U.S. Department of Labor

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

BRB No. 18-0399 BLA

CHARLES GILBERT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED c/o SUNCOKE ENERGY, INCORPORATED	)	DATE ISSUED: 12/13/2019
	)	
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 D. Bell, Administrative Law Judge, United States Department of Labor.

Charles Gilbert, Oneida, Kentucky.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

Ann Marie Scarpino (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, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2015-BLA-05484) of Administrative Law Judge Steven D. Bell rendered on a claim filed on May 17, 2013 pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). 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.[2] 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 if he made such a request and 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 23, 2019, the Board informed the other parties of claimant's request and provided time to respond. Employer responded that the Board should deny claimant's request as untimely. 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.

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 entitled to a new hearing before a new and properly appointed administrative law judge. *Id.*

Employer contends that claimant forfeited the Appointments Clause issue because he failed to raise it before initial briefing was completed in this appeal. Employer's Response at 2-3. We disagree. Because claimant appealed without the assistance of counsel, he was not required to file a brief identifying the issues to be considered on appeal. *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88, 1-90 (1995) (Order); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-175, 1-177 (1989) (Order); 20 C.F.R. §802.211(e).

[1] 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).

[2] The Board also served this letter on employer and the Director, Office of Workers' Compensation Programs.

That distinguishes this case from those where the Board has held that a party forfeits an issue by failing to raise it in its opening brief. *See, e.g., Motton v. Huntington Ingalls Indus., Inc.*, 52 BRBS 69, 69 n.1 (2018); *Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995).

The Board has discretion to prescribe informal procedures to be followed when a party is not represented by counsel, 20 C.F.R. §802.220, and "may, depending upon the particular circumstances, prescribe an alternate method of furnishing such information as may be necessary for the Board to decide the merits of any such appeal." 20 C.F.R. §802.211(e). Here, as the Director notes, "[t]he Board's July 25 [letter] asked only if the claimant wanted the *Lucia* issue considered, and explained that the Board will do so only if asked." Director's Response at 1 n.1. In other words, given that claimant was not required to file an opening brief, the Board's letter provided an alternate method for him to inform the Board whether he chose to raise an Appointments Clause challenge.[3] *See* 20 C.F.R. §802.211(e). We therefore reject employer's contention that claimant forfeited the Appointments Clause issue.

The Department of Labor (DOL) has expressly conceded that the Supreme 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. The administrative law judge held a hearing in this case on September 12, 2017, during which he admitted evidence and heard claimant's testimony. Decision and Order at 1, 3.

The appropriate remedy for an adjudication tainted with an appointments violation is a new hearing before a properly appointed official. *Lucia*, 138 S.Ct. at 2055, *citing Ryder v. United States*, 515 U.S. 177, 182-83 (1995). That official must be able to consider the matter as though he had not adjudicated it before. *Lucia*, 138 S.Ct. at 2055. The administrative law judge's presiding over the hearing, receiving evidence, and hearing claimant's testimony involved consideration of the merits, and would be expected to color the administrative law judge's consideration of the case. This therefore tainted the adjudication with an Appointments Clause violation requiring remand. 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,

[3] We therefore reject employer's additional argument that the Board raised the Appointments Clause issue sua sponte for claimant. Employer's Response at 3.

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

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge