U.S. Department of Labor

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

BRB No. 18-0370 BLA

RANDELL SHEPHERD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INCOAL, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN BUSINESS AND MERCANTILE INSURANCE	)	DATE ISSUED: 02/25/2019
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery), Prestonsburg, Kentucky, for claimant.

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

Kathleen H. Kim (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 Decision and Order (2015-BLA-05275) of Administrative Law Judge Peter B. Silvain, Jr., 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 filed on January 7, 2014.[1]

After crediting claimant with eighteen years of qualifying coal mine employment,[2] the administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). He therefore found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and 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).[3] The administrative law judge further found that employer did not rebut the presumption and 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 prior claim, filed on September 17, 1984, was finally denied by the district director on January 21, 1985 because claimant did not establish any element of entitlement. Director's Exhibit 1.

[2] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. 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] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] Article II, Section 2, Clause 2, sets forth the appointing powers:

therefore 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] Claimant responds that employer waived its 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 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.

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), holding that Securities and Exchange Commission administrative law judges were not appointed in accordance with the Appointments Clause of the Constitution. 138 S.Ct. at 2055. The Court further held that, because the petitioner timely raised his challenge, he was entitled to a new hearing before a new and properly appointed administrative law judge. *Id.*

> [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.

Art. II, § 2, cl. 2.

[5] Employer also argues that the administrative law judge's erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer's Brief at 16-20. Employer argues further that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption. *Id.* at 20-26.

In light of *Lucia*, the Director acknowledges that "in cases in which an Appointments Clause challenge has been timely raised,[6] 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 now properly appointed) [Department of Labor administrative law judge]." Director's Brief at 3. As the Director notes, 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. *Id.* at 3. But the administrative law judge took significant actions before December 21, 2017,[7] therefore, 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."[8] *Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc) (published).

[6] 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); Claimant's Brief at 3-6.

[7] By Order dated May 10, 2016, the administrative law judge cancelled the scheduled hearing, and granted claimant's request for a decision based on the record. The administrative law judge further admitted Director's Exhibits 1-64 into evidence, and provided the parties until July 11, 2016 to submit additional documentary evidence.

[8] 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 12-16. 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