



BRB No. 19-0307 BLA

EDWARD R. BEDWELL)	
)	
Claimant-Respondent)	
)	
v.)	
)	
HERITAGE COAL COMPANY, LLC, Self-)	DATE ISSUED: 07/02/2020
Insured Through PEABODY ENERGY)	
CORPORATION)	
)	
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 Awarding Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Tighe A. Estes and H. Brett Stonecipher (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer/carrier.

Cynthia Liao (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, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal the Decision and Order Awarding Benefits (2018-BLA-05223) of Administrative Law Judge Steven D. Bell issued on a claim filed pursuant to 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 6, 2015.

The administrative law judge found, based on the parties' stipulation, Claimant has twenty-nine years of qualifying coal mine employment. He also determined Claimant established a totally disabling respiratory or pulmonary impairment and therefore invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).¹ He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge lacked the authority to decide the case because he was not appointed in accordance with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.² Employer also contends the district director, the Department of Labor (DOL) official who processes claims, is an inferior officer who was not appointed in a manner consistent with the Appointments Clause. It next contends the administrative law judge erred in finding it liable for the payment of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's Appointments Clause challenges and affirm the administrative law judge's determination Employer is liable for benefits.

¹ Section 411(c)(4) establishes a rebuttable presumption Claimant is totally disabled due to pneumoconiosis if he had 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); 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 of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Board’s scope of review is defined by statute. We must affirm the administrative law judge’s Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.³ 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, 361-62 (1965). The Board reviews the administrative law judge’s procedural rulings for abuse of discretion. *McClanahan v. Brem Coal Co.*, 25 BLR 1-171, 1-175 (2016); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-236 (2007) (en banc).

Appointments Clause – Administrative Law Judge

Employer initially alleges the administrative law judge failed to rule on its Appointments Clause challenge. Employer’s Brief at 2. It also urges the Board to vacate his decision and remand the case for assignment to a different, constitutionally appointed administrative law judge for a new hearing pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).⁴ Employer’s Brief at 17-18. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting DOL administrative law judges,⁵ but maintains the ratification was insufficient to cure the constitutional defect. *Id.*

³ The Board will apply the law of the United States Court of Appeals for the Seventh Circuit, as Claimant’s last coal mine employment occurred in Indiana. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 10.

⁴ *Lucia* involved a challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC administrative law judges are “inferior officers” subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

⁵ The Secretary of Labor issued a letter to Judge Bell 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 Administrative Law Judge Bell.

The Director responds, arguing contrary to Employer’s assertion, the administrative law judge ruled on Employer’s challenge and asserts he had the authority to adjudicate this case because the Secretary’s ratification brought his appointment into constitutional compliance. Director’s Brief at 8-9. She also maintains Employer failed to rebut the presumption of regularity that applies to actions of public officers such as the Secretary. We agree with the Director’s position.

The administrative law judge rejected Employer’s Appointments Clause challenge because it waived the issue by not pursuing it after the *Lucia* decision issued and further because he was not assigned the case until after ratification of his appointment on December 21, 2017. Decision and Order at 2 n.5; see Director’s Brief at 8. As the Director states, an appointment by the Secretary need only be “evidenced by an open, unequivocal act.” Director’s Brief at 4, quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803). Ratification is permissible so long as the agency head: 1) had at the time of ratification the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the “presumption of regularity,” courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal*, 820 F.3d at 603, citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

Congress authorized the Secretary to appoint administrative law judges to hear and decide cases under the Act. 30 U.S.C. §932a; see also 5 U.S.C. §3105. Thus, under the presumption of regularity, it is presumed the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all administrative law judges in a single letter. Rather, he specifically identified Judge Bell and indicated he gave “due consideration” to his appointment. Secretary’s December 21, 2017 Letter to Administrative Law Judge Bell. The Secretary further stated he was acting in his “capacity as head of the Department of Labor” when ratifying the appointment of Judge Bell “as an Administrative Law Judge.” *Id.*

Employer does not assert the Secretary had no “knowledge of all the material facts” or did not make a “detached and considered judgement” when he ratified the administrative law judge’s appointment. Employer therefore has not overcome the presumption of regularity.⁶ *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification

⁶ While Employer alleges the Secretary’s ratification letter was signed with an autopen, Employer’s Brief at 2, 17, such signing does not render the appointment invalid. See *Nippon Steel Corp. v. Int’l Trade Comm’n*, 239 F. Supp. 2d 1367, 1373, 1375

insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary properly ratified the administrative law judge’s appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals valid where Secretary of Transportation issued a memorandum “adopting” the General Counsel’s assignments “as judicial appointments of [his] own”); *Advanced Disposal*, 820 F.3d 592, 604-05 (National Labor Relations Board’s retroactive ratification of the appointment of a Regional Director with statement it “confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc” earlier invalid actions was proper). Consequently, we reject Employer’s argument that this case should be remanded for a new hearing before a different administrative law judge.⁷

Appointments Clause – District Director

Employer argues for the first time in this appeal the district director lacked the authority to identify the responsible operator and process this case because she is an “inferior Officer” of the United States not properly appointed under the Appointments Clause. Employer again relies on *Lucia*. Employer’s Brief at 6-7.

The Appointments Clause issue is “non-jurisdictional” and subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring “a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party’s] case”); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) (“Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.”). *Lucia* was decided over eight months prior to the administrative law judge’s Decision and Order Awarding Benefits, but Employer failed to raise its challenge to the district director’s appointment while the case was before the administrative law judge. At that time, the administrative law judge could have addressed Employer’s arguments and, if appropriate, taken steps to have the case remanded - the remedy it seeks here. *See Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 10 (2019). Instead, Employer waited to raise the issue until after the administrative law judge issued

n.14 (Ct. Int’l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an “open and unequivocal act”).

⁷ Further, Employer waived the issue by failing to brief it before the administrative law judge after the *Lucia* decision was issued, when it had assented to the administrative law judge’s procedural requirement that all issues had to be addressed in the post-hearing brief (see below). *See Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 10 (2019).

an adverse decision. Based on these facts, we conclude Employer forfeited⁸ its right to challenge the district director's appointment. Further, because Employer has not raised any basis for excusing its forfeiture, we see no reason to entertain its arguments. *See Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019); *Kiyuna*, 53 BRBS at 11; *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against resurrecting lapsed arguments because of the risk of sandbagging).

Responsible Insurance Carrier

Employer does not directly challenge its designation as the responsible operator. Rather, it asserts the administrative law judge failed to rule on liability issues raised in its April 20, 2018 position statement submitted prior to the hearing. Employer's Brief at 2. Contrary to Employer's contention, however, the administrative law judge did not fail to rule on its liability issues. Rather, the administrative law judge noted:

Although Employer submitted a Responsible Operator Position Statement on Coverage Issue arguing that Patriot Coal's security bond should be exhausted before Carrier assumes any liability, it failed to raise this issue or make any argument about it in its [post-hearing] brief. Therefore, I deem it to have been waived.

Decision and Order at 3 n.13. The Director urges the Board to affirm the administrative law judge's waiver determination because Employer has not argued he abused his discretion and failed to raise the argument in its post-hearing brief as required by the administrative law judge. We agree with the Director's argument.

An administrative law judge exercises broad discretion in resolving procedural and evidentiary matters. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc). Thus, a party seeking to overturn an administrative law judge's disposition of a procedural or evidentiary issue must establish that the administrative law judge's action represented an abuse of discretion. *See V.B. [Blake] v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

Employer has not argued the administrative law judge's action constituted an abuse of discretion. Thus we decline to address its contention because it has not complied with

⁸ “[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the ‘intentional relinquishment or abandonment of a known right.’” *Hamer v. Neighborhood Hous. Servs. of Chicago*, 583 U.S. , 138 S. Ct. 13, 17 n.1 (2017), quoting *United States v. Olano*, 507 U. S. 725, 733 (1993).

the regulation requiring it to provide argument and authority concerning each issue raised. *See* 20 C.F.R. §802.211(b); *McClanahan*, 25 BLR at 1-175; *Barnes v. Director, OWCP*, 18 BLR 1-55, 1-57 (1994) (the Board will decline to address issues that are not raised with specificity). Moreover, Employer had the opportunity to raise and preserve its liability arguments before the administrative law judge but failed to do so.

At the May 22, 2018 hearing, the administrative law judge stated checking the box on the referral form, Form CM-1025, sent to the Office of Administrative Law Judges from the district director was insufficient to preserve an issue and if an issue was not argued in a party's post-hearing brief, he would "deem [the] issue to have been waived." Hearing Transcript at 9. Employer's counsel responded: "Okay. That's fine, Judge." *Id.* Employer did not raise the responsible operator or insurer issue at the hearing or in its post-hearing brief. *See* Hearing Transcript; August 1, 2018 Brief on Behalf of Heritage Coal Co., LLC. Consequently, we reject Employer's request for remand because it knowingly waived its right to contest liability. *See* 20 C.F.R. §725.462 ("party may . . . withdraw his or her controversion to any or all issues"); 29 C.F.R. §18.91 (post-hearing brief contains "proposed findings of fact, conclusions of law, and the specific relief sought" as well as "all portions of the record and authorities relied upon in support of each assertion"). Thus, we affirm the administrative law judge's conclusion Employer is liable for any benefits payable to Claimant. *See* Decision and Order at 19.

Employer has not otherwise challenged the administrative law judge's findings. We affirm, therefore, the administrative law judge's determinations that: Claimant had twenty-nine years of qualifying coal mine employment; he was totally disabled; he invoked the Section 411(c)(4) presumption; and Employer did not rebut the presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 18. We further affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge