U.S. Department of Labor

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

BRB Nos. 18-0373 BLA
and 18-0374 BLA

LINDA S. SCOTT (o/b/o and Widow of KENNETH G. SCOTT, SR.)	)	
Claimant-Respondent	)	
v.	)	
MEG-LYNN LAND COMPANY, INCORPORATED	)	DATE ISSUED: 05/29/2019
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 Morris D. Davis, Administrative Law Judge, United States Department of Labor.

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

Cody F. Fox (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Rita A. Roppolo (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 (2012-BLA-05426 and 2013-BLA-05595) of Administrative Law Judge Morris D. Davis rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim[1] filed on March 24, 2010, and a survivor's claim filed on November 14, 2012.[2] This case is before the Board for the second time.

In a Decision and Order issued May 16, 2016, the administrative law judge denied benefits in the miner's claim and the survivor's claim. Pursuant to appeals filed by the Director, Office of Workers' Compensation Programs (the Director), the Board affirmed, as unchallenged, the administrative law judge's finding that the miner had 7.72 years of coal mine employment.[3] The Board vacated, however, his findings that the autopsy and medical opinion evidence does not establish the existence of pneumoconiosis, and remanded the miner's claim for further consideration. In the survivor's claim, the Board vacated his finding that the evidence does not establish that the miner's death was due to pneumoconiosis, and remanded the case for further consideration. *Scott v. Meg-Lynn Land Co.*, BRB Nos. 16-0500 BLA and 16-0501 BLA (May 25, 2017) (unpub.).

On remand, the administrative law judge found that the autopsy and medical opinion evidence establishes clinical and legal pneumoconiosis.[4] He further found the

[1] The miner's previous claim, filed on February 29, 2000, was finally denied by the district director on May 18, 2000 because the evidence did not establish the existence of pneumoconiosis. Director's Exhibit 1.

[2] The miner died on November 2, 2012, while his second claim was pending before the Office of Administrative Law Judges. Director's Exhibit 4 (Survivor's Claim). Claimant, the miner's widow, is pursuing his claim on behalf of his estate, as well as her survivor's claim. The Board consolidated these appeals for purposes of decision only. *Scott v. Meg-Lynn Land Co.*, BRB Nos. 18-0373 BLA and 18-0374 BLA (June 28, 2018) (Order) (unpub.).

[3] The Board noted that because the miner established fewer than fifteen years of coal mine employment, claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012). *Scott v. Meg-Lynn Land Co.*, BRB Nos. 16-0500 BLA and 16-0501 BLA, slip op. at 3 (May 25, 2017) (unpub.).

[4] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent

miner was totally disabled due to pneumoconiosis and awarded benefits. Having awarded benefits in the miner's claim, he found claimant derivatively entitled to survivor's benefits pursuant to Section 422(*l*).

In the present appeal, employer argues the administrative law judge lacked the authority to hear and decide the case because he was not appointed in accordance with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[5] Employer therefore requests that the case be remanded for reassignment to a different, properly appointed administrative law judge.[6] Claimant responds in support of the awards of benefits, asserting the administrative law judge had the authority to adjudicate this claim. The Director responds that, in light of recent case law from the United States Supreme Court, employer's contention has merit. Director's Brief at 3.

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,

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deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[5] 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.

Art. II, § 2, cl. 2.

[6] Employer also challenges the administrative law judge's findings that the autopsy and medical opinion evidence establish the existence of pneumoconiosis, and that the miner was totally disabled due to pneumoconiosis. Employer further challenges the award of derivative benefits in the survivor's claim. Employer's Brief at 7-22 (unpaginated). We need not address these arguments in light of our disposition of this appeal.

and in accordance with applicable law.[7] 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 the administrative law judge issued his Decision and Order Awarding Benefits on remand, the Supreme Court held in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018), that Securities and Exchange Commission (SEC) administrative law judges are "inferior Officers" under the Appointments Clause of the Constitution. Because the SEC administrative law judge's appointment was not consistent with the Appointments Clause and the petitioner timely raised his challenge, the Court held he was entitled to a new hearing before a new and properly appointed administrative law judge. *Id.*

In light of *Lucia*, the Director argues that "in cases in which an 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 (DOL) administrative law judge]." 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 DOL administrative law judges on December 21, 2017.[8] *Id.* Because the administrative law judge took significant actions before the Secretary's ratification on December 21, 2017,[9] however, the Secretary's ratification did not foreclose the Appointments Clause argument raised by employer. 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

[7] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 32 at 20-22.

[8] Employer asserts 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 5-6 (unpaginated). We decline to address this contention as premature.

[9] The administrative law judge held a hearing on August 11, 2015, during which he admitted evidence and heard claimant's testimony. He also rendered findings in his decision and order on May 16, 2016.

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 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.[10]

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[10] On July 23, 2018, claimant's counsel filed an attorney fee application, requesting a fee for services performed during the previous appeals to the Board in BRB Nos. 16-0500 BLA and 16-0501 BLA pursuant to 20 C.F.R. §802.203. We decline to consider claimant's counsel's request for fees at this time. Counsel is entitled to fees for services only if there has been a successful prosecution of the claim. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993). Because we have vacated the administrative law judge's award of benefits, there has not yet been a successful prosecution of this claim. If, on remand, the administrative law judge again awards benefits, claimant may submit a revised fee petition for attorney's fees for work performed before the Board. 20 C.F.R. §802.203(c).