



BRB No. 18-0288 BLA

PAUL S. YOUNCE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
P & J COAL COMPANY,	)	DATE ISSUED: 01/30/2019
INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE	)	
INSURANCE	)	
	)	
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 Larry A. Temin, Administrative Law Judge, United States Department of Labor.

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

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

Michelle S. Gerdano (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, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05079) of Administrative Law Judge Larry A. Temin 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 subsequent claim filed on October 22, 2014.<sup>1</sup>

The administrative law judge credited claimant with 17.054 years of underground coal mine employment and found that he established a totally disabling respiratory or pulmonary impairment. The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption.<sup>2</sup> He further determined that employer failed to 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.<sup>3</sup> Employer

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<sup>1</sup> The record contains claimant’s two most recent prior claims dated August 27, 2001 and March 13, 2007. Director’s Exhibits 1, 2. These claims were denied by the district director by reason of abandonment on February 21, 2002 and December 3, 2007, respectively. *Id.* Claimant took no further action on the denial of the March 13, 2007 claim until he filed the current claim on October 22, 2014. Director’s Exhibit 4.

<sup>2</sup> Under Section 411(c)(4) of the Act, a claimant is presumed to be totally disabled due to pneumoconiosis if he or she 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.

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

therefore maintains that the administrative law judge's decision awarding benefits should be vacated and the case remanded for reassignment to a properly appointed administrative law judge.<sup>4</sup> Claimant responds that employer waived its right to assert this 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 United States Supreme Court, employer's contention has merit. Director's Brief at 2.

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'Keefe 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), in which it held that Securities and Exchange Commission administrative law judges are subject to the Appointments Clause of the Constitution and were not appointed in accordance with it. *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

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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.

Art. II, § 2, cl. 2.

<sup>4</sup> Employer also contends that the administrative law judge erred in finding that claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory impairment and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer's Brief at 25-30. Further, employer argues that the administrative law judge erred in finding that it failed to rebut the presumption. Employer's Brief at 30-36. In light of our disposition of this appeal *infra*, we decline to reach these issues.

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,<sup>5</sup> 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 properly appointed) [administrative law judge].” Director’s Brief at 2.

The administrative law judge considered this issue in his Decision and Order, and noted that on December 21, 2017, the Secretary of Labor, R. Alexander Acosta, ratified his appointment as an administrative law judge. Decision and Order at 2 n.6. Addressing the substantive and procedural actions he took before this date, the administrative law judge found them to be “appropriate” and therefore ratified them. *Id.* Because the administrative law judge took significant actions before the Secretary’s ratification on December 21, 2017, however, the Secretary’s ratification did not foreclose the Appointments Clause argument raised by employer.<sup>6</sup> 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.”<sup>7</sup> *Miller 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 Decision and Order Awarding Benefits, and remand this case to the Office of Administrative Law Judges for

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<sup>5</sup> We reject claimant’s contention that employer waived its Appointments Clause challenge by failing to raise it before the administrative law judge. *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).

<sup>6</sup> The administrative law judge held a formal hearing on June 29, 2017, during which he admitted evidence and heard claimant’s testimony.

<sup>7</sup> 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 20-24. We decline to address this contention as it is not necessary to do so.

reassignment to a new administrative law judge and for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

JUDITH S. BOGGS  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge