



BRB No. 18-0415 BLA

FLORA BURTON)	
(Widow of CARL BURTON))	
)	
Claimant-Respondent)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	
)	DATE ISSUED: 04/30/2019
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 Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Jeffrey S. Goldberg (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 ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-05991) of Administrative Law Judge Daniel F. Solomon, rendered on a survivor's claim filed on September 11, 2014,¹ pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited the miner with thirty-three years of underground coal mine employment and found claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), thereby invoking the presumption that the miner's death was due pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).² He further found employer did not rebut the presumption and awarded benefits.³

On appeal, employer argues 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 Employer

¹ Claimant is the widow of the miner, who died on August 21, 2005. Director's Exhibit 7. On June 10, 2015, the district director denied her survivor's claim for benefits. Director's Exhibit 10. Claimant filed a request for reconsideration, which the district director also denied on September 10, 2015. Director's Exhibit 21. Claimant next filed a request for modification on December 7, 2015. Director's Exhibit 23. The district director issued a Proposed Decision and Order Awarding benefits on June 30, 2016. Director's Exhibit 27. Employer requested a hearing and the case was assigned to Administrative Law Judge Daniel F. Solomon, who issued his Decision and Order on April 26, 2018. Director's Exhibits 28, 32.

² Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption that the miner's death was due to pneumoconiosis if he had fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similarly to those in underground mines, and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

³ The administrative law judge also found that claimant was entitled to modification of the district director's September 10, 2015 denial of benefits pursuant to 20 C.F.R. §725.310, and that she established entitlement to benefits under 20 C.F.R Part 718.

⁴ 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,

therefore argues that the administrative law judge's decision should be vacated and the case remanded for reassignment to a properly appointed administrative law judge.⁵ Claimant responds, urging the Board to reject employer's Appointments Clause arguments and to affirm the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), also responds, asserting that in light of Supreme Court precedent, the Board should vacate the administrative law judge's decision and remand the case for reassignment to a new, properly appointed administrative law judge.

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.⁶ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe 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).

The Supreme Court recently held that Securities and Exchange Commission administrative law judges were not appointed in accordance with the Appointments Clause of the Constitution. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018). The Court further held that, because the petitioner timely raised his challenge to the constitutional validity of the appointment of the administrative law judge, the petitioner was entitled to a new hearing before a new and properly appointed administrative law judge. *Id.*

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.

⁵ Employer also challenges several of the administrative law judge's evidentiary rulings, and his findings claimant established total disability and invoked the Section 411(c)(4) presumption, and that employer did not rebut it. Employer's Brief at 6-26. In light of our disposition of this appeal, we decline to reach these issues.

⁶ Because the miner's last coal mine employment was in West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

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 different (and now properly appointed) [Department of Labor administrative law judge].”⁷ Director’s Brief at 3. As the Director notes, 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 administrative law judges on December 21, 2017. *Id.* at 2 n.3. Claimant argues that, in light of this ratification, a remand is not required in this case. Claimant’s Response Brief at 6. Because the administrative law judge took significant actions before the Secretary’s ratification on December 21, 2017,⁸ however, the Secretary’s ratification did not foreclose the Appointments Clause argument raised by employer.⁹ Director’s Brief at 3. As the Board recently 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.”¹⁰ *Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc).

⁷ We reject claimant’s argument that the United States Supreme Court’s holding does not apply to Department of Labor (DOL) administrative law judges. Claimant’s Brief at 6. As the Director, Office of Workers’ Compensation Programs (the Director), notes, the DOL has expressly conceded its applicability. Director’s Brief at 3, *citing Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Br. for the Fed. Resp. at 14 n.6.

⁸ The administrative law judge held a telephonic hearing on June 29, 2017, during which he admitted evidence and heard testimony by the miner’s daughter on claimant’s behalf.

⁹ Employer first raised its Appointments Clause argument to the administrative law judge in a February 28, 2018 motion to hold the claim in abeyance. The administrative law judge did not rule on the motion.

¹⁰ Employer asserts that the Secretary’s December 21, 2017 ratification of DOL administrative law judges was insufficient to cure any constitutional deficiencies in their appointment. Employer’s Brief at 4-6. We need not address this assertion, however, in light of our disposition of this appeal.

Accordingly, we vacate the administrative law judge's Decision and Order 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 his opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge