

U.S. Department of Labor

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



BRB No. 17-0359

DANIEL R. KUPKE)
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: Sept. 6, 2018
)
 SERVICE EMPLOYEES)
 INTERNATIONAL, INCORPORATED)
)
 and)
)
 INSURANCE COMPANY OF THE STATE)
 OF PENNSYLVANIA)
)
 Employer/Carrier-)
 Respondents)
)
 FLUOR DANIEL CORPORATION)
)
 and)
)
 INSURANCE COMPANY OF THE STATE)
 OF PENNSYLVANIA)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) ORDER

On April 23, 2018, claimant filed a timely motion for reconsideration en banc of the Board's decision in the captioned case, *Kupke v. Service Employees Int'l, Inc.*, BRB No. 17-0359 (Apr. 5, 2018). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer Service Employees International, Inc. (SEII) responds, urging the Board to deny claimant's motion for reconsideration. In addition, on July 5, 2018, claimant filed a motion to stay the proceedings in view of *Lucia v. Sec. & Exch. Comm'n*, 138 S. Ct. 2044 (2018), pending "an investigation and verification by the Solicitor of Labor" regarding whether the administrative law judge who ruled on claimant's counsel's fee petition was properly appointed under the Appointments Clause of the U.S. Constitution, Article II, §2, cl. 2. 20 C.F.R. §802.219(a), (b). Employers SEII and Fluor Daniel, and the Director, Office of Workers' Compensation Programs, each respond urging rejection of claimant's motion to stay on the ground that claimant's Appointments Clause argument was not timely raised.

We deny claimant's motion to stay the proceedings. Claimant did not challenge the administrative law judge's authority to hear this claim in his initial appeal to the Board and thus forfeited his Appointments Clause argument. The regulation at 20 C.F.R. §802.211 requires a party represented by counsel to file a brief which sets forth the issues to be considered by the Board and the facts and law supporting the party's contentions. Thus, it is well established that a party cannot raise a new issue to the Board for the first time in a motion for reconsideration.¹ *Ravalli v. Pasha Maritime Services*, 36 BRBS 91 (2002), *denying recon. in* 36 BRBS 47 (2002). The Appointments Clause issue is "non-jurisdictional," *see Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009), and thus is subject to the doctrines of waiver and forfeiture. *Id.*; *see Lucia*, 138 S. Ct. at 2055 ("one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief").

In his motion for reconsideration of the Board's decision, claimant further asserts that the Board erred in affirming the administrative law judge's fee award based on attorney hourly rates ranging from \$225 to \$350. Claimant contends that the Board improperly affirmed the administrative law judge's reliance on fee awards issued by the United States District Court for the Southern District of Florida, as the administrative law judge did not give the parties notice that she would rely on those cases, thus depriving claimant of an opportunity to respond. Claimant asserts that in *Yunis v. Academi, LLC*, BRB No. 17-0058 (Sept. 28, 2017) and *Abassi v. Mission Essential Personnel*, BRB No. 17-0059 (Sept. 28, 2017), the Board vacated hourly rate awards based on district court cases where the administrative law judge did not provide notice to the parties of his intent to rely on such

¹ In addition, the issue was not raised in claimant's motion for reconsideration, but in a subsequent motion filed while his motion for reconsideration was pending.

cases. Claimant thus contends that, in this case, he similarly must be given the opportunity to address the relevance of the cases selected by the administrative law judge.

We deny claimant's motion for reconsideration. The Board's decision states that "the administrative law judge gave very detailed and specific reasons for her rejection of counsel's (and employer's) evidence and for her conclusions concerning the range of market rates applicable in south Florida." *Kupke*, slip op. at 8. In addition, the Board addressed claimant's contentions regarding the *Yunis* and *Abassi* decisions and explained why this case is distinguishable. *Id.* at n.13. Claimant has failed to demonstrate error in the Board's conclusion that the administrative law judge's hourly rate determinations were not arbitrary, capricious, contrary to law or based on an abuse of her discretion.

Accordingly, claimant's motions for abeyance and reconsideration are denied. 20 C.F.R. §§802.219(f), 802.409. The Board's decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge