



BRB No. 18-0467 BLA

DONNIE D. NEWSOME)	
)	
Claimant-Respondent)	
)	
v.)	
)	
DM&M COAL COMPANY,)	
INCORPORATED/OLD REPUBLIC)	
INSURANCE COMPANY)	
)	DATE ISSUED: 07/24/2019
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 Awarding Benefits of Monica Markley, Administrative Law Judge, United States Department of Labor.

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

Michelle S. Gerdano (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 ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-06294) of Administrative Law Judge Monica Markley, rendered 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 June 21, 2010.

Based on her determination that the miner had 13.12 years of coal mine employment, the administrative law judge found claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.¹ 30 U.S.C. §921(c)(4) (2012). She also found no evidence of complicated pneumoconiosis, and therefore claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2012); 20 C.F.R. §718.304. Considering whether claimant could establish entitlement to benefits without the presumptions, the administrative law judge found he established the existence of clinical and legal pneumoconiosis,² and he is totally disabled due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues the administrative law judge lacked the authority to decide the case because she was not properly appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.³ Employer therefore argues her

¹ Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he has at least fifteen 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); 20 C.F.R. §718.305.

² "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

³ 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

decision should be vacated and the case remanded for reassignment to a different, properly appointed administrative law judge.⁴ Claimant has not filed a response brief. 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 4.

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.⁵ 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 the administrative law judge issued her Decision and Order, the Supreme Court held in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018), that Securities and Exchange Commission (SEC) administrative law judges are "inferior Officers" under the Appointments Clause of the Constitution. Because the SEC administrative law judge was not appointed in a manner consistent with the Constitution and the petitioner timely raised his challenge, the Court held he was entitled to a new hearing before a new and properly appointed administrative law judge. *Id.*

In light of *Lucia*, the Director argues that "in cases in which an Appointments Clause challenge has been timely raised, 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 different (and now properly appointed) [Department of Labor (DOL) administrative law judge]." Director's Brief at 3. As the

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.

⁴ Employer also challenges the administrative law judge's finding that it is the properly named responsible operator. Employer argues further that the administrative law judge misapplied the preamble to the 2001 regulations in finding that claimant is totally disabled due to pneumoconiosis. Employer's Brief at 8-9. In light of our disposition of this appeal *infra*, we decline to reach these issues.

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

Director notes, the Secretary of Labor, as the Head of a Department under the Appointments Clause, ratified the appointment of all DOL administrative law judges on December 21, 2017. *Id.* Because the administrative law judge took significant actions before December 21, 2017,⁶ however, 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.”⁷ *Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc).

⁶ The administrative law judge issued a Notice of Hearing and Scheduling Order on December 29, 2015. She held a hearing on April 27, 2016, during which she admitted evidence and heard claimant’s testimony. Decision and Order at 2; Hearing Transcript at 13.

⁷ 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 10-14. Employer also argues that limits placed on the removal of administrative law judges “violate [the] separation of powers.” *Id.* at 12. We decline to address these contentions 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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge