No. 20-3331

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

H&P COAL COMPANY;
AMERICAN RESOURCES INSURANCE COMPANY

Petitioners

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

and

CECIL MAE MABE

Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

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BRIEF FOR THE FEDERAL RESPONDENT

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION

This case involves a 2012 claim for disability benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944, filed by former coal miner Bill Wayne Mabe. On October 30, 2018, United States Department of Labor (DOL) Administrative Law Judge Peter B. Silvain, Jr. (the ALJ) issued a decision and order awarding benefits to Mr. Mabe and ordering H&P Coal Company, the

miner's former employer, and its insurance carrier, American Resources Insurance Company (collectively H&P), to pay the awarded benefits. H&P appealed this decision to DOL's Benefits Review Board (Board) on November 12, 2018, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). The Board had jurisdiction to review the decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

The Board affirmed Mr. Mabe's award on January 28, 2020. H&P then petitioned this Court for review on March 25, 2020, within sixty days of the Board's decision. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in the circuit where the injury occurred. Mr. Mabe was exposed to coal-mine dust–the injury contemplated by 33 U.S.C. § 921(c)–in the Commonwealth of Kentucky, within this Court's territorial jurisdiction.

STATEMENT OF THE ISSUE

The Appointments Clause provides that Congress may authorize inferior officers to be appointed by "the President," the "Courts of Law," and the "Heads of Departments." U.S. Const. art. II, § 2, cl. 2. H&P argues in its opening brief that the ALJ's decision awarding benefits should be vacated because the ALJ was not properly appointed. It relies on the Supreme Court's decision in *Lucia v. Securities*

& Exchange Commission, __ U.S. __, 138 S.Ct. 2044, 201 L.Ed.2d 464 (2018) (holding that SEC ALJs had not been appointed in a constitutional manner and requiring remand for a new hearing before a different SEC ALJ). The company did not raise this argument before the ALJ, even though *Lucia* had been issued while the case was pending before him. Instead, H&P waited until the ALJ issued a decision adverse to its interests to challenge his appointment before the Board.

The question presented is whether H&P forfeited its Appointments Clause argument by failing to raise it before the ALJ.

STATEMENT OF THE CASE

Mr. Mabe filed this claim for federal black lung benefits on January 23, 2012.[1] A.18 (summarizing procedural history). On September 26, 2012, a district director of the Department's Office of Workers' Compensation Programs (OWCP) made a preliminary determination that Mr. Mabe was entitled to benefits. Federal Respondent's Separate Appendix (SA) 65-67.

H&P responded by requesting a *de novo* hearing before the Office of Administrative Law Judges. In its hearing request, H&P identified numerous

[1] This is Mr. Mabe's third BLBA claim for benefits. His first claim was finally denied in May 1990. *See* Petitioner's Appendix at (A.) 18 (summarizing prior claim). His second claim was finally denied in November 2003. *Id.* Because black lung disease may worsen over time, *see* 20 C.F.R. § 718.201(c), a miner may file a subsequent claim at least one year after the effective date of a prior denial of benefits. 20 C.F.R. § 725.309(c); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 485–86 (6th Cir. 2012).

grounds challenging both Mr. Mabe's entitlement to benefits and its liability for them. SA. 68-71. H&P's hearing request referenced and incorporated objections from a previously-filed "Response and Controversion" pleading, which raised a "res judicata and/or collateral estoppel" defense and challenged application of "Section 1556 of the Patient Protection and Affordable Care Act, P.L. 111-148 (2010).[2] SA.71, 76-83, 85-89. In neither its hearing request nor prior controversion did H&P challenge the DOL ALJ's authority to decide this case under the Appointments Clause.

On December 11, 2015, the ALJ issued a comprehensive Notice of Hearing and Pre-Hearing Order. SA.90-95. The Notice informed the parties of their prehearing responsibilities, including discovery obligations, and referred the parties to the Rules of Practice and Procedure before the Office of Administrative Law Judges. SA.91 n.4. Following motions practice on evidentiary issues, the parties agreed to forgo a hearing and have the ALJ decide the case on the record. On May 2, 2017, the ALJ granted their request and issued an order memorializing their agreement to a decision on the record. SA.96-98. That order also provided a final schedule for the submission of the parties' evidence and a deadline for the

[2] The PPACA reinstated 30 U.S.C. § 921(c)(4), which provides a rebuttable presumption of total disability or death due to pneumoconiosis for certain miners and their survivors. *Zurich Am. Ins. Group v. Duncan*, 889 F.3d 293, 297 n.1 (6th Cir. 2018). The ALJ did not rely on this provision in awarding benefits. *Infra* n.5.

filing of closing briefs. *Id*. The parties duly submitted their evidence to the ALJ, and H&P submitted a closing brief.[3] SA.99-118; *see also* A.18 n.5 (summarizing course of events).

In its closing brief, filed on August 25, 2017, H&P argued that Mr. Mabe worked as a coal miner for 14.75 years, that he did not have pneumoconiosis, and that his disability was not due to pneumoconiosis. SA.99-118. Again, H&P made no mention of the Appointments Clause or the ALJ's authority to decide the case.

On December 21, 2017, the Secretary of Labor (Secretary) ratified the ALJ's appointment in conformity with DOL's conclusion that its ALJs were inferior officers of the United States who must be so appointed.[4] On June 21, 2018, the Supreme Court announced in *Lucia v. S.E.C.*, __ U.S. __, 138 S.Ct. 2044, 2055 (2018), that the remedy for an Appointments Clause violation was reassignment to a different, properly appointed ALJ.

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[3] When this case was before the ALJ, Mr. Mabe was represented by a lay representative of Stone Mountain Health Services who did not file a closing brief. *See* A.17, 18 n.5.

[4] *See* Sec'y of Labor's Decision Ratifying the Appointments of Incumbent U.S. Dept. of Labor Administrative Law Judges (Dec. 20, 2017), available at https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Memorandum_on_Ratification_of_Appointment_of_USDOL_ALJs_(Dec_20_2017).pdf (last visited Oct. 7, 2020); *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 744 (6th Cir. 2019).

On October 30, 2018, more than a year after H&P filed its closing brief and four months after *Lucia*, the ALJ issued a decision and order awarding benefits to Mr. Mabe.[5] Additionally, given that his authority had not been timely challenged, the now-properly-appointed ALJ believed it appropriate to in turn ratify his prior actions.[6] A.18 n.5.

H&P timely appealed the ALJ's decision to the Board on November 12, 2018.[7] The company's opening brief, filed on February 6, 2019, raised for the first time a constitutional challenge to the ALJ's appointment. On May 10, 2019, while the case was pending before the Board, Mr. Mabe died. *See* R.15 (advising this Court of Mr. Mabe's death and substituting his widow, Cecil Mae Mabe, as the proper party). On January 28, 2020, the Board affirmed the ALJ's decision, ruling,

[5] The ALJ found that Mr. Mabe suffered from COPD significantly related to or substantially aggravated by his coal mine employment, or "legal pneumoconiosis" within the definition of 20 C.F.R. § 718.201(a)(2), and that he was totally disabled by the disease. A.30-32, 59-62.

[6] *Lucia*, of course, made clear that an ALJ's self-ratification is not an adequate remedy when a timely and valid Appointment Clause challenge is raised. *See* 138 S.Ct. at 2055 nn.5-6.

[7] H&P's opening brief before this Court mischaracterizes the timing of its Board appeal as it relates to *Lucia*: "By that time [of its Board appeal], the Supreme Court had held that . . . proceedings officiated by an illegally appointed ALJ were to be readjudicated *de novo* by a properly appointed ALJ." Opening Brief (OB) at 2. *Lucia* had revealed the full extent of the remedy in June 2018, four months before the ALJ's October 2018 decision, and well before H&P's Board appeal.

as relevant here, that H&P forfeited its challenge to the ALJ's authority under the Appointments Clause by not first raising it before the ALJ himself. A.11.

H&P petitioned this Court for review on March 25, 2020. A.1. In its opening brief, H&P asserts, based on *Lucia*, that the ALJ was not properly appointed, and that the remedy is to vacate the award and remand the case for a new hearing and decision before a different, properly-appointed ALJ. H&P further asserts that it was not required to first raise its Appointments Clause challenge before the ALJ.

SUMMARY OF THE ARGUMENT

H&P could have had the relief it now seeks before this Court–a new hearing before a different ALJ–simply by asking for it while the case was before the ALJ. All of the pieces of the puzzle were in place at that time. Instead, it stayed silent. As a result, H&P forfeited its Appointments Clause challenge.

In *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 746-47 (6th Cir. 2019), this Court identified three ways in which issue exhaustion may arise under a particular administrative scheme: by statute, by regulation, or in the absence of these two, by a prudential, judicially-imposed rule. DOL regulations governing the conduct of ALJ decision-making under the BLBA, notably 20 C.F.R. §§ 725.309, 725.463, and 29 C.F.R. § 18.80, require parties to identify contested issues for adjudication by the ALJ or risk their forfeiture. These regulations function in the same way as

20 C.F.R. § 802.211, which this Court held in *Bryan* requires issue exhaustion before the Board. As in *Bryan*, therefore, the Court need not look beyond DOL regulations to enforce an exhaustion requirement in ALJ proceedings under the BLBA.

That said, the Court may also find an exhaustion requirement under the third method. "The basis for a judicially imposed issue-exhaustion requirement is an analogy to the rule that appellate courts will not consider arguments not raised before trial courts." *Sims v. Apfel*, 530 U.S. 103, 108 (2000). That analogy applies to BLBA proceedings, which are adversarial in nature, require the parties to submit evidence and identify the issues, and restrict administrative appellate review to issues the parties specify in their opening Board briefs. Forty years of binding Board precedent–in all manner of cases–has reiterated this exhaustion requirement in ALJ black lung proceedings, and the judiciary, including this Court, has affirmed those decisions.

H&P's arguments for excusing its forfeiture lack merit. The company never objected to the ALJ's appointment during the more than three years this claim was pending before him, including the more than four months between *Lucia* and the ALJ's decision. H&P did not object to the adjudication of its rights by an improperly appointed officer of the United States until after that officer ruled against it–a clear case of sandbagging this Court should not reward. Moreover,

H&P points to no circumstance that would excuse its failure to raise this issue earlier. Its argument that it was futile to raise the challenge is obviously misplaced, given that other parties raised challenges and obtained relief at the same time that H&P remained studiously silent.

The Court should reject H&P's arguments to the contrary and deny its petition for review.

ARGUMENT

H&P'S ARGUMENT–THAT THE DECISIONS BELOW MUST BE VACATED BECAUSE THE ALJ WAS NOT APPOINTED IN ACCORDANCE WITH THE APPOINTMENTS CLAUSE–SHOULD BE REJECTED.

A. Standard of Review

Whether H&P forfeited its Appointments Clause argument by failing to raise it before the ALJ is a question of law. This Court reviews questions of law *de novo*. *Arch of Kentucky, Inc. v. Director, OWCP*, 556 F.3d 472, 477 (6th Cir. 2009); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 508 (6th Cir. 2003).

B. H&P forfeited its Appointments Clause challenge when this claim was pending before the ALJ.

This Court made clear in *Jones Bros. v. Sec. of Labor*, 898 F.3d 669, 674-77 (6th Cir. 2018), and in *Bryan*, 937 F.3d at 753, that Appointments Clause challenges are subject to administrative forfeiture on the same terms as other types of claims. Thus, the only question before the Court is whether there exists an

administrative exhaustion requirement before DOL ALJs in black lung proceedings.

In *Bryan*, this Court further observed that the Supreme Court has identified "three categories of statutory schemes" that give rise to an "issue exhaustion" requirement within an administrative system. 937 F.3d at 746 (citing *Sims*, 530 U.S. at 107-110); *accord Ramsey v. Comm'r of Social Security*, __ F.3d __, 2020 WL 5200979, *2 (6th Cir. 2020). Under the first category, issue exhaustion is a "creature[] of statute," *Ramsey*, 2020 WL 5200979, *2, whereby Congress imposes an explicit or general mandate. *Bryan*, 937 F.3d at 746-47. The second category involves statutes that "say nothing about exhaustion, but permit agencies to adopt regulations detailing their internal claims-processing rules" so long as the applicable regulation "comport[s] with the statute under which it arose" and is not applied incorrectly or arbitrarily by the agency. *Bryan*, 937 F.3d at 747. Under the final category, issue exhaustion, although not explicit in the statutory scheme, is fairly implied from it. *Id.* at 747; *Ramsey*, 2020 WL 5200979, *3.

Black lung proceedings before DOL ALJs require issue exhaustion under the second and third categories. In regard to the second category, BLBA program regulations, as well as the regulations governing DOL ALJs generally, direct the parties to identify the issues to be adjudicated by the ALJ. Accordingly, the Board, which functions as an appellate administrative body that reviews ALJ decisions,

has long declined to consider issues not raised before the ALJ. As to category three, BLBA claims, unlike the Social Security claims addressed in *Ramsey*, are adversarial contests. The parties, who are typically represented by licensed attorneys, are expected to develop their cases through several levels of adjudication, and thereby limit the issues for review by the Board and then the courts of appeals, much as litigants in Article III courts must raise issues at trial before seeking relief in the courts of appeals.

This Court has already found issue exhaustion in two stages of black lung proceedings. *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254 (6th Cir. 2018) held that Appointments Clause challenges must be timely raised in an opening brief before this Court, and *Bryan* likewise held that they must be timely raised in opening briefs before the Board. Based on the reasoning adopted in *Island Creek Coal* and *Bryan*, those challenges must also be timely raised before the ALJ.

1. ALJ adjudications of BLBA claims have a regulatory exhaustion requirement.

Litigation of BLBA claims before the Office of Administrative Law Judges (OALJ), like litigation before the Board, is bound by a regulatory issue exhaustion requirement expressed through a number of regulations. These rules create a system of progressive issue exhaustion meant to narrow the issues for consideration by the ALJ, the Board, and the courts, by requiring parties to dispute them or lose their right to do so.

As an initial matter, the private parties to a BLBA claim are expected to develop the issues in their cases at the very beginning, while the claim is pending before the district director.[8] For example, after a claim is filed, a potentially-liable operator receives a notice of the claim, and later, the designated operator must respond within 30 days by disputing its designation or waive the right to challenge it in future proceedings. *See* 20 C.F.R. §§ 725.408(a)(3); 725.412(a)(2); *see also Appleton & Ratliff Coal Corp. v. Ratliff*, 664 Fed. App'x 470, 475 (6th Cir. Nov. 15, 2016) ("Because A&R failed to timely contest its liability under the Department of Labor's unchallenged regulations, it is precluded from doing so now."). Similarly, the parties are expected to submit their own evidence in response to the district director's preliminary analysis of the case. 20 C.F.R. §§ 725.410(a)(2), (b); 725.414. Once they have done so and "all contested issues, if any, are joined," the district director then issues a proposed decision and order deciding the claim. 20 C.F.R. § 725.418(a). This decision will then become final if not challenged by a dissatisfied party within 30 days. 20 C.F.R. § 725.419(d). A party who wishes to receive *de novo* review by an ALJ must "specify the findings

[8] Administrative review of a BLBA claim begins with an OWCP district director. A district director is authorized to "take such action as is necessary to develop, process, and make determinations with respect to the claim." 20 C.F.R. § 725.401. The district director typically undertakes the initial collection of evidence related to a miner's employment and health, and develops liability evidence related to the identification of the responsible operator. 20 C.F.R. §§ 725.405-407.

and conclusions with which the responding party disagrees." 20 C.F.R. § 725.419(b). In forwarding the claim file to the OALJ, the district director must transmit a "statement . . . of contested and uncontested issues in the claim." 20 C.F.R. § 725.421(b)(7).

Against this backdrop, the case proceeds to OALJ, where additional regulations further restrict the issues for decision. Significantly, the purpose of the ALJ hearing "shall be to resolve contested issues of fact or law." 20 C.F.R. § 725.455(a). Moreover, section 725.463, entitled "Issues to be resolved at hearing; new issues," specifies that "the hearing shall be confined to those contested issues which have been identified by the district director (see § 725.421) or any other issue raised in writing before the district director." 20 C.F.R. § 725.463(a). This section also strictly regulates the ALJ's consideration of new issues:

> An administrative law judge may consider a new issue only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director. Such new issue may be raised upon application of any party, or upon an [ALJ's] own motion, with notice to all parties, at any time after a claim has been transmitted by the district director to the Office of Administrative Law Judges and prior to decision by an [ALJ]. If a new issue is raised, the [ALJ] may, in his or her discretion, either remand the case to the district director with instructions for further proceedings, hear and resolve the new issue, or refuse to consider such new issue.

20 C.F.R. § 725.463(b). Section 725.463 thus requires that parties must raise before the ALJ any issues not previously "joined" or identified by the district director in order to have them considered by the ALJ.

General DOL regulations governing procedure before the OALJ also require the parties to identify the issues for adjudication. These rules mandate that each party file a "prehearing statement" at least 21 days before the hearing unless otherwise ordered by the presiding ALJ.[9] 29 C.F.R. § 18.80(a). The prehearing statement must identify, *inter alia*, "[t]he issues of law to be determined with reference to the appropriate statute, regulation, or case law," the facts in dispute, as well as any stipulations, and exhibits. 29 C.F.R. § 18.80(c). The parties must also include "a precise statement of the relief sought." *Id*. In practice, one function of the prehearing statement in BLBA claims is to identify any "new issue[s]" to be presented to the ALJ pursuant to 20 C.F.R. § 725.463; it also serves to put the opposing party on notice of the issues they will need to prove or disprove.

One final regulation confirms the existence of an issue exhaustion requirement in ALJ proceedings. A "subsequent claim," like the one in this case, may proceed if, as a threshold matter, the claimant establishes a previously-denied

[9] The general OALJ rules apply unless inconsistent with a "governing statute, regulation, or executive order." 29 C.F.R. § 18.10(a). Here, the ALJ's Notice of Hearing reminded the parties of the applicability of the OALJ procedural rules at 29 C.F.R. Part 18. *See* SA.91 n.4.

element of entitlement with new evidence. 20 C.F.R. § 725.309(c); *Banks*, 690 F.3d at 485-86. Once a claimant does so,

> no findings made in connection with the prior claim, *except those based on a party's failure to contest an issue (see § 725.463)* will be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim will be binding on that party in the adjudication of the subsequent claim.

20 C.F.R. § 725.309(c)(5) (emphasis added). The regulation thus explicitly anticipates and accounts for forfeiture of issues in future proceedings. The cross-reference to section 725.463 moreover makes clear that this regulation is the mechanism for issue exhaustion in ALJ hearings. *See Arkansas Coals, Inc. v. Lawson*, 739 F.3d 309, 320 (6th Cir. 2014) (holding that the Director's identification and contest of responsible operator designation satisfied section 725.463 for purposes of relitigating issue in a subsequent claim).

Taken together, 20 C.F.R. §§ 725.309, 725.463, and 29 C.F.R. § 18.80, require parties in black lung proceedings before the ALJ to identify contested issues for adjudication by the ALJ or risk their forfeiture. These operate in the same way as 20 C.F.R. § 802.211, which *Bryan* held required issue exhaustion before the Board. Just as in *Bryan*, the Court need not look beyond the second category to find a regulatory exhaustion requirement in ALJ proceedings.

2. Requiring prudential issue exhaustion before the ALJ in BLBA claims is consistent with *Sims* and *Ramsey*.

"The basis for a judicially imposed issue-exhaustion requirement is an analogy to the rule that appellate courts will not consider arguments not raised before trial courts." *Sims*, 530 U.S. at 108. "Where the parties are expected to develop the issues in an adversarial administrative proceeding, . . . the rationale for requiring issue exhaustion is at its greatest." *Id*. at 109. Sections 18.80, 725.309, and 725.463, although sufficient on their own to create regulatory exhaustion, are part of a comprehensive body of procedural norms and Board case law forming a two-tiered administrative system of trial and appellate review in BLBA claims that mirrors "normal adversarial litigation" before the courts. This tradition goes back more than forty years, and the Court should formally recognize it by enforcing a judicially-imposed "prudential" issue exhaustion requirement.

In *Ramsey v. Comm'r of Social Security*, Nos. 19-1579, 1581, 1586, 1889, 1977, 3886, __F.3d__, 2020 WL 5200979 (6th Cir. 2020), this Court held that claimants in Social Security Administration (SSA) cases need not raise an Appointments Clause challenge to an SSA ALJ's authority before the ALJ. 2020 WL 5200979, *7; *accord Cirko v. Comm'r of Social Security*, 948 F.3d 148 (3d Cir. 2020); *but see Carr v. Comm'r of Social Security*, 961 F.3d 1267 (10th Cir. 2020), petition for cert. filed July 1, 2020 (No. 19-1442) (holding Appointments Clause challenges must be raised before SSA ALJ), and *Davis v. Comm'r of Social*

Security, 963 F.3d 790 (8th Cir. 2020), petition for cert. filed July 29, 2020 (No. 20-105) (same). In so holding, the Court determined that "both the nature of the claim presented and characteristics of the particular administrative procedure provided . . . . weigh[ed] against imposing an exhaustion requirement for Appointments Clause challenges." *Ramsey*, 2020 WL 5200979, *3 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992)). In BLBA cases, both factors cut the other way. *See Ramsey*, 2020 WL 5200979, *7 and n.1 (noting *Ramsey's* "narrow" holding "in no way decides whether a similar result would be appropriate for Appointments Clause challenges to the ALJs of other administrative agencies.").

a. Characteristics of the Black Lung Administrative Scheme

Unlike "inquisitorial" Social Security proceedings, BLBA adjudications are "highly" adversarial. *U.S. Dep't of Labor v. Triplett,* 494 U.S. 715, 733 (1990) (Marshall, J., concurring); *Conley v. Nat'l Mines Corp.*, 595 F.3d 297 (6th Cir. 2010) ("The Black Lung Benefits Act creates an adversarial administrative procedure designed to require mining companies to pay [entitled] miners."); *Eastover Min. Co.*, 338 F.3d at 308 (same); *Director, OWCP v. Bivens*, 757 F.2d 781 (6th Cir. 1985) (explaining that the BLBA's attorney fee shifting is only appropriate in adversarial proceedings); *Fox ex rel. Fox v. Elk Run Coal Co., Inc.* 739 F.3d 131, 133 (4th Cir. 2014) (observing that request for ALJ hearing initiates

adversarial process that continues through proceedings before the Board); *id*. at 137 (explaining that "it falls to each party to shape and refine its case, subject of course to the risk that its adversary will discredit it"); *Day v. Johns Hopkins Health Corp.*, 907 F.3d 766, 770 (4th Cir. 2018) (BLBA "proceedings between the miner and the company borrow heavily from judicial process. The miner and coal company are situated as adversaries."); *BethEnergy Mines, Inc. v. Cunningham*, 104 Fed. App'x 881, 883-84 (4th Cir. 2004) (enforcing stipulation on statute of limitations and noting that issue exhaustion is favored in black lung cases under *Sims* because "ALJ hearings are adversarial").[10] Indeed, there can be little question that an adversarial relationship exists given that it is private industry–coal companies and their insurers–operating under a profit motive that is primarily

[10] In *Day v. Johns Hopkins Health Corp.*, the Fourth Circuit summarized some of the BLBA's adversarial OALJ procedures:

> Each party can present evidence, offer witnesses, cross-examine adverse experts, and brief its case. [20 C.F.R.] §§ 725.414; 725.455(d); 725.457(a). For its part, the ALJ possesses such judicial powers as the authority to administer oaths, issue subpoenas, and direct discovery proceedings, among other things. *Id.* §§ 725.351; 725.455(b). After the hearing, the ALJ must set forth a decision and order containing "a statement of the basis for the order, findings of fact, [and] conclusions of law." *Id.* § 725.477.

907 F.3d at 770.

responsible for the payment of BLBA benefits. *See, e.g. Arkansas Coals*, 739 F.3d at 311.[11]

In addition to the specific adversarial procedures discussed above, *supra* n.10, ALJ proceedings in BLBA cases possess many of the same procedures utilized in deportation proceedings, which this Court has said "bear a strong resemblance to judicial trials." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 698-99 (6th Cir. 2002). Among the similarities: parties to a BLBA ALJ proceeding are served with a Notice of Hearing informing them of the date of the hearing, a schedule for discovery, and the consequences of failure to appear, 20 C.F.R. § 725.453; the proponent of any issue must prove its case by a preponderance of evidence, *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 279-80 (1994*)*; and the ALJ's role is to be a neutral arbiter of the evidence, *see Consolidation Coal Co. v. Williams*, 453 F.3d 609, 618-621 (4th Cir. 2006) (applying bias-recusal standard for Article III district court judges to ALJ who adjudicated a BLBA claim); 20 C.F.R. § 725.458 (providing for the taking of witness testimony through interrogatory or deposition according to the rules of practice of Federal district courts).

[11] Indeed, this Court has cautioned that black lung litigation can become so adversarial that that it may require occasional checks. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993) ("If such a system [which at that time barely regulated the admission of medical evidence] continues unchecked, justice will not be served, while moneyed interests thrive.").

A further analogy to court litigation is the fact that parties in BLBA cases are generally represented before an ALJ, and almost always by an attorney. The BLBA itself and program regulations even incentivize legal representation of claimants (and employers to oppose their claims) by providing for the payment of claimants' attorney's fees when victorious. 33 U.S.C. § 928 (incorporated by 30 U.S.C. § 932(a)); 20 C.F.R. §§ 725.366, 725.367. And a provision prohibiting the compromise of BLBA claims, 20 C.F.R. § 725.620(d), further cements the adversarial relationship between claimants and employers by prohibiting settlements for less than the full amount of a claim.[12]

Given these statutory, regulatory, and judicially-enforced limitations on its review authority, the Board has long-imposed a prudential exhaustion requirement on all manner of factual, evidentiary, and legal questions not raised before the ALJ. *See, e.g.*, *Dankle v. Duquesne Light Co.*, 20 Black Lung Rep. 1-1, 1995 WL 17049134, *1-2 (Ben. Rev. Bd. 1995) (parties waive objection to the admission of evidence–even when the inclusion of that evidence in the record is disfavored by regulation–if they do not challenge it before the ALJ); *Prater v. Director, OWCP*, 8

[12] The trial-court quality of ALJ hearings is reinforced by the Board's limited standard of review. Unlike the SSA's Appeals Council, which undertakes *de novo* review, the Board must treat as "conclusive" ALJ findings of fact that are supported by substantial evidence. 33 U.S.C. § 921(b)(3). The statute accordingly "circumscribes the Board's review" so that parties do not get a "do over" with that body. *Bryan*, 937 F.3d at 750.

Black Lung Rep. 1-461, 1986 WL 66307, *1 (Ben. Rev. Bd. 1986) (party who fails to object to the expansion of contested issues under 20 C.F.R. § 725.463 prior to decision by the ALJ waives the right to appeal whether that expansion was appropriate); *McKinney v. Benjamin Coal Co.*, 6 Black Lung Rep. 1-529, 1-531 (1983) (relationship of disease to employment with a particular past employer waived because not challenged before the ALJ); *Taylor v. 3D Coal Co.*, 3 Black Lung Rep. 1-350, 1-355 (1981) (opposition to consolidation for decision of miner's and survivor's claims waived); *Martin v. Island Creek Coal Co.*, 2 Black Lung Rep. 1-276, 1-280 (1979) ("Whether the question is one of fact or of law, a party cannot claim to be aggrieved on appeal when it waived its opportunity to be heard on the issue below."). Even the Director is precluded from raising issues for the first time on appeal to the Board. *Bernardo v. Director, OWCP*, 9 Black Lung Rep. 1-97, 1986 WL 66249, *1 (Ben. Rev. Bd. 1986); *Abbott v. Director, OWCP*, 13 Black Lung Rep. 1-15, 1989 WL 245227, *1 (Ben. Rev. Bd. 1989) (Director waived opposition to attorney fee petition for work performed before ALJ.).[13]

[13] The Board and courts have allowed certain exceptions to this policy, such as where a pertinent statute has been overlooked below, *Walker Mfg. Co. v. Dickerson, Inc.*, 560 F.2d 1184, 1187 n.2 (4th Cir. 1977), or where a change in law occurred while the case was already pending *on appeal*. *Reilly v. Dir., OWCP*, 7 Black Lung Rep. 1-139 (1984). Before the Board, H&P did not make, and therefore forfeited, any argument that an exception to the general rule applied here. *Bryan*, 937 F.3d at 750.

In short, by requiring parties to raise issues before the ALJ, the Board has behaved exactly like an appellate court, a practice that this Court has not only recognized, *but enforced*. *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 215 (6th Cir. 1996) (noting that "[t]he standards of review for the [Benefits Review Board] and this court are the same"); *Manbeck v. Consolidation Coal Co.*, 884 F.2d 580 (Table), 1989 WL 98476, *2 (6th Cir. Aug. 24, 1989) (unpub.) (upholding Board's finding that claimant waived argument before ALJ and equating ALJ/Board relationship to that of trial/appellate courts); *Island Fork Constr. v. Bowling*, 872 F.3d 754, 757-58 (6th Cir. 2017) (party in BLBA claim forfeited challenge to personal jurisdiction by failing to raise it before the ALJ or the Board); *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 727-28 (6th Cir. 1986) (claimant failed to preserve issue of ALJ's alleged bias by not raising it in second proceeding before the ALJ after Board's initial remand).

Other courts of appeals have likewise enforced issue exhaustion before the ALJ, either under the BLBA or the procedurally-related Longshore and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. §§ 901-950.[14] *See Bourgeois v. Director*, OWCP, 946 F.3d 263, 265-66 (5th Cir. 2020) (refusing to consider argument on issue because "[the claimant] fails to point to any portion of the record that demonstrates that he asserted this claim before the ALJ");

[14] *See* 30 U.S.C. § 932(a) (incorporating numerous provisions of the LHWCA).

Consolidation Coal Co. v. Director, OWCP, 732 F.3d 723, 730 (7th Cir. 2013) (refusing to review challenge to validity of regulations not raised before the ALJ); *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1009 (7th Cir. 1996) (refusing to review petitioner's challenge to progressive nature of the claimant's pneumoconiosis because it was not raised before the ALJ); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 1081 (9th Cir. 1988) (affirming Board's refusal to consider an issue first raised on appeal); *Long v. Director, OWCP*, 767 F.2d 1578, 1583 (9th Cir. 1985) (refusing to consider argument that claimant's due process rights were violated by inability to cross-examine affiant and noting that "the error, if any, might have been avoided if the issue was raised before the ALJ"); *Newport News Shipbuilding & Dry Dock Co. v. Gillus*, 84 Fed. App'x 333, 334 (4th Cir. Jan. 5, 2004) (unpub.) (waiver of issue under LHWCA because petitioner failed to raise it in motion for reconsideration to the ALJ). In fact, in *Perkins v. Marine Terminals Corp.*, the Ninth Circuit went so far as to find that the Board "was . . . without authority to raise and decide" a non-jurisdictional issue that had not been raised before the ALJ. 673 F.2d 1097, 1101 (9th Cir. 1982). Clearly, there is a long history of judicial enforcement of issue exhaustion in ALJ proceedings. Since an Appointments Clause challenge is non-jurisdictional, *Jones Bros.*, 898 F.3d at 678, it can hardly be error for the Board to adhere to its longstanding practice of requiring issue exhaustion in ALJ proceedings under the BLBA.

In sum, the BLBA administrative structure is clear–ALJ hearings are trials, and petitions to the Board are appeals reviewed under an appropriate appellate standard. Just as this Court will not address an Appointments Clause challenge not raised in an opening brief, *Island Creek Coal Co.*, 910 F.3d at 256, Board regulations require litigants to specifically raise issues in their opening brief or forfeit them. *Bryan*, 937 F.3d at 749-50. BLBA ALJ proceedings are therefore completely unlike those under the Social Security Act, which this Court concluded do not depend on the parties to raise and contest the issues for decision. *Ramsey*, 2020 WL 5200979, *4 (SSA regulations "*suggest* [SSA] does not depend on individual claimants to flag issues for review") (emphasis added). If "[t]he basis for a judicially imposed issue-exhaustion requirement is an analogy to the rule that appellate courts will not consider arguments not raised before the trial courts," *Sims*, 530 U.S. at 108, then the analogy could not be stronger than it is in BLBA cases.[15]

[15] Given the obvious and significant differences in the BLBA and SSA administrative schemes, there is little reason to closely parse and distinguish *Ramsey*. Nonetheless, the Director believes the majority opinion in *Ramsey* overreads Justice O'Connor's concurrence in *Sims*. The crux of her concurrence is her finding that the Social Security regulations "affirmatively suggest that specific issues need not be raised before the Appeals Council." *Sims*, 530 U.S. at 113. The *Ramsey* majority finds no issue exhaustion before SSA ALJs in part because "there is nothing in the [SSA] regulations explaining that failing to raise the issue precludes the claimant from seeking a judicial decision on that issue." *Ramsey*, 2020 WL 5200979, *5 (quoting Justice O'Connor's concurrence). But providing no direction or notice (one way or another) is far different than an affirmative

b. Nature of the Claim Presented

In *Ramsey*, this Court determined that the nature of claimant's Appointments Clause challenge in the Social Security context did not weigh in favor of requiring exhaustion before the SSA ALJ because it involved "neither an exercise of discretion, nor an issue within the agency's special expertise," but rather "a question of constitutional law." 2020 WL 5200979, *6. By contrast, the Department of Labor here had taken action well within its authority to correct any Appointments Clause errors and provide appropriate relief *while* H&P's case was pending–but H&P chose not to raise the issue and receive the provided for relief until after the ALJ issued an adverse decision. Eight months before the ALJ's decision here, the Secretary ratified the appointment of the ALJ, in conformance with constitutional standards, *see supra* n.4; four months before the ALJ's decision, *Lucia* set out the constitutional violation and remedy; and in those same intervening post-*Lucia* four months, the Board and DOL ALJs began affording *Lucia* relief to timely Appointments Clause challenges. *See, e.g.*, *McNary v. Black*

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suggestion that an action must be, or need not be taken. More important, to the extent the majority's reasoning demands a regulatory statement that explicitly forecloses judicial review of an unraised issue, it is inconsistent with *Bryan*. There, the Court found Board rule 20 C.F.R. § 802.211(a) (requiring identification of "specific issues to be considered" by the Board) establishes issue exhaustion, even though the regulation does not indicate that the failure to do so will preclude judicial review.

Beauty Coal Co., Case No. 2014-BLA-5373 (ALJ order dated August 22, 2018)[16]; *Mullins v. Prestige Coal Co.*, Inc., Case No. 2017-BLA-6241 (ALJ order dated August 22, 2018)[17]; *Powell v. Garrett Mining, Inc.*, Case No. 2012-BLA-5298 (ALJ order dated August 20, 2018)[18]; *Miller v. Pine Branch Coal Sales, Inc.*, __ Black Lung Rep. (MB) __, 2018 WL 8269864 (Ben. Rev. Bd. 2018) (en banc) (vacating improperly appointed ALJ's award and remanding the case for reassignment to a different ALJ);[19] *Billiter v. J&S Collieries*, BRB No. 18-0256, SA.132-33 (Aug. 9, 2018) (same).

Simply put, by the time the ALJ decided this case, DOL had identified and rectified the problem, the Supreme Court had determined the appropriate remedy, and that remedy had been granted in many cases before the OALJ and Board.

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[16] Available at: https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2014/MCNARY_OLIS_W_v_BLACK_BEAUTY_COAL_CO_2014BLA05373_(AUG_22_2018)_143516_ORDER_PD.PDF (last visited Oct. 7, 2020).

[17] Available at: https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2017/MULLINS_TOLBERT_P_v_PRESTIGE_COAL_CO_DIR_2017BLA06241_(AUG_22_2018)_110106_ORDER_PD.PDF (last visited Oct. 7, 2020).

[18] Available at: https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2012/RICHARDSON_ROGER_F_v_GARRETT_MINING_INC_D_2012BLA05298_(AUG_20_2018)_184501_ORDER_PD.PDF (last visited Oct. 7, 2020).

[19] Available at: https://www.dol.gov/brb/decisions/blklung/published/18-0323.pdf (last visited Sept. 21, 2020).

There was, therefore, no thorny constitutional problem requiring judicial expertise. Rather, the challenge had become an easily-resolved as-applied challenge with a virtually-automatic procedural fix, well within the ALJ's authority in the adjudication of BLBA claims. If H&P had timely asked, it would have received a new hearing by a different, properly-appointed ALJ.[20] Instead, H&P chose to wait to see if the ALJ would issue a decision in its favor. When the ALJ did not do so, only then did H&P belatedly raise it Appointments Clause challenge. *See Ramsey*, 2020 WL 5200979, *8 (Siler, J. dissenting) (explaining that absence of issue exhaustion would permit a "wily lawyer" to "sandbag" and get "two bites at the apple").

Finally, nothing prevented the ALJ from considering a timely Appointments Clause challenge because ALJs routinely address as-applied constitutional challenges in BLBA cases, most commonly under the due process clause.[21] *See, e.g.*, *Gooslin v. Pond Creek Mining Co.*, Case No. 2010-BLA-05752 (OALJ Aug.

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[20] H&P notes that the record and briefing before the ALJ had closed by the time *Lucia* was decided. OB 6. Although correct, this observation is of no import. Nothing prevented the company from bringing its Appointments Clause challenge before *Lucia*. *Island Creek Coal Co.*, 910 F.3d at 257 ("No precedent prevented the company from bringing the constitutional claim before [*Lucia*]. *Lucia* itself noted that existing case law 'says everything necessary to decide this case.' *Id.* at 2053.").

[21] Appointments Clause challenges in BLBA proceedings are as-applied challenges. *Bryan*, 937 F.3d at 753.

4, 2014) (unpub.) (denying motion for reconsideration of earlier remand to the district director, noting movant's due process challenge)[22]; *Farley v. Canada Coal Co., Inc.*, Case Nos. 2016-BLA-05786, 2016-BLA-05835 (OALJ May 7, 2018) (granting motion to strike evidence on due process grounds)[23]. To the extent H&P cites authority for the proposition that ALJs cannot consider constitutional challenges, those cases only note that *facial* challenges are beyond the ALJ's reach. *See Crowell v. Benson*, 285 U.S. 22, 46 (1932) (observing that "cases involving constitutional rights" may be beyond an administrative officer's purview, but doing so in the context of a challenge to the constitutionality of the LHWCA itself); *see also id*. at 36 (describing the nature of the constitutional claim made). As this Court observed previously, the Appointments Clause challenge as presented here is not a facial challenge. *Bryan*, 937 F.3d at 753; *Jones Bros.*, 898 F.3d at 676-77.

C. The Court should not excuse H&P's forfeiture.

As this Court noted in *Bryan*, "courts have developed several standard exceptions" to prudential issue exhaustion requirements, "including a 'futility'

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[22] Available at: https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2010/GOOSLIN_DOUGLAS_M_JR_v_POND_CREEK_MINING_CO_2010BLA05752_(AUG_04_2014)_121204_MODIS_SD.PDF (last visited Oct. 7, 2020).

[23] Available at: https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2016/FARLEY_SYLVIA_LYNN_W_v_CANADA_COAL_COMPANY__2016BLA05786_(MAY_07_2018)_153118_ORDER_PD.PDF (last visited Oct. 7, 2020).

exception for parties who assert claims that an agency cannot consider . . . and a 'hardship' exception for parties who face undue harm from agency exhaustion." 937 F.3d at 751. This Court held in *Bryan* that a futility exception to exhaustion requirements would not excuse the failure to raise an Appointments Clause challenge, *id.* at 752, and this Court should reach the same result here.

As an initial matter, H&P does not argue that it would have been harmed by raising its Appointments Clause challenge to the ALJ. Rather, H&P contends that it would have been futile to do so. OB 13-16. Any suggestion of futility, however, is plainly belied by the cases granting *Lucia* relief to parties making timely challenges. *See supra* 25-27. Indeed, to accept H&P's futility assertion would mean that the ALJ was precluded from providing *Lucia* relief, even when such relief was clearly warranted.

In any event, all DOL ALJs, including the ALJ here, are empowered to remove themselves from cases and have the cases reassigned. The general procedural rules for practice before DOL ALJs provide for the substitution of the presiding ALJ either during or after the hearing. 29 C.F.R. § 18.15. During the hearing, "a successor judge," "must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden," and who "may also recall any other witness." *Id*. § 18.15(a). After the hearing, the successor judge may order supplemental proceedings upon good

cause. *Id*. § 18.15(b). These provisions ensure that the new ALJ can independently develop and review the record. The rules also provide that an ALJ "must withdraw from a proceeding whenever he or she considers himself or herself disqualified." 29 C.F.R. § 18.16(a). If a party moves for the ALJ's disqualification, "[t]he motion must allege grounds for disqualification." 29 C.F.R. § 18.16(b).

The DOL ALJ rules are therefore grounds-neutral, unlike the Social Security disqualification regulation, which was "plainly directed at bias," *Ramsey*, 2020 WL 5200979, *3 n.2. A DOL ALJ's belief that he or she was without proper constitutional authority during a critical phase of a pending case would certainly justify disqualification.

In addition, the threat of a motion for a new ALJ posed no existential or economic threat to the ALJ, as H&P asserts. OB 16. The correction of an ALJ's formerly invalid appointment within the administrative system of BLBA adjudications was uncontroversial and routine well before October of 2018, when the ALJ awarded Mr. Mabe benefits. An invalid appointment posed no danger to the ALJ himself far earlier–the Secretary's ratification of his appointment in December 2017 neutralized any fear that asking for reassignment was tantamount to asking for his resignation letter. *See* OB 16-17. After the Secretary ratified his appointment, the ALJ's position was secure.

Conversely, H&P argues that it did not forfeit its challenge, because the ALJ raised the issue himself in his decision and order awarding benefits to Mr. Mabe. OB 15-16. H&P misconstrues what the ALJ did. Because the parties had not challenged his authority, the ALJ simply confirmed his prior actions. A.18 n.5. Doing so hardly called into question his authority; if anything, it underscored it and the absence of any challenge to it. H&P's contention is plainly illogical.

Moreover, as courts considering the question have universally determined, *Lucia* relief is a nonjurisdictional remedy that parties are meant to ask for themselves. *See Jones Bros.*, 898 F.3d at 677 ("[W]e generally expect parties . . . to raise their as-applied or constitutional avoidance challenges before the [agency] and courts to hold them responsible for failing to do so."). For the ALJ to unilaterally transfer the case to another ALJ for the sake of the Appointments Clause after he had awarded benefits, he would have had to affirmatively *prejudice Mr. Mabe*, whose BLBA entitlement he had just determined.

Finally, H&P complains that asserting an Appointments Clause challenge involves a "moving target" that will always be "one step too late." OB 11. But that criticism is founded on its own failure to understand and heed the teachings of *Sims* and its progeny, including *Jones Bros.* and *Bryan*, which set out a clear three-part test for adjudicating forfeiture questions. *Ramsey*, 2020 WL 52000979, *2. Indeed, H&P's opening brief is completely untethered to the underlying reasoning

of those cases. As laid out above, the regulations and the structure of the adversarial BLBA adjudication system impose an exhaustion requirement at the ALJ level for issues such as this one. And as discussed above, H&P's motion would not have been "one step too late" if it had been made at any time before it lost the case on the merits.

D. Excusing H&P's forfeiture would reward sandbagging.

Granting *Lucia* relief to H&P will encourage and reward what Justice Scalia memorably dubbed "'sandbagging': suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later–if the outcome is unfavorable–claiming that the course followed was reversible error." *Comm'r of Internal Revenue v. Freytag*, 501 U.S. 868, 895 (1991) (Scalia, J. concurring in part); *Ramsey*, 2020 WL 52000979, *8 (Siler, J. dissenting) (explaining that majority decision gives claimants "two bites at the apple"). Here, H&P's actions constitute classic sandbagging: even though *Lucia* relief was available to it, H&P permitted the ALJ to decide the case and, only after he ruled against it, did H&P challenge his authority. The Court should not countenance such a ruse, particularly because awarded miners in BLBA cases have been found to be totally disabled by pneumoconiosis, a progressive respiratory disease, and are receiving disability benefits, including medical benefits. Awarded miners are also frequently of advanced age with little financial means, and additional adjudications take time–

sometimes more time than miners like Mr. Mabe have left.[24] The prejudice resulting from untimely coal company challenges (who bring the vast majority of such challenges, including ten currently pending at the courts of appeals and Board) thus stands in stark contrast to challenges brought by a denied SSA claimant.

[24] As noted previously, Mr. Mabe died while waiting for a final decision on H&P's sandbagged Appointments Clause challenge. R.15. The median length of time from docketing to decision for black lung cases is 20 months, and the average is 22 months. Office of Administrative Law Judges, Quarterly Report on Case Inventory for 3rd Quarter FY 2020 at 11, 12. Available at https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/Reporting/OALJ_Quarterly_Reporting_FY20_QTR3_Posted.pdf (last viewed Sept. 21, 2020).

CONCLUSION

The Court should deny the petition for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 7,824 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2020, the Director's brief was served electronically using the Court's CM/ECF system on the Court and the following:

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