

U.S. Department of Labor

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



BRB Nos. 18-0466 BLA
and 18-0614 BLA

MANUEL WATSON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
EBENEZER COAL COMPANY,)	DATE ISSUED: 06/14/2019
INCORPORATED)	
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeals of the Decision and Order - Awarding Benefits and the Supplemental Decision and Order Awarding Attorney's Fees of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Joseph E. 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 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: BOGGS, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order - Awarding Benefits and the Supplemental Decision and Order Awarding Attorney's Fees (2016-BLA-5703) of Administrative Law Judge Lee J. Romero, Jr. rendered pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).¹ This case involves a miner's claim filed on April 3, 2014.

On appeal, employer argues the administrative law judge lacked the authority to hear and decide the case because he was not appointed in accordance with the Appointments Clause of the United States Constitution, art. II, § 2, cl. 2.² Employer therefore requests that the case be remanded for reassignment to a different, properly

¹ Employer's appeal of the administrative law judge's Decision and Order – Awarding Benefits was assigned BRB No. 18-0466 BLA and employer's appeal of the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees was assigned BRB No. 18-0614 BLA. The Board consolidates these appeals for purposes of decision only.

² Article II, Section 2, Clause 2 of the United States Constitution 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.

appointed administrative law judge.³ Claimant responds in support of the award of benefits, asserting the administrative law judge had the authority to adjudicate this claim. The Director responds that, in light of recent case law from the United States Supreme Court, employer's contention has merit.

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.⁴ 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 his Decision and Order - Awarding Benefits, 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's appointment was not consistent with the Appointments Clause 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]."⁵ Director's Brief at 3. As the

³ Employer also challenges the administrative law judge's determinations regarding the responsible operator, length of coal mine employment, the existence of pneumoconiosis arising out of coal mine employment, and total disability due to pneumoconiosis. Employer's Brief at 12-24. We need not address these arguments in light of our disposition of this appeal.

⁴ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

⁵ We reject claimant's argument that the United States Supreme Court's holding does not apply to Department of Labor (DOL) administrative law judges. Claimant's Brief at 6. As the Director, Office of Workers' Compensation Programs (the Director), notes,

Director notes, the Secretary of Labor, exercising his power as the Head of a Department under the Appointments Clause, ratified the appointment of all DOL administrative law judges on December 21, 2017.⁶ *Id.* Because the administrative law judge took significant actions before the Secretary’s ratification on December 21, 2017,⁷ however, the Secretary’s ratification did not foreclose the Appointments Clause argument raised by employer.⁸ 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.” *Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc).

Because the underlying award of benefits must be vacated and a new administrative law judge will issue a new decision on the merits of claimant’s entitlement, the administrative law judge’s fee award must also be vacated.

Accordingly, we vacate the Decision and Order – Awarding Benefits and the Supplemental Decision and Order Awarding Attorney’s Fees and remand the case to the

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 asserts 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 8-10. Employer also argues that the limits placed on the removal of administrative law judges “violate [the] separation of powers.” *Id.* at 10. We decline to address these contentions as premature.

⁷ The administrative law judge held a hearing on June 6, 2017, during which he admitted evidence and heard claimant’s testimony.

⁸ Employer first raised its Appointments Clause argument to the administrative law judge in a February 5, 2018 motion to hold the claim in abeyance. The administrative law judge denied employer’s motion by Order dated March 19, 2018.

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

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge