



BRB No. 23-0477 BLA

SALLY KEENE)	
(Widow of MICHAEL D. KEENE))	
)	
Claimant-Respondent)	
)	
v.)	
)	
K & R CONTRACTORS, LLC)	DATE ISSUED: 06/13/2024
)	
Employer-Petitioner)	
)	
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 of William P. Farley, Administrative Law Judge, United States Department of Labor.

Charity A. Barger (Street Law Firm, LLP), Grundy, Virginia, for Employer.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer L. Jones, Deputy Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) William P. Farley's Decision and Order Awarding Benefits (2023-BLA-05466) rendered on a survivor's claim filed on July 11, 2022, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant is the widow of Michael D. Keene, a miner who died on June 14, 2022, and who was awarded benefits in a January 29, 2019 Decision and Order Granting Benefits issued by ALJ Francine Applewhite. He noted the Benefits Review Board affirmed the award of benefits in the miner's claim. *See Keene v. K & R Contractors, LLC*, BRB No. 19-0242 BLA (Apr. 23, 2020) (unpub.), *recon. denied*, BRB No. 19-0242 BLA (Aug. 31, 2020) (unpub. Order). Finally, the ALJ found Claimant established each element necessary to demonstrate automatic entitlement and therefore awarded survivor's benefits under Section 422(l) of the Act, 30 U.S.C. §932(l).¹

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution.² It also argues the removal provisions applicable to ALJs rendered his appointment unconstitutional. Further, it asserts that because the Miner's award of benefits was not final and effective, the ALJ erred in determining that Claimant is automatically entitled to survivor's benefits pursuant to Section 932(l). Claimant has not filed a response.

¹ Under Section 422(l) of the Act, a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2018).

² 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.

U.S. Const. art. II, § 2, cl. 2.

The Director, Office of Workers' Compensation Programs, responds, urging the Board to reject Employer's arguments.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause/Removal Protections

Employer urges the Board to vacate the ALJ's Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. 237 (2018).⁴ Employer's Brief at 4. In addition, it challenges the constitutionality of the removal protections afforded Department of Labor ALJs. *Id.* at 7-11. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional. *Id.* Moreover, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and the opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). *Id.* For the reasons set forth in *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 3-6 (May 26, 2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023), we reject Employer's Appointments Clause arguments as to the propriety of ALJ Farley's appointment.

As for Employer's arguments with respect to ALJ removal protections, in *Howard v. Apogee Coal Co.*, 25 BLR 1-301 (2022), the Board rejected similar arguments in part

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the Miner performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); *Keene v. K & R Contractors, LLC*, BRB No. 19-0242 BLA, slip op. at 2 n.2 (Apr. 23, 2020) (unpub.), *recon. denied*, BRB No. 19-0242 BLA (Aug. 31, 2020) (unpub. Order).

⁴ *Lucia* involved an Appointments Clause challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. 237, 251 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

because the employer did not sufficiently allege “it suffered any harm due to the ALJ’s removal protections.” *Howard*, 25 BLR at 1-307 (applying *Calcutt v. FDIC*, 37 F.4th 293, 319 (6th Cir. 2022)). Subsequently, in the miner’s claim relevant to this case, the United States Court of Appeals for the Fourth Circuit denied Employer’s petition for review and held that “the Board has no authority to remedy the alleged separation-of-powers violation.”⁵ *K & R Contractors, LLC v. Keene*, 86 F.4th 135, 145 (4th Cir. 2023). The court nevertheless denied Employer’s request for a new hearing because, like the Board’s holding in *Howard*, Employer did not show that the alleged “constitutional violation caused [it] harm.” *Id.* at 149. So too here. Thus, even if the Board had authority to remedy the violation presented by Employer’s removal protections arguments, we would decline to do so because Employer has failed to identify any harm that the allegedly unconstitutional removal provisions caused it.

Section 422(l)

Considering whether Claimant is entitled to benefits under Section 422(l), the ALJ found Claimant established each element necessary to demonstrate entitlement: she filed her claim after January 1, 2005; she is an eligible survivor of the Miner; her claim was pending on or after March 23, 2010; and the Miner was determined to be eligible to receive benefits at the time of his death. *See* 30 U.S.C. §932(l); Decision and Order at 2.

We reject Employer’s argument that the ALJ’s application of Section 422(l) was erroneous because the Miner’s award of benefits was not yet final. Employer’s Brief at 2-4. After Employer filed its brief, the Fourth Circuit denied Employer’s petition for review; therefore, Employer’s finality contention is moot. *Keene*, 86 F.4th at 139, 150. Moreover, the Board has previously rejected this argument, holding an award of benefits in a miner’s claim need not be final for a claimant to receive benefits under Section 422(l). *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-145-47 (2014). Thus, we reject Employer’s argument and affirm the ALJ’s determination that Claimant is derivatively entitled to survivor’s benefits pursuant to Section 422(l). 30 U.S.C. §932(l); 20 C.F.R. §725.212(a); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

⁵ The effect of this aspect of the court’s holding was that Employer’s forfeiture of its ALJ removal protections argument before the Board by failing to adequately brief the issue did not preclude Employer from raising its arguments on appeal to the circuit, particularly where the Director waived Employer’s forfeiture and asked the court to resolve the arguments on the merits. *K & R Contractors, LLC v. Keene*, 86 F.4th 135, 144-46 (4th Cir. 2023).

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge