U.S. Department of Labor

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

BRB No. 18-0333 BLA

RONALD A. FOSSAT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SUNNYSIDE COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 02/26/2019
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order on Remand Reaffirming and Ratifying All Previous Procedural Orders and the Decision and Order Awarding Benefits in This Matter of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Sarah M. Hurley (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/carrier (employer) appeals the Order on Remand Reaffirming and Ratifying All Previous Procedural Orders and the Decision and Order Awarding Benefits in This Matter (2015-BLA-05546) of Administrative Law Judge Lee J. Romero, Jr., rendered 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 miner's claim filed on June 13, 2013, and is before the Board for the second time.

In a Decision and Order dated August 4, 2017, the administrative law judge credited claimant with twenty-five years of coal mine employment at an underground mine, and found he established total disability pursuant to 20 C.F.R. §718.204(b)(2). He therefore found claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

Employer filed an appeal with the Board, arguing 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.[2] Claimant responded urging affirmance of the award of benefits.

[1] Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he has 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] 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

The Director, Office of Workers' Compensation Programs (the Director), also responded, noting that 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. Director's Motion to Remand at 2. Consequently, the Director asserted that actions taken by DOL administrative law judges after that date were not subject to challenge on Appointments Clause grounds. *Id.* Because Judge Romero issued his decision in this case before December 21, 2017, however, the Director conceded that the Secretary's ratification did not foreclose the Appointments Clause argument raised by employer. *Id.* The Director therefore requested that the Board vacate the administrative law judge's Decision and Order and remand the case for the administrative law judge to "reconsider his decision and all prior substantive and procedural actions taken in regard to this claim, and ratify them if [he] believes such action is appropriate." *Id.* at 2-3. The Board granted the Director's motion, and remanded the case with instructions to "reconsider the substantive and procedural actions previously taken and to issue a decision accordingly." *Fossat v. Sunnyside Coal Co.*, BRB No. 17-0627 BLA (Mar. 8, 2018) (Order) (unpub.).

On April 4, 2018, the administrative law judge issued an order in which he stated that he had reviewed all of his prior actions in this case, including his findings of fact and conclusions of law. Order on Remand at 2. Noting further that the ratification of his appointment rendered moot "any issue concerning the constitutionality of [his] appointment," the administrative law judge "restated, reaffirmed, and ratified" the findings and conclusions reached in his August 4, 2017 Decision and Order awarding benefits. *Id.* at 3.

On appeal, employer again argues the administrative law judge lacked the authority to hear and decide this case. Employer argues the administrative law judge's decision should be vacated and the case remanded for reassignment to a properly appointed administrative law judge.[3] Claimant responds in support of the award of benefits. 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.

[3] Employer also contends the administrative law judge erred in finding claimant established a totally disabling respiratory impairment and, therefore, erred in finding he invoked the Section 411(c)(4) presumption. Employer's Brief at 21-27. Employer further argues the administrative law judge erred in finding it failed to rebut the presumption. *Id.* at 27-36. In light of our disposition of this appeal *infra*, we decline to reach these issues.

Director responds that, in light of recent case law from the Supreme Court, the Board should grant employer's request for a remand. Director's Brief at 3.

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.[4] 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 the Board's March 8, 2018 order remanding the case, the 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, 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 different (and now properly appointed) [Department of Labor administrative law judge]." Director's Brief at 3. Although the administrative law judge, on remand, followed the Board's directive to reconsider the substantive and procedural actions that he had previously taken and to issue a new decision, the Supreme Court's *Lucia* decision makes clear that this was an inadequate remedy. 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."[5] *Miller*

[4] Because claimant's coal mine employment was in Utah, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Hearing Transcript at 20.

[5] 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 15-20. Employer also argues that limits placed on the removal of administrative law judges "violate [the] separation of powers." *Id.* at 18. We decline to address these contentions as premature.

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 Order on Remand Reaffirming and Ratifying All Previous Procedural Orders and the Decision and Order Awarding Benefits in this Matter, 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