

U.S. Department of Labor

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



BRB Nos. 18-0497 BLA
and 18-0588 BLA

EVERETT L. SILCOX)	
)	
Claimant-Respondent)	
)	
v.)	
)	
T. M. COAL COMPANY)	
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	DATE ISSUED: 05/30/2019
)	
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 and the Attorney Fee Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

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

Ann Marie Scarpino (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 (2015-BLA-05565) of Administrative Law Judge Joseph E. Kane, rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Employer also appeals the administrative law judge's August 31, 2018 Attorney Fee Order (2015-BLA-05565).¹ This case involves a subsequent claim filed on April 17, 2014.²

The administrative law judge accepted employer's concession that claimant had eighteen years of underground coal mine employment and found claimant established total respiratory disability. Consequently, he found that claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),³ and established a change in an applicable condition of entitlement. He further found employer did not rebut the presumption and awarded benefits.

¹ Employer's appeal of the administrative law judge's Decision and Order awarding benefits was assigned BRB No. 18-0497 BLA and employer's appeal of the administrative law judge's Attorney Fee Order was assigned BRB No. 18-0588 BLA. By Order dated October 17, 2018, the Board consolidated these appeals for purposes of decision only. *Silcox v. T. M. Coal Co.*, BRB Nos. 18-0497 BLA and 18-0588 BLA (Oct. 17, 2018) (Order) (unpub.).

² This is claimant's fourth claim for benefits. His most recent prior claim, filed on February 23, 1999, was denied by Administrative Law Judge Daniel J. Roketenetz on January 29, 2001 because he failed to establish pneumoconiosis or that his disabling respiratory or pulmonary impairment is due to pneumoconiosis. Director's Exhibit 1.

³ Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he 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 impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

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 Constitution, Art. II § 2, cl. 2.⁴ 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.⁵ Claimant responds, urging the Board to reject employer's arguments and affirm the award of benefits.⁶ 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 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.⁷ 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).

⁴ 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.

Art. II, § 2, cl. 2.

⁵ Employer also alleges error in the administrative law judge's finding that it failed to rebut the Section 411(c)(4) presumption and his award of attorneys' fees. Employer's Brief at 16-24. In light of our disposition of this appeal *infra*, we decline to reach these issues.

⁶ Claimant also responds in support of the award of attorneys' fees. Claimant's Brief at 16-18.

⁷ 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 1.

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 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 prior to being 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 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 the Secretary’s ratification on December 21, 2017,⁸ and it is undisputed he was not properly appointed at that time, 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.”⁹ *Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc) (published).

Because the underlying award of benefits must be vacated and a new administrative law judge will issue a new decision on the merits of entitlement, the administrative law judge’s fee award must also be vacated.¹⁰

⁸ The administrative law judge held a hearing on August 18, 2016, during which he admitted evidence and heard claimant’s testimony. Hearing Transcript at 5-6, 9, 11.

⁹ 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 11-13. Employer also argues that limits placed on the removal of administrative law judges “violate [the] separation of powers.” *Id.* at 13. We decline to address these contentions as premature.

¹⁰ In his August 31, 2018 Order, the administrative law judge awarded claimant’s counsel attorney’s fees for legal services rendered in the miner’s claim. Counsel is entitled to fees for services only if there has been a successful prosecution of the claim. 33 U.S.C.

Accordingly, we vacate the administrative law judge's Decision and Order Awarding Benefits and his Attorney Fee Order, 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. If benefits are awarded, the new administrative law judge should consider any attorney fee petitions filed at that time.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

§928(a), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §725.367; *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993). Because we have vacated the administrative law judge's award of benefits, there has not yet been a successful prosecution of this claim.