

U.S. Department of Labor

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



BRB Nos. 18-0457 BLA  
and 18-0458 BLA

PEGGY L. SHOOK (Survivor of and o/b/o )  
BILLIE H. SHOOK) )

Claimant-Respondent )

v. )

JEWELL SMOKELESS COAL )  
CORPORATION )

and )

SUNCOKE ENERGY, INCORPORATED )

Employer/Carrier- )  
Petitioners )

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

Party-in-Interest )

DATE ISSUED: 05/23/2019

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in Miner's and Survivor's Claims of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, 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: BOGGS, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits in Miner's and Survivor's Claims (2013-BLA-05398 and 2014-BLA-05624) of Administrative Law Judge Paul R. Almanza rendered 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 March 2, 2012, and a survivor's claim filed on April 7, 2014.

The administrative law judge credited the miner with at least fifteen years of coal mine employment at an underground mine, and found he was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). He therefore found claimant<sup>1</sup> invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).<sup>2</sup> The administrative law judge further found employer did not rebut the presumption, and awarded benefits in the miner's claim. In the survivor's claim, the administrative law judge found that because the miner was entitled to benefits at the time of his death, claimant was automatically entitled to survivor's benefits under Section 422(l) of the Act, 30 U.S.C. §932(l) (2012).<sup>3</sup> Alternatively, he found claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, 30 U.S.C. §921(c)(4) (2012), and that employer did not rebut it. Thus he also awarded benefits in the survivor's claim.

On appeal, employer argues the administrative law judge lacked the authority to hear and decide the case because he had not been properly appointed in a manner consistent

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<sup>1</sup> Claimant is the widow of the miner who died on March 14, 2014, while his claim was pending before the Office of Administrative Law Judges. Director's Exhibit 5.

<sup>2</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis when the claimant establishes 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); *see* 20 C.F.R. §718.305.

<sup>3</sup> Under Section 422(l) of the Act, the survivor of a miner who was eligible to receive benefits at the time of his 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).

with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.<sup>4</sup> Employer therefore argues the administrative law judge's decision should be vacated and the case remanded for reassignment to a properly appointed administrative law judge.<sup>5</sup> Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds that, in light of recent precedent from the United States Supreme Court, employer's contention has merit. Director's Brief at 3-4.

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.<sup>6</sup> 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).

The Supreme Court held in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) that Securities and Exchange Commission administrative law judges were not appointed in accordance with Appointments Clause of the Constitution. The Court further held that

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<sup>4</sup> 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.

<sup>5</sup> Employer also challenges the administrative law judge's finding claimant established that the miner had at least fifteen years of coal mine employment at an underground mine and, thus, invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Employer's Brief at 1, 6, 13-18. Employer further argues the administrative law judge erred in finding that it failed to rebut the presumption. Employer's Brief at 19-32. In light of our disposition of this appeal *infra*, we decline to reach these issues.

<sup>6</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the miner's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

because the petitioner timely raised his challenge, the petitioner 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 new (and properly appointed) [Department of Labor (DOL) administrative law judge].” Director’s Brief at 3. As the 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. Because the administrative law judge took significant actions before the Secretary’s ratification on December 21, 2017,<sup>7</sup> 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.” *Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc).

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<sup>7</sup> The administrative law judge held a hearing on November 29, 2016, during which he admitted evidence and heard claimant’s testimony.

Accordingly, we vacate the administrative law judge's Decision and Order Awarding Benefits in Miner's and Survivor's Claims, 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

RYAN GILLIGAN  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge