

U.S. Department of Labor

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



BRB No. 18-0556 BLA

AVONELL ISAAC)
(Widow of LONZO ISAAC))

Claimant-Respondent)

v.)

AGIPCOAL USA, INCORPORATED)

and)

OLD REPUBLIC INSURANCE COMPANY)

Employer/Carrier-)
Petitioners)

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

Party-in-Interest)

DATE ISSUED: 07/26/2019

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand 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.

Rita A. Roppolo (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: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2015-BLA-05593) of Administrative Law Judge Larry A. Temin, rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim¹ filed on August 13, 2013, and is before the Board for the second time.

In the administrative law judge's initial Decision and Order, dated December 22, 2017, he determined claimant established entitlement to survivor's benefits. Employer filed an appeal with the Board, arguing the administrative law judge lacked the authority to hear and decide the case because he had not been appointed in a manner consistent with the Appointments Clause of the Constitution, U.S. Const., art. 2, §2, cl. 2.² Employer further challenged the award of benefits on the merits. Claimant responded, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responded by filing a motion to remand the case to the administrative law judge to reconsider substantive and procedural actions he took prior to the Secretary of Labor's ratification of his appointment on December 21, 2017. In response, employer urged the Board to grant the Director's motion, but disagreed with the Director's assertion that the intervening ratification of the administrative law judge's appointment cured any defect in his original appointment. The Board granted the Director's motion by Order dated May 31, 2018, and remanded the case to the

¹ Claimant is the widow of the miner, who died on June 28, 2013. Decision and Order at 7; Director's Exhibit 11. The miner did not file a lifetime claim for benefits. Directors' Exhibit 2; Director's Brief at 2.

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.

U.S. Const., art. II, §2, cl. 2.

administrative law judge with instructions to reconsider, and, if appropriate, ratify his decision and prior actions in the case. *Isaac v. Agipcoal USA, Inc.*, BRB No. 18-0160 BLA (May 31, 2018) (Order) (unpub.).

On August 8, 2018, the administrative law judge issued a Decision and Order Awarding Benefits on Remand in which he stated he had reconsidered his prior findings and “readjudicat[ed] and reaffirm[ed] all of the determinations rendered prior to December 21, 2017 in this case.” Decision and Order on Remand at 2. On appeal, employer again contends the administrative law judge lacked authority to hear and decide this case.³ Employer maintains the administrative law judge’s decision should be vacated and the case remanded for reassignment to a properly appointed administrative law judge. Claimant urges the Board to affirm the award of benefits, and asserts ratification of the administrative law judge’s appointment gave him the authority to adjudicate her claim. The Director responds that, in light of the decision of the United States Supreme Court in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), the Board should grant employer’s request for remand.

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. 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 (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 Board’s May 31, 2018 order remanding the case, the Supreme Court decided *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), holding that Securities and Exchange Commission administrative law judges were not appointed in accordance with the Appointments Clause of the Constitution. *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 was entitled to a new hearing before a new and properly appointed administrative law judge. *Id.*

³ Employer also contends that the administrative law judge erred in finding total respiratory or pulmonary disability, and thus erred in finding claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Employer’s Brief at 19-22; Decision and Order at 6-12, 18-24. Further, employer argues that the administrative law judge erred in finding that the presumption was not rebutted. Employer’s Brief at 22-29; Decision and Order at 24-31. In light of our disposition of this appeal *infra*, we decline to reach these issues.

In light of *Lucia*, the Director acknowledges “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,⁴ the challenging party is entitled to the remedy specified in *Lucia*: a new hearing before a different (and now properly appointed) DOL [administrative law judge].”⁵ Director’s Brief at 3. Although the administrative law judge, on remand, followed the Board’s directive to reconsider the substantive and procedural actions he had previously taken and to issue a new decision, the Supreme Court’s *Lucia* decision makes clear this was an inadequate remedy. As the Board has 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.”⁶ *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 on Remand, and remand this case to the Office of Administrative Law

⁴ The administrative law judge held a hearing on March 29, 2017, during which he admitted evidence and heard claimant’s testimony. Decision and Order at 2, 3-4; Hearing Transcript at 6-15, 16-28.

⁵ We reject claimant’s assertion that the Department of Labor (DOL) “holds the *Lucia* decision has no impact on the processing of this case.” Claimant’s Brief at 7. As the Director, Office of Workers’ Compensation Programs (the Director), notes, the DOL has expressly conceded its applicability. Director’s Brief at 3, citing *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

⁶ Employer continues to assert that the ratification of Department of Labor administrative law judges was insufficient to cure any constitutional deficiencies in their appointment. Employer’s Brief at 14-15, 17-19. Employer also argues limits placed on the removal of administrative law judges “violate [the] separation of powers doctrine.” *Id.* at 16. We decline to address these contentions as premature. Director’s Brief at 4 n.3.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge