



BRB No. 18-0448 BLA

ROBERT E. NOBLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN COALS CORPORATION	)	
	)	DATE ISSUED: 10/29/2019
Employer-Respondent	)	
	)	
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 Steven B. Berlin,  
Administrative Law Judge, United States Department of Labor.

Robert E. Noble, LeBurn, Kentucky.

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, BUZZARD and  
GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,<sup>1</sup> the Decision and Order Denying Benefits (2015-BLA-05499) of Administrative Law Judge Steven B. Berlin on a claim filed pursuant to the provisions of 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 September 11, 2013. By letter dated July 25, 2019, the Board informed claimant that a recent United States Supreme Court decision, *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018), may apply to his case.<sup>2</sup> The Board explained that it would consider whether *Lucia* applies to claimant's case only if claimant 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 16, 2019, the Board informed the other parties of claimant's request and provided time to respond. The Director, Office of Workers' Compensation Programs (the Director), responded that based on the particular facts of this case, she does not object to remand and reassignment to another, properly appointed administrative law judge.<sup>3</sup> Director's Response at 2. 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 that because the petitioner timely raised his Appointments Clause challenge, he was

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

<sup>2</sup> The Board also served this letter on employer and the Director, Office of Workers' Compensation Programs.

<sup>3</sup> The Director 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 letter asking if he wanted the *Lucia* issue to be considered is sufficient to timely raise an Appointments Clause challenge. Director's Response at 1 n.1.

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. At the parties' request, the administrative law judge canceled the hearing, admitted the Director's and the parties' exhibits into the record, and closed the record on September 5, 2017. 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.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge