

U.S. Department of Labor

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



BRB No. 19-0280 BLA

BETTY J. HILL )  
(Widow of ROBERT E. HILL) )  
 )  
Claimant-Respondent )

v. )

ISLAND CREEK COAL COMPANY )

and )

CONSOL ENERGY, INCORPORATED )

Employer/Carrier- )  
Petitioners )

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

Party-in-Interest )

DATE ISSUED: 05/15/2020

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Noran J. Camp,  
Administrative Law Judge, United States Department of Labor.

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

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

Ann Marie Scarpino (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, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its carrier (employer) appeal the Decision and Order Awarding Benefits (2018-BLA-06267) of Administrative Law Judge Noran J. Camp 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 survivor's claim filed on June 25, 2018.

The administrative law judge found claimant established entitlement under Section 422(*l*) of the Act: she is an eligible survivor of the miner; filed her claim after January 1, 2005; her claim was pending after March 23, 2010; and the miner was receiving benefits at the time of his death.<sup>1</sup> 30 U.S.C. §932(*l*).<sup>2</sup> Accordingly, he awarded benefits.

On appeal, employer argues the judge who awarded benefits in the miner's claim was not appointed in a manner consistent with the Appointments Clause of the Constitution.<sup>3</sup> Employer therefore argues the award of benefits in the miner's claim is

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<sup>1</sup> The miner filed a claim for benefits on June 29, 2004. Director's Exhibit 1. On May 24, 2016, Administrative Law Judge Alice M. Craft issued a Decision and Order Granting the Claimant's Request for Modification, Awarding Benefits. The Board and the United States Court of Appeals for the Sixth Circuit affirmed the award of benefits. *Island Creek Coal Co. v. Hill*, 739 Fed. App'x 825 (6th Cir. 2018), *aff'g Hill v. Island Creek Coal Co.*, BRB No. 16-0529 BLA (June 28, 2017) (unpub.). On August 13, 2018, employer filed a petition for rehearing with the Sixth Circuit, arguing the court should vacate Judge Craft's decision pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). The court denied the petition for rehearing without comment on September 5, 2018, and issued a mandate in the case on November 27, 2018.

<sup>2</sup> Section 422(*l*) provides that the 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).

<sup>3</sup> Article II, Section 2, Clause 2, sets forth the appointing powers:

invalid and cannot serve as the basis for an award of derivative survivor benefits. Employer also challenges the constitutionality of Section 422(l). Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's argument that the miner's award is invalid. The Director further urges the Board to reject employer's argument that Section 422(l) is unconstitutional. In a reply brief, employer reiterates its previous contentions.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence and in accordance with applicable law.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 361-62 (1965).

### **Appointments Clause Challenge**

Employer contends that the miner's award cannot be the basis for claimant's survivor benefits because the judge who awarded the miner's benefits was not properly appointed under the Appointments Clause. Employer's Brief at 7-15; *see Lucia v. SEC*, 585 U.S., 138 S.Ct. 2044 (2018).<sup>5</sup> We disagree.

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[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>4</sup> Claimant's coal mine employment occurred 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).

<sup>5</sup> *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 the Special Trial Judges at the Tax Court, SEC administrative law judges

Because the award of benefits in the miner’s claim became final in 2018, it is not subject to an Appointments Clause challenge. The United States Court of Appeals for the Sixth Circuit affirmed Judge Craft’s award of benefits in 2018 and subsequently denied employer’s motion for a rehearing based on its Appointments Clause challenge. The court issued a mandate in the case on November 27, 2018, and the decision became final. *See* Fed. R. App. P. 41(c), Advisory Committee Notes 1998 amendments (a court’s decision is final and effective upon issuance of mandate); 6th Cir. I.O.P. 41 (“A mandate is the document by which this court relinquishes jurisdiction and authorizes the originating court or agency to enforce this court’s judgment”). Because the miner’s award is final,<sup>6</sup> we reject employer’s challenge to its validity.

We also reject employer’s contention the miner’s award is subject to challenge as an element of claimant’s survivor’s claim. Employer’s Brief at 10; Employer’s Reply Brief at 1-3. A survivor is not required to re-litigate the validity of a miner’s award to obtain benefits under Section 422(l). *See Vision Processing LLC v. Groves*, 705 F.3d 551, 557 (6th Cir. 2013); *West Virginia CWP Fund v. Stacy*, 671 F.3d 378, 391 (4th Cir. 2011); *B&G Construction v. Director, OWCP*, 662 F.3d 233, 249 (3d Cir. 2011). Because employer is precluded from attacking the administrative law judge’s award of benefits in the miner’s claim on Appointments Clause grounds, it cannot rely on that basis as a reason to vacate the award of benefits in the survivor’s claim.

### **Constitutionality of the Affordable Care Act and Section 422(l)**

Citing *Texas v. United States*, 340 F.Supp.3d 579, *decision stayed pending appeal*, 352 F.Supp.3d 665, 690 (N.D. Tex. 2018), employer contends the Board should vacate the administrative law judge’s award of survivor’s benefits because the Affordable Care Act (ACA), which enacted Section 422(l), Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer’s Brief at 11-14. Employer cites the district court’s rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id.*

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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)).

<sup>6</sup> Employer asserts that the miner’s award should be considered invalid because the Sixth Circuit denied its rehearing petition “without ruling on either the validity or any potential failure” of its Appointments Clause challenge. Employer’s Brief at 10. Employer, however, has not cited any legal authority in support of its argument. Moreover, although the Sixth Circuit did not directly address employer’s Appointments Clause argument, it effectively rejected it by denying employer’s petition for a rehearing.

After the parties submitted their briefs, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) and the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. See *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214-15 (2010), *aff'd sub nom. W.Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010).<sup>7</sup> We therefore reject employer's argument that Section 422(l) is unconstitutional.

As none of the administrative law judge's findings in the survivor's claim are otherwise challenged, we affirm the administrative law judge's determination claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(l); *Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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<sup>7</sup> Further, the United States Court of Appeals for the Fourth Circuit has held that the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative as a law. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012).

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

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge