission administrative law judges are subject to the Appointments Clause of the Constitution and were not appointed in accordance with it. *Lucia*, 138 S.Ct. at 2055. The Court further held that because the petitioner timely raised his challenge to the constitutional validity of the administrative law judge’s appointment, the petitioner was entitled to a new hearing before a new and properly appointed administrative law judge. *Id.* In light of *Lucia*, the Director argues that “in cases in which an Appointments Clause challenge has been timely raised,⁷ and in which the [administrative law judge] took significant actions prior to being properly appointed, the challenging party is entitled to the remedy specified in *Lucia*: a new hearing before a new (and now properly appointed) [Department of Labor Administrative Law Judge].”⁸ Director’s Brief at 3. The administrative law judge in this case took significant actions before the Secretary “ratified” her appointment on December 21, 2017.⁹ As the Board recently held, “*Lucia* dictates that when a case is remanded because the administrative law

⁶ Because the miner’s last coal mine employment was in Kentucky, 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); Director’s Exhibit 3.

⁷ We reject claimant’s contention that employer waived its Appointments Clause challenge by failing to raise it before the administrative law judge. *See Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (petitioner’s challenge to the administrative law judge’s authority was timely when it was raised on appeal to the Securities and Exchange Commission and the federal courts).

⁸ The Director, Office of Workers’ Compensation Programs, notes that the Secretary of Labor, as the Head of a Department under the Appointments Clause, ratified the appointment of all Department of Labor administrative law judges on December 21, 2017. Director’s Brief at 3. Claimant argues that, in light of this ratification, a remand is not required in this case. Claimant’s Response Brief at 4.

⁹ The administrative law judge held a hearing on October 18, 2017, during which she admitted evidence and heard claimant’s testimony.

judge was not constitutionally appointed, the parties are entitled to a new hearing before a new, 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 Awarding Benefits In Living Miner’s And Survivor’s Claims, 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