U.S. Department of Labor

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

BRB No. 18-0323 BLA

JOHN MILLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PINE BRANCH COAL SALES, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	DATE ISSUED: 10/22/2018
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	EN BANC

Appeal of the Decision and Order on Remand of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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: HALL, Chief Administrative Appeals Judge, BOGGS, BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2015-BLA-05642) of Administrative Law Judge John P. Sellers, III, awarding benefits 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 subsequent claim[1] filed on May 27, 2014, and is before the Board for the second time.

Initially, in a Decision and Order dated June 27, 2017, the administrative law judge credited claimant with twenty years of coal mine employment,[2] at least fifteen years of which took place at surface mines in conditions substantially similar to those in an underground mine. He further found that the new evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption[3] and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). He further determined that employer failed to rebut the Section 411(c)(4) presumption, and awarded benefits accordingly.

Employer filed an appeal with the Board, arguing that the administrative law judge lacked the authority to hear and decide the case because he had not been properly appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4]

[1] Claimant's initial claim, filed on January 19, 2006, was denied by reason of abandonment. Director's Exhibit 1. The regulations provide that, "[f]or purposes of §725.309, a denial by reason of abandonment shall be deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Hearing Transcript at 14. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the evidence establishes fifteen or more 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); *see* 20 C.F.R. §718.305.

[4] Article II, Section 2, Clause 2, sets forth the appointing powers of the President:

In response, the Director, Office of Workers' Compensation Programs (the Director), noted that the Secretary of Labor, exercising his power as the Head of a Department under the Appointments Clause, ratified the appointment of all Department of Labor (DOL) administrative law judges on December 21, 2017. Consequently, the Director asserted that actions taken by DOL administrative law judges after that date were not subject to challenge on Appointments Clause grounds. However, because Judge Sellers issued his decision in this case before December 21, 2017, the Director conceded that the Secretary's ratification did not foreclose the Appointments Clause argument raised by employer. Director's Motion to Remand at 2. The Director therefore requested that the Board vacate the administrative law judge's Decision and Order and remand the case for the administrative law judge to "reconsider his decision and all prior substantive and procedural actions taken in regard to this claim, and ratify them if [he] believes such action is appropriate." *Id.* at 3. The Board granted the Director's motion, and remanded the case with instructions to "reconsider the substantive and procedural actions previously taken and to issue a decision accordingly." *Miller v. Pine Branch Coal Sales, Inc.*, BRB No. 17-0555 BLA (Mar. 9, 2018) (Order) (unpub.).

The administrative law judge issued a Decision and Order on Remand awarding benefits on March 29, 2018. In that decision, the administrative law judge stated, "I have reviewed all substantive and procedural actions I have previously taken. Upon review, I ratify them all." Decision and Order on Remand at 2. He then set forth, in full, his "original Decision and Order Awarding Benefits, now ratified . . . ." *Id.* at 2-35.

On appeal, employer again contends that the administrative law judge lacked the authority to hear and decide this case. Employer argues that the administrative law judge's decision should be vacated and the case remanded for reassignment to a properly appointed administrative law judge. The Director responds that, in light of recent case law from the Supreme Court, the Board should vacate the administrative law judge's decision and remand the case "for reassignment to a new, properly appointed, [administrative law

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> [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.

judge.]" Director's Brief at 1.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

After employer filed its brief in this appeal, the Supreme Court decided *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), in which the Court held that Securities and Exchange Commission administrative law judges are inferior officers under the Appointments Clause of the Constitution. *Lucia*, 138 S.Ct. at 2055. The Court further held that, because the petitioner timely raised his challenge to the constitutional validity of the appointment of the administrative law judge (who had not been appointed in conformance with the Appointments Clause), the petitioner was entitled to a new hearing before a new and properly appointed administrative law judge. *Id*.

In light of *Lucia*, the Director acknowledges that "in cases in which the 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) administrative law judge." Director's Brief at 3. Although the administrative law judge, on remand, followed the Board's directive to reconsider the substantive and procedural actions that he had previously taken and to issue a new decision, the Supreme Court's *Lucia* decision makes clear that this was an inadequate remedy. *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.[5]

[5] Employer asserts that 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 12-18. Employer also argues that limits placed on the removal of administrative law judges "violate [the] separation of powers." *Id.* at 15. We decline to address these contentions as premature.

Accordingly, we vacate the administrative law judge's Decision and Order on Remand awarding 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.

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