



BRB No. 18-0402 BLA

MICHAEL R. ROBBINS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
UNITED CASTLE COAL COMPANY)	
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	DATE ISSUED: 10/30/2019
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Michael R. Robbins, Norton, Virginia.

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

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,¹ the Decision and Order Denying Benefits (2015-BLA-05060) of Administrative Law Judge Patrick M. Rosenow 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 October 24, 2013.

By letter dated July 25, 2019, the Board informed claimant that a recent Supreme Court decision, *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018), may apply to his case. The Board explained that it would consider whether *Lucia* applies to his case only if he asked the Board to do so. Therefore, the Board asked claimant to respond whether he wanted the *Lucia* issue to be considered. The Board further explained that, should *Lucia* be found to apply, the case would be remanded for a new hearing before a different administrative law judge. Claimant responded that he wanted the Board to consider whether *Lucia* applies.

By Order dated August 15, 2019 and letter dated October 9, 2019, the Board informed the other parties of claimant's request and provided time to respond.² The Director, Office of Workers' Compensation Programs, responds that based on the particular facts of this case, she does not object to remand and reassignment to another, properly appointed administrative law judge.³ Employer did not file a response to claimant's request for review pursuant to *Lucia*.

After the administrative law judge issued his Decision and Order Denying Benefits, the Supreme Court held that Securities and Exchange Commission administrative law judges not appointed by the head of the agency were not appointed in accordance with the Appointments Clause of the Constitution. *Lucia*, 138 S.Ct. at 2055. The Court further held

¹ Robin Napier, a benefits counselor with Stone Mountain Health Services, has requested, on behalf of claimant, that the Board review the administrative law judge's decision in its entirety, but is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

² On August 15, 2019 the Board issued an Order informing the other parties of claimant's request and providing ten days to respond. Because the Order was not served on employer's current counsel, the Board forwarded, by letter dated October 9, 2019, a copy of its August 15, 2019 Order to counsel, together with all relevant documents.

³ The Director, Office of Workers' Compensation Programs, concedes that because the Board does not require unrepresented petitioners to file an opening brief and identify the issues on appeal, claimant's affirmative response to the Board's July 25, 2019 order asking if he wanted the *Lucia* issue to be considered is sufficient to timely raise an Appointments Clause challenge. Director's Brief at 1 n.1.

that because the petitioner timely raised his Appointments Clause challenge, he was entitled to a new hearing before a new and properly appointed administrative law judge. *Id.*

The Department of Labor (DOL) has expressly conceded that the Court's holding in *Lucia* applies to DOL administrative law judges. See *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6. 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, prior to the issuance of the administrative law judge's decision in this case. The administrative law judge held a telephonic hearing on September 8, 2016, however, during which he admitted evidence and heard claimant's testimony. Decision and Order at 1, 3-4. Because the administrative law judge took significant actions before the Secretary ratified his appointment, his subsequent actions are tainted by the Appointments Clause violation. 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." *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 Denying 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.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge