

U.S. Department of Labor

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



BRB No. 23-0157 BLA

IRENE FOSSAT )  
(Widow of RONALD A. FOSSAT) )  
 )  
Claimant-Respondent )

v. )

SUNNYSIDE COAL COMPANY )

and )

OLD REPUBLIC INSURANCE )  
COMPANY, INC. )  
 )  
Employer/Carrier- )  
Petitioners )

DATE ISSUED: 02/15/2024

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

Party-in-Interest )

DECISION and ORDER

Appeal of the Order Granting Claimant's Motion for Summary Decision of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

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

Michael Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Employer and its Carrier.

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, BUZZARD and JONES, Administrative Appeals Judges.

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theresa C. Timlin's Order Granting Claimant's Motion for Summary Decision (2021-BLA-05824) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim filed on March 11, 2021.<sup>1</sup>

The ALJ determined that because the Miner was found eligible to receive benefits at the time of his death,<sup>2</sup> Claimant is automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).<sup>3</sup> Thus the ALJ awarded benefits.<sup>4</sup>

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because she was not appointed in a manner consistent with the Appointments Clause of the

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<sup>1</sup> Claimant is the widow of the Miner, who died on February 15, 2021. She pursued the miner's claim on behalf of her husband's estate and her survivor's claim separately. Director's Exhibits 2, 3.

<sup>2</sup> ALJ Evan H. Nordby awarded benefits in the Miner's most recent claim on January 21, 2021. The Miner died while Employer's appeal of his claim was pending before the Benefits Review Board, and Claimant pursued the claim on behalf of the Miner's estate. The Board affirmed the award of benefits in the miner's claim on January 11, 2023. *Fossat v. Sunnyside Coal Co.*, BRB No. 21-0386 BLA (Jan. 11, 2023) (unpub.). Employer has appealed the award of benefits to the United States Court of Appeals for the Tenth Circuit.

<sup>3</sup> 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 death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

<sup>4</sup> On December 13, 2022, Claimant filed a Motion for Summary Decision. Claimant's Motion for Summary Decision. The ALJ granted Claimant's motion on December 30, 2022. Order Granting Claimant's Motion for Summary Decision.

Constitution, Art. II § 2, cl. 2.<sup>5</sup> It further asserts the removal provisions applicable to the ALJ rendered her appointment unconstitutional. It also argues the ALJ erred in awarding Claimant survivor's benefits under Section 422(I) because the miner's claim was pending on appeal before the United States Court of Appeals for the Tenth Circuit and therefore not final. Both Claimant and the Director, Office of Workers' Compensation Programs (the Director), filed responses in support of the ALJ's Order granting summary decision. Employer replied, reiterating its arguments on appeal.

The Board's scope of review is defined by statute. We must affirm the ALJ's Order if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>6</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

### **Appointments Clause**

Employer urges the Board to vacate the Order and remand the case to be heard by a different, constitutionally-appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).<sup>7</sup> Employer's Brief at 8-12; Employer's Reply to Director's Response at 5-6.

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<sup>5</sup> 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.

<sup>6</sup> The Board will apply the law of the United States Court of Appeals for the Tenth Circuit, as the Miner performed his last coal mine employment in Utah. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); *Fossat*, BRB No. 21-0386 BLA slip op. at 3 n.4 (Jan. 11, 2023) (unpub.)

<sup>7</sup> *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

Although the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,<sup>8</sup> Employer maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment.<sup>9</sup> *Id.* For the reasons set forth in *Johnson v. Apogee Coal Co.*, BLR , 22-0022 BLA, slip op. at 3-6 (May 26, 2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023), we reject Employer's arguments.

### **Removal Provisions**

Employer challenges the constitutionality of the removal protections afforded DOL ALJs.<sup>10</sup> Employer's Brief at 8-10; Employer's Reply to Director's Response at 5-6. It generally argues the removal provisions in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion in *Lucia*. *Id.* Employer also relies on the United States Supreme Court's holdings in *Free Enter. Fund*

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<sup>8</sup> The Secretary of Labor issued a letter to the ALJ on December 21, 2017, stating:

In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Timlin.

<sup>9</sup> On July 20, 2018, the Department of Labor (DOL) expressly conceded the Supreme Court's holding in *Lucia* applies to the DOL's ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

<sup>10</sup> Employer urged the Board to delay addressing its arguments regarding the ALJ removal provisions pending the United States Supreme Court's decision in *Axon Enterprise Inc. v. Federal Trade Commission, et al.*, 589 U.S. (2023). Employer's Brief at 10; Employer's Reply to Claimant's Brief at 4; Employer's Reply to Director's Response at 5-6. The Supreme Court issued its decision in *Axon* on April 14, 2023. As the Director correctly notes, the Court did not address the validity of ALJ removal protections but instead addressed only whether the parties were required to litigate certain constitutional questions involving the Securities and Exchange Commission and Federal Trade Commission through administrative litigation rather than going directly to federal court. Director's Brief at 4 n.1.

*v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). *Id.* For the reasons set forth in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022), we reject Employer’s arguments.

### **Survivor’s Claim**

Considering whether Claimant is entitled to benefits under Section 422(*l*), the ALJ found there was no question of material fact that Claimant established each element necessary to demonstrate entitlement: she filed her claim after January 1, 2005; she is an eligible survivor of the Miner; her claim was pending on or after March 23, 2010; and the Miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*); *see* 20 C.F.R. §725.212(a); Decision and Order at 3.

We reject Employer’s argument that the ALJ’s application of Section 422(*l*) was erroneous because the Miner’s award of benefits was not yet final. Employer’s Brief at 3-7. The Board has rejected this argument and held that an award of benefits in a miner’s claim need not be final for a claimant to receive benefits under Section 422(*l*), as the ALJ correctly noted. *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-145-47 (2014); Order Granting Claimant’s Motion for Summary Decision at 3. We decline Employer’s request to reconsider the Board’s holding in *Rothwell*.

Because Employer raises no other specific challenge to the ALJ’s determination that Claimant is entitled to benefits under Section 422(*l*), we affirm it. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the ALJ's Order Granting Claimant's Motion for Summary Decision is affirmed.

SO ORDERED.

JUDITH S. BOGGS  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge