No. 21-1623

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EDD POTTER COAL COMPANY,

Petitioner

v.

AUSTINE SALMONS

and

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

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

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Petitioner,

v.

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

Respondents.

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

BRIEF FOR THE FEDERAL RESPONDENT

This appeal concerns coal miner Austine Salmons' claim for benefits under the Black Lung Benefits Act ("BLBA"), 30 U.S.C. §§ 901-44. Despite having ample opportunity to raise its Appointments Clause argument, U.S. Const. art. II, § 2, cl. 2, while the case was first before the Administrative Law Judge ("ALJ") and Benefits Review Board ("Board"), Edd Potter Coal Company ("EPCC") waited to raise the issue until after the Board had affirmed its status as the liable

party and remanded the case to the ALJ for further consideration of the merits of Salmons' claim. On appeal from the ALJ's remand decision, the Board held that EPCC forfeited its Appointments Clause challenge by failing to raise it when the claim was first before the ALJ and Board. The Director, Office of Workers' Compensation Programs ("OWCP"), U.S. Department of Labor ("DOL") urges this Court to affirm the Board's decision and to hold, as other circuits have, that Appointments Clause issues must be timely raised before ALJs and the Board in BLBA cases.

STATEMENT OF THE ISSUE

Did EPCC forfeit its Appointments Clause challenge by waiting to raise it until after the Benefits Review Board had remanded the case for further consideration of Salmons' entitlement to benefits?[1]

STATEMENT OF THE CASE

I. District director, ALJ, and BRB proceedings

Austine Salmons filed his BLBA claim on August 15, 2011. Petitioner's Appendix ("PA") 2. After the district director notified EPCC of the claim, it

[1] EPCC no longer directly challenges Salmons' entitlement to benefits or its status as the responsible operator liable for benefits. However, both issues would have to be reopened before a new ALJ if the Court finds EPCC did not forfeit its Appointments Clause challenge.

contested Salmons' entitlement and its own liability, raising, among other defenses, various constitutional challenges (but not one based on the Appointments Clause). Director's Supplemental Appendix ("SA") 159-66. The district director issued a proposed decision and order denying Salmons' claim. SA 167-79.

Salmons then requested a *de novo* hearing before DOL's Office of Administrative Law Judges ("OALJ"). The district director prepared Form CM-1025, which identified the issues EPCC had contested before the district director and incorporated by reference EPCC's earlier filings, including its challenge to its designation as the responsible operator and constitutional challenges to BLBA regulations. SA 180-81. Because EPCC had raised no Appointments Clause concern, it was not listed as an issue on the form.

The case eventually was assigned to ALJ Christine Kirby. On December 1, 2015, she issued a Notice of Hearing and Pre-hearing Order that warned

> [o]nly those issues indicated on [Form CM 1025] or other issues raised in writing before the District Director will be considered, unless it is an issue that was not reasonably ascertainable while the claim was pending before the District Director. 20 C.F.R. § 725.463. New issues must be raised in writing at least 20 days prior to the hearing.

SA 183. Relatedly, the Notice directed each party to file a prehearing statement: "The representative of each party shall complete a brief pre-hearing report listing and summarizing all the claims and contentions, listing stipulations (particularly length of coal mine employment)[,] issues contested and conceded, and all

objections and grounds for all motions that may have been made, as well as any other helpful information." SA 184. On March 24, 2016, EPCC informed the ALJ and parties that it was contesting its designation as the responsible operator, but did not mention the Appointments Clause. SA 187-89.

ALJ William Colwell held the hearing on April 26, 2016.[2] SA 190-225. During the hearing, the ALJ asked EPCC whether it had any changes to the issues it was contesting. EPCC withdrew its challenge to the timeliness of the claim and agreed that Salmons had been a coal miner after December 31, 1969, but did not mention the Appointments Clause or the ALJ's appointment. SA 195-96. EPCC filed an evidence summary form and post-hearing brief on April 20, 2017, again making no mention of the Appointments Clause and expressing no dissatisfaction with the ALJ's appointment. SA 226-36. The ALJ awarded benefits against EPCC on August 23, 2017. PA 1-29. EPCC appealed to the Benefits Review Board, challenging Salmons' entitlement to benefits and its own designation as the responsible operator liable for benefits, but did not raise an Appointments Clause challenge. PA 33-58. On November 30, 2018, the Board affirmed the ALJ's finding

[2] Judge Colwell explained that Judge Kirby had been reassigned to a different agency. SA195.

that EPCC was the responsible operator but vacated his finding that Salmons was entitled to benefits. PA 79-96.

On January 9, 2019, with the case again before ALJ Colwell on remand, EPCC at last raised an Appointments Clause challenge, requesting the case be reassigned to a properly appointed ALJ in light of *Lucia v. SEC*, 138 S.Ct. 2044 (2018) . PA 97. The ALJ denied the request on October 23, 2019, finding that EPCC had forfeited its Appointments Clause challenge by failing to raise it when the case was previously before him or the Board. PA 98-99. The ALJ again awarded benefits against EPCC on November 4, 2019, nearly a year and a half after *Lucia*. PA 101-108.

EPCC again appealed to the Board, which affirmed on March 31, 2021. PA 144. The Board specifically rejected EPCC's argument that the ALJ's appointment violated the Appointments Clause (PA 112), affirming the ALJ's finding that it had forfeited the issue by failing to raise it when the claim was first before the ALJ and Board. PA 146-48.

EPCC's timely appeal to this Court followed. PA 157-58.

II. Appointments Clause litigation

While Salmons' case was proceeding before the ALJ and the Board, the courts of appeals and the Supreme Court considered whether Securities and Exchange Commission (SEC) ALJs were "inferior officers" who must be

appointed in accordance with the Appointments Clause under the Supreme Court's 1991 decision, *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991). On December 27, 2016—eight months before the first ALJ decision—the Tenth Circuit held that, "[b]ased on *Freytag*," SEC ALJs were inferior officers and improperly appointed, as they were appointed by SEC staff and not the Commission itself. *Bandimere v. SEC*, 844 F.3d 1168, 1170 (10th Cir. 2016). Consequently, the court "set aside" the SEC's decision finding that Bandimere violated securities laws. *Id*. at 1188. *Bandimere* created a circuit split, as the D.C. Circuit had reached the opposite conclusion in *Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016). Both cases were appealed to the Supreme Court, which granted review on January 12, 2018. 138 U.S. 736.

On December 21, 2017, while *Bandimere* and *Lucia* were pending before the Supreme Court—and while Salmons' case was pending before the Board for the first time—the Secretary of Labor ratified the appointments of ALJ Colwell and other incumbent ALJs. The ratification was "intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the

U.S. Constitution." DOL ALJ Ratification Letters (Dec. 21, 2017).[3] The Secretary also began personally appointing new ALJs, in compliance with the Appointments Clause. *See, e.g.*, DOL ALJ Appointment Letters (Sept. 12, 2018).[4]

On June 21, 2018, more than five months before the Board issued its first decision in this case, the Supreme Court decided *Lucia*. Noting that "*Freytag* says everything necessary to decide this case," the Court held that SEC ALJs were inferior officers and were improperly appointed. *Id*. at 2053-54. The Court further determined the remedy for a *timely* Appointments Clause challenge was to reassign the case to a different, properly-appointed ALJ for a new hearing. *Id*. at 2055. In response, the Board and DOL ALJs began to address timely challenges by remanding or reassigning cases for new hearings with new ALJs.[5] *See, e.g.*, *Miller*,

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[3] *Available at* https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Secretarys_Ratification_of_ALJ_Appointments_12_21_2017.pdf.

[4] *Available at* https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Appointment_Letters_Alford_thru_Wang_09_12_2018_posted_Redacted.pdf.

[5] For a short period in 2018 before *Lucia* issued, the Board addressed Appointments Clause violations in BLBA cases by having the now-properly-

2018 WL 8269864, at *2-3; *Billiter v. J&S Collieries*, No. 18-0256 (Ben. Rev. Bd. Aug. 9, 2018) (addendum); *McNary v. Black Beauty Coal Co.*, No. 2014-BLA-05373 (OALJ Aug. 22, 2018);[6] *Mullins v. Prestige Coal Co., Inc.*, No. 2017-BLA-06241 (OALJ Aug. 22, 2018);[7] *Powell v. Garrett Mining, Inc.*, No. 2012-BLA-05298 (OALJ Aug. 20, 2018).[8] Despite *Lucia* relief thus being plainly available for pre-decision Appointments Clause challenges, EPCC never raised an Appointments Clause challenge in Salmons' case until after the Board had confirmed its status as

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appointed ALJs reconsider their decisions and, if appropriate, ratify them. *See, e.g.*, *Miller v. Pine Branch Coal Sales, Inc.*, __ Black Lung Rep. (MB) __, 2018 WL 8269864, at *1-2 (Ben. Rev. Bd. 2018) (*en banc*) (Board remand and ALJ ratification in March 2018).

[6] *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.

[7] *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.

[8] *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.

the responsible party and remanded for further consideration of Salmons' entitlement to benefits.

SUMMARY OF ARGUMENT

EPCC could have had the relief it now seeks from this Court—a new hearing before a different ALJ—simply by timely requesting it. All of the pieces of the puzzle were in place when the case was first before an ALJ, and other operators had requested and were offered *Lucia* relief where ALJs had taken significant action prior to the Secretary's ratification of their appointments. Instead, EPCC stayed silent until after the ALJ and Board had issued their initial decisions.

DOL's regulations require parties to identify contested issues—including Appointments Clause challenges—for adjudication by the ALJ and Board or risk their forfeiture. *Joseph Forrester Trucking v. Dir., OWCP* [*JFT*], 987 F.3d 581, 587-90 (6th Cir. 2021) (forfeiture before ALJ); *Island Creek Coal Co. v. Bryan [Bryan]*, 937 F.3d 738, 749-50 (6th Cir. 2019) (forfeiture before Board); *David Stanley Consultants v. Dir., OWCP*, 800 F. App'x 123, 127 (3d Cir. 2020) (same). So does forty years of binding Board and judicial precedent applying a prudential, judicially-imposed issue exhaustion requirement. *JFT*, 987 F.3d at 588-89 (collecting Board cases finding forfeiture of issues not raised before ALJ); *Bryan*, 937 F.3d at 750 (collecting in-circuit cases finding forfeiture of issues not raised

before Board). EPCC failed to follow these rules and thus forfeited its Appointments Clause argument.

EPCC's arguments for excusing its forfeiture lack merit. The Board could have easily addressed its Appointments Clause challenge (had it been raised), since by the time it decided EPCC's first appeal, the Supreme Court had already issued *Lucia*. Moreover, asking the ALJ or Board for *Lucia* relief obviously would not have been futile as other operators were afforded *Lucia* relief in other cases when they timely asked. The Court should affirm that EPCC forfeited its Appointments Clause challenge.

ARGUMENT

Appointments Clause challenges are non-jurisdictional and thus "subject to ordinary principles of waiver and forfeiture." *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 678 (6th Cir. 2018). "Typically, issue-exhaustion rules are creatures of statute or regulation." *Carr v. Saul*, 141 S.Ct. 1352, 1358 (2021). But "[w]here statutes or regulations are silent," "'the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding.'" *Id*. (quoting in part *Sims v. Apfel*, 530 U.S. 103, 109 (2000)).

DOL's regulations require issue exhaustion in black lung proceedings before DOL ALJs and the Board. Appointments Clause issues are therefore forfeited if not

timely raised before them. *JFT*, 987 F.3d at 587-89 (challenge forfeited if not raised before ALJ); *Bryan*, 937 F.3d at 749-50 (6th 2019) (challenge forfeited if not timely raised before Board).

Alternatively, the Court should hold that issue exhaustion is required as a matter of judicial prudence. BLBA proceedings, unlike the Social Security proceedings in *Carr*, are highly adversarial and the parties are expected to develop the issues for the adjudicators' consideration, much as litigants in Article III courts must raise issues at trial and on appeal.[9] Holding otherwise would encourage sandbagging and harm BLBA claimants', DOL's, and the courts' individual and institutional interests.

I. DOL's regulations require issue exhaustion before the ALJ and Board.

A. DOL's regulations require issue exhaustion at the ALJ level.

DOL's regulations "require that litigants raise issues before the ALJ as a prerequisite to review by the Benefits Review Board." *JFT*, 587 F.3d at 587. The regulations create a system of progressive issue exhaustion meant to narrow the

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[9] *Carr* held that claimants for Social Security disability benefits did not forfeit their Appointments Clause challenges by failing to make them first to their respective ALJs. 141 S.Ct. at 1356. This Court reached the same conclusion in *Probst v. Saul*, 980 F.3d 1015, 1020 (4th Cir. 2020). The reasoning in the two decisions are similar, but we largely address and rely on *Carr* because it stands as the final word on the issue.

issues for consideration by the ALJ by requiring parties to dispute them or lose their right to do so.

As a general 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 before the district director. *See id.* at 584-86. For example, a potentially liable coal mine operator must respond within 30 days of a notice of a claim by disputing its liability or else waives the right to challenge it in future proceedings. 20 C.F.R. § 725.408(a)(3). Similarly, the parties are expected to submit their own evidence in response to the district director's preliminary analysis of the case. *Id.* §§ 725.410(a)(2), (b), 725.412(a)(2), 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. *Id.* § 725.418(a). This decision becomes final if not challenged within 30 days. *Id.* § 725.419(d).

A party seeking *de novo* ALJ review must "specify the findings and conclusions with which [it] disagrees," *id.* § 725.419 (b), thus "teeing up those issues for an ALJ[.]" *JFT*, 987 F.3d at 586. When forwarding the claim file to the OALJ, the district director transmits a "statement . . . of contested and uncontested issues in the claim" on Form CM-1025. 20 C.F.R. § 725.421(b)(7). As seen here,

the district director fills out Form CM-1025 based on the issues the parties have raised. *See* SA 180-81 (incorporating by reference EPCC's contested issues).[10]

Against this backdrop, the case proceeds to OALJ, where additional regulations further restrict the issues for decision. The ALJ "is charged with 'resolv[ing] contested issues of fact or law.'" *JFT*, 987 F.3d at 586 (quoting 20 C.F.R. § 725.455(a)). Section 725.463 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). The ALJ "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." *Id*. § 725.463(b). This section also establishes procedures for raising new issues:

> Such new issue[s] 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 [OALJ] 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.

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[10] EPCC argues the limited space on forms used by the district director misleads parties into thinking that they do not need to raise constitutional issues to the district director. Opening Brief ("OB") 10. But EPCC raised constitutional arguments before the district director and they were incorporated into Form CM-1025. *See* SA 180-81. Clearly EPCC was not misled or deterred by any forms.

Id. (emphasis added). "[A] party may, *upon request*, be granted an appropriate continuance," if the ALJ will consider a new issue. *Id.* § 725.463(c) (emphasis added). Section 725.463 thus requires parties to affirmatively raise any issues not previously identified by the district director in order to have them considered by the ALJ.

General DOL regulations governing OALJ procedures also require the parties to identify issues for adjudication. 29 C.F.R. § 18.80(a) requires each party to file a prehearing statement. The statement must identify "[t]he issues of law to be determined with reference to the appropriate statute, regulation, or case law," "a precise statement of the relief sought," the facts in dispute, and any stipulations. *Id*. § 18.80(c). As seen in this case, the prehearing statement is used in BLBA claims to further narrow the issues listed on Form CM-1025. SA 180-81, 187-89. It also helps identify "new issue[s]" to be presented to the ALJ under 20 C.F.R. § 725.463.[11]

Finally, the Board's limited scope of review also demonstrates that issues must be raised at the ALJ level. *JFT*, 987 F.3d at 586. The Board may not "engage

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[11] As EPCC notes, OB 10 n.8, the general OALJ rules apply unless inconsistent with a "governing statute, regulation, or executive order." 29 C.F.R. § 18.10(a). Prehearing statements are regularly utilized in BLBA proceedings, as here, because prehearing statements help ALJs identify contested issues.

in a de novo proceeding or unrestricted review of a case brought before it," but can only review "the findings of fact and conclusions of law on which the decision or order appealed from was based." 20 C.F.R. § 802.301(a). In other words, issues first must be presented to the ALJ *before* they can be appealed to the Board.

Taken together, 20 C.F.R. §§ 725.463, 802.301, and 29 C.F.R. § 18.80, require parties in black lung proceedings before an ALJ to identify contested issues for adjudication by the ALJ or risk their forfeiture. *JFT*, 987 F.3d at 586-87.[12] Contrary to EPCC's assertion, this includes Appointments Clause issues. As the Sixth Circuit held, "[s]imply put, in the absence of a developed legal and factual Appointments Clause challenge, the Board is unable to address the issue without engaging in a prohibited 'de novo' or 'unrestricted' review of the ALJ decision." *Id*. at 588.

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[12] EPCC argues that 20 C.F.R. § 725.463 and 29 C.F.R. § 18.80 do not require issue exhaustion because they do not expressly state that issues not raised will be considered forfeited. OB 9-10 (citing *Probst*, 980 F.3d at 1020 n.3). Footnote 3 in *Probst* is *dicta*, however, as SSA never argued that its regulations required issue exhaustion. *Probst*, 980 F.3d at 1025-26 (Richardson, J., concurring); *Carr*, 141 S.Ct. at 138 (acknowledging Commissioner's concession that "no statute or regulation obligated petitioners to raise their Appointments Clause challenges in administrative proceedings"). More to the point, *Carr* did not rely on the absence of express exhaustion warnings in the SSA ALJ regulations to find the petitioners did not forfeit their Appointment Clause challenges. Rather, the Court found the SSA ALJ regulations—even without express warnings—"more adversarial" than the SSA Hearing Council regulations. 141 S.Ct. at 1360.

B. DOL's regulations require issue exhaustion at the Board level.

The case for regulatory issue exhaustion before the Board is straightforward. Board regulation 20 C.F.R. § 802.211 requires petitioners to identify the "specific issues to be considered" by the Board. This provision, the Supreme Court has suggested, imposes an issue exhaustion mandate, *Sims*, 530 U.S. at 108; and the Sixth and Third Circuits have directly so held. *Bryan*, 937 F.3d at 749-50 ("[Section 802.211(a)] (not our discretion) bridges this [issue exhaustion] gap by requiring parties to file petitions for review identifying 'specific issues to be considered' by the Board."); *David Stanley Consultants*, 800 F. App'x at 127 (issue exhaustion at the Board "derives from 20 C.F.R. § 802.211(b), which requires that petitions for review include a supporting brief that '[s]pecifically states the issues to be considered by the Board.'").

This interpretation of Section 802.211 also comports with this Court's longstanding practice of requiring issue exhaustion at the Board level. *See Armco, Inc. v. Martin*, 277 F.3d 468, 476 (4th Cir. 2002) (holding petitioner waived issues for judicial review by failing to raise them before Board); *Marfork Coal Co. v. Weis*, 251 F. App'x 229, 237 (4th Cir. 2007); *BethEnergy Mines v. Cunningham,* 104 Fed. App'x 881 (4th Cir. 2004); *see also Energy West Mining Co. v. Lyle*, 929 F.3d 1202, 1206 (10th Cir. 2019) (company forfeited Appointments Clause challenge by failing to raise it before the Benefits Review

Board); *Bryan*, 937 F.3d at 750 (collecting Sixth Circuit black lung cases where the court refused to address issues not raised at the Board).

This Court should follow the Sixth and Third Circuits, and affirm the Board's conclusion that EPCC forfeited its Appointments Clause challenge by failing to raise it at the Board during its first appeal.[13]

II. Issue exhaustion before the ALJ and Board in BLBA claims should be required as a prudential matter.

If the Court decides that issue exhaustion is required by regulation, the Court need not address prudential issue exhaustion. *JFT*, 987 F.3d at 587-88. In the alternative, the Court should hold that issue exhaustion is required before the ALJ and Board as a prudential matter. "[T]he desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Carr*, 141 S.Ct. at 1358. "The critical feature that distinguishes adversarial proceedings . . . is whether claimants bear the responsibility to develop issues for adjudicators' consideration." *Id*. The regulations at 20 C.F.R. §§ 725.463, 802.301, 802.211, and 29 C.F.R. § 18.80 are part of a comprehensive

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[13] The ALJ and Board regulations also belie EPCC's argument that "in *Lucia's* immediate aftermath, DOL notified *nobody* about a judicially crafted use-it-or-lose-it approach to Appointments Clause challenges." OB 9 (emphasis in original).

body of procedural norms and Board case law that form an adversarial system of administrative trial and appellate review in BLBA claims. This system generally mirrors adversarial litigation before the courts and specifically requires parties to develop the issues for consideration by the ALJ and Board. This tradition goes back more than forty years, *supra* at 11-17, and the Court should formally recognize it by enforcing judicially-imposed prudential issue exhaustion requirements before the ALJ and Board.

A. BLBA adjudications are highly adversarial and require claimants to develop the issues for the adjudicators' consideration.

Unlike Social Security litigation, BLBA adjudications are adversarial, as EPCC concedes (OB 11). *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 733 (1990) (Marshall, J., concurring); *BethEnergy Mines, Inc.*, 104 F. App'x at 883-84 (issue exhaustion is favored in black lung cases under *Sims* because ALJ hearings are adversarial). In BLBA proceedings, "it falls to each party to shape and refine its case, subject of course to the risk that its adversary will discredit it." *Fox ex rel. Fox v. Elk Run Coal Co., Inc.*, 739 F.3d 131, 137 (4th Cir. 2014); *Day v. Johns Hopkins Health Sys. Corp.*, 907 F.3d 766, 770 (4th Cir. 2018) (BLBA "proceedings between the miner and the company borrow heavily from judicial process").

The trial-court quality of ALJ hearings is reinforced by the Board's limited standard of review. The parties stay in an "adversarial posture" as cases proceed to

the Board on appeal. *Fox*, 739 F.3d at 133. Unlike the SSA's Appeals Council, which can consider new evidence submitted after the ALJ decision, 20 C.F.R. § 404.970(a)(5), the Board must treat ALJ factual findings as "conclusive" if supported by substantial evidence. 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a); 20 C.F.R. § 802.301. This "circumscribes the Board's review" so that parties do not get a "do over" on appeal. *Bryan*, 937 F.3d at 750. Because BLBA ALJ proceedings are similar to trial court proceedings, logically the Court should hold that the same trial-level issue exhaustion requirements used in the courts apply to BLBA proceedings.

Such a holding would be consistent with Board precedent, which imposes, "with near black-letter authority," a prudential exhaustion requirement on all manner of factual, evidentiary, and legal questions not raised before the ALJ. *JFT*, 987 F.3d at 589 (citing cases); *Kiyuna v. Matson Terminals, Inc.*, __ Ben. Rev. Bd. Serv. __, 2019 WL 2881243 (2019). The courts have similarly required issue exhaustion before the ALJ. *See Boyd & Stevenson Coal Co. v. Dir., OWCP*, 407 F.3d 663, 666 (4th Cir. 2005) ("In reviewing a decision of the Benefits Review Board, our review is governed by the same standard the Board applies when reviewing an ALJ's decision."); *BethEnergy Mines, Inc.*, 104 F. App'x at 883-85 (refusing to consider a statute of limitations issue the employer failed to contest before the ALJ); *see also Island Fork Constr. v. Bowling*, 872 F.3d 754, 757-58 (6th

Cir. 2017); *Consolidation Coal Co. v. Dir., OWCP*, 732 F.3d 723, 730 (7th Cir. 2013); *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1009 (7th Cir. 1996); *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 727-28 (6th Cir. 1986). Clearly, there is a long history of judicial enforcement of issue exhaustion in ALJ proceedings. Since an Appointments Clause challenge is non-jurisdictional and thus subject to forfeiture, *JFT*, 987 F.3d at 586, the Board committed no error by adhering to its longstanding practice of requiring issue exhaustion before the ALJ.

The adversarial nature of black lung proceedings—and the requirement that the parties identify the issues for consideration—persist in the administrative appellate process. Before the Board, it is the petitioner's responsibility to specifically identify the issues for consideration, not the Board's. *See* 20 C.F.R. § 802.211; *cf. Sims*, 530 U.S. at 112 (observing that the SSA Appeals Council "has primary responsibility for identifying and developing the issues"). And a petitioner's failure to identify an issue in its opening brief will result in its forfeiture. *Motton v. Huntington Ingalls Indus.*, 52 Ben. Rev. Bd. Serv. 69, 69 at n.1, 2018 WL 6303734, at *1 n.1 (Ben. Rev. Bd. 2018) (finding claimant waived Appointments Clause challenge by failing to raise it in opening brief to Board); *Luckern v. Richard Brady & Assoc.*, 52 Ben. Rev. Bd. Serv. 65, 66 n.3, 2018 WL 5734480, at *2 (Ben. Rev. Bd. 2018) (finding employer waived Appointments Clause challenge by failing to raise it in opening brief to Board); *Messer v. Andalex*

Resources, Inc., BRB No. 18-0272 BLA, 2019 WL 2462927 (May 17, 2019) (unpub.) (finding that the "employer waived its Appointments Clause argument by failing to raise it when the case was previously before the Board"); *Tackett v. IGC Knott County*, BRB No. 18-0033 BLA, 2019 WL 1075364 (Feb. 26, 2019) (unpub.) (same). Thus, Board proceedings, just like proceedings before the courts of appeals, are both adversarial and require the parties to define the issues for the adjudicators' consideration.

In sum, the BLBA administrative structure is clear: ALJ hearings are trials, and the Board reviews ALJ decisions like an appellate court would. Just as courts of appeals generally will not address issues not raised before the Board, the Board will refuse to address issues not raised before the ALJ or not timely presented to it. Unlike the SSA proceedings in *Carr* and *Sims*, the analogy to normal adversarial litigation could not be stronger than it is in BLBA cases.

B. EPCC's as-applied Appointments Clause challenge could have been easily resolved without judicial intervention.

Carr determined that the SSA claimant's Appointments Clause challenge weighed against issue exhaustion in part because no SSA ALJ was constitutionally appointed when Carr's hearing occurred. 141 S.Ct. at 1361. By contrast, DOL here took action in December 2017 to correct any Appointments Clause error and provide appropriate relief while Salmons' case was pending before the Board and

briefing had not yet been completed. By the time EPCC first raised its Appointments Clause challenge in January 2019, the Secretary had ratified the appointments of incumbent DOL ALJs more than a year earlier, and had appointed new ALJs. Moreover, the Supreme Court had issued *Lucia* six months earlier, in June 2018. As a result, by the time the Board issued its first decision in this case, the Board and ALJs had afforded *Lucia* relief in "legions" of BLBA cases where the Appointments Clause issue was timely raised. *JFT*, 987 F.3d at 591; *see supra* p. 7-8.

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 Board's authority in the adjudication of BLBA claims. If EPCC had timely asked, it would have received a new hearing by a properly-appointed ALJ.

C. Other institutional and individual interests weigh in favor of exhaustion and against sandbagging.

Other institutional and individual interests also favor exhaustion. *Probst* found that SSA claimants' interest in their benefits, which often comprise most of their income, weighed against applying a forfeiture rule. 980 F.3d at 1023. In the BLBA context, the equities cut the other way. Applying a forfeiture rule prevents needless delay in the resolution of benefit claims. Awarded miners in BLBA cases

are totally disabled by pneumoconiosis, an incurable, progressive disease, and are frequently of advanced age with little financial means. Additional adjudications take time—sometimes more time than the miner has left.[14] They should not have to endure months or years of additional litigation and uncertainty because of an Appointments Clause challenge an employer could have raised earlier. *See JFT*, 987 F.3d at 590 (length of black lung proceedings is a reason "why the Board's regulatory scheme disfavors allowing an operator to undo years of proceedings based upon arguments at its disposal from the start.").

Granting *Lucia* relief to EPCC would also 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." *Freytag*, 501 U.S. at 895 (Scalia, J., concurring in part); *JFT*, 987 F.3d at 592 (requiring exhaustion of Appointments Clause issues before the ALJ in part due to

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[14] The median length of time from docketing to decision for black lung cases is 21 months; the average is 22 months. OALJ, Quarterly Report on Case Inventory for 3rd Quarter FY 2021 at 19-20, https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/Reporting/OALJ_Quarterly_Reporting_FY21_QTR3_Posted.pdf.

concerns about "sandbagging" and "judge-shopping"). Here, EPCC's actions constitute classic sandbagging: even though *Lucia* relief was available to it, EPCC permitted the ALJ to decide the case and, only after the Board rejected its attempt to extricate itself entirely from the case (by contesting its designation as the responsible operator liable for benefits), did it challenge the ALJ's authority.[15] The Court should not allow EPCC to drag out BLBA proceedings, and attack findings, through such gamesmanship.

DOL's institutional interest in having the opportunity to self-correct also weighs in favor of issue exhaustion. *Probst* found SSA's self-correction argument unpersuasive because SSA delayed taking action. 980 F.3d at 1023; *see also Carr*, 141 S.Ct. at 1361 (explaining that SSA's inaction supported application of futility exception to exhaustion requirement). But here, DOL's prompt actions show the issue exhaustion rules working as they should; when litigants began raising Appointments Clause challenges, the agency self-corrected and resolved Appointments Clause issues in many cases that otherwise would have flooded the courts. *JFT*, 987 F.3d at 591-92; *see supra* pp. 7-8. Had EPCC spoken up earlier,

[15] If the Board had accepted EPCC's responsible operator contention, the Black Lung Disability Trust Fund would have been responsible for the payment of benefits.

as other employers did in other cases, it would have been heard and already received a new ALJ hearing, without having to go to this Court.

Finally, issue exhaustion serves administrative and judicial efficiency by helping the agency and the courts manage the volume of litigation in an orderly fashion.[16] Regardless of how heavily this factor figures in the Court's analysis, it unquestionably cuts against EPCC and further weakens its case for scrapping principles of issue exhaustion.

In sum, the adversarial nature of BLBA proceedings, the simple automatic fix that EPCC would have obtained on (timely) demand, and the individual and institutional interests of the private parties, the agency, and the courts all weigh in favor of requiring issue exhaustion in this case.

III. The Court should not excuse EPCC's forfeiture.

Finally, EPCC argues that its forfeiture should be excused because (1) raising an Appointments Clause challenge before the ALJ and Board would have been futile, (2) the Board has not consistently required parties to raise their

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[16] Compared to SSA, the BLBA program is much smaller and has fewer resources. In 2017, DOL had 41 ALJs compared to SSA's 1,655. Office of Personnel Management, ALJs by Agency, https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency. DOL ALJs hear cases arising from over 80 other statutes and executive orders besides the BLBA. DOL, About the Office of Administrative Law Judges, https://www.dol.gov/agencies/oalj/about/ALJMISSN.

Appointments Clause challenges to the ALJ and Board, and (3) the state of the law regarding the Appointments Clause was uncertain when the case was first before the ALJ. OB 11-18. EPCC's arguments are not persuasive.

A. EPCC could have obtained a *Lucia* remedy from the Board upon request.

EPCC argues that it did not forfeit its Appointments Clause challenge because raising the argument would have been futile. OB 11-15. But the courts of appeals uniformly disagree, holding that DOL ALJs and the Board can entertain Appointment Clause challenges. *JFT*, 987 F.3d at 591 ("[A]n Appointments Clause challenge is, at bottom, an as-applied constitutional challenge. . . ALJs can entertain as-applied constitutional challenges and provide the requested relief . . ."); *Bryan*, 937 F.3d at 753 ("The Board had the authority to address this constitutional issue and provide effective relief (a new hearing before a properly appointed judge. . .)"); *Energy West Mining*, 929 F.3d at 1206 1202, 1206 ("The Board could have remedied a violation of the Appointments Clause by vacating the administrative law judge's decision and remanding for reconsideration by a constitutionally appointed officer."); *David Stanley Consultants*, 800 F. App'x at 128 ("The Board is empowered to hear Appointments Clause challenges, and has done so in cases in which such a challenge was properly raised."). And, as a factual matter, by the time the Board issued its first decision in this case, *Lucia* relief was

being provided in "legions" of BLBA cases after timely assertion of Appointments Clause arguments. *JFT*, 987 F.3d at 591; *see supra* pp. 7-8, 22. Indeed, to accept EPCC's futility assertion would mean that the ALJ and Board were precluded from providing *Lucia* relief, even when such relief was clearly warranted.[17]

EPCC also asserts that it was futile to administratively raise its Appointments Clause challenge because *Carr* held that DOL ALJs and the Board may not rule on constitutional issues. OB 11-12. But *Carr* does not reach that far. The decision addressed SSA procedures only, and in regard to the SSA ALJs' powers, the Court merely recounted SSA's own understanding of its ALJs' authority. 141 S.Ct. at 1361-62. Moreover, *Carr* considered only prudential issue exhaustion and the prudential exceptions to that mandate. 141 S.Ct. at 1358. Here, in contrast, because issue exhaustion arises by virtue of DOL's regulations, not solely judicial prudence, prudential exceptions (like futility) may have no application. *Bryan*, 937 F.3d at 752, 754; *National Mines Corp. v. Conley*, 790 F.

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[17] EPCC argues that the ALJ could not have reassigned Salmons' claim because there were no constitutionally-appointed ALJs when the case was originally before him. OB 14. But regardless of whether the ALJ could have fashioned a remedy at that time, had EPCC preserved and timely raised the issue in its first appeal to the Board, it plainly could have obtained relief (via remand for reassignment to a properly appointed judge). *Cf. U.S. v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952) (rejecting statutory appointments challenge because not raised before tribunal that could have granted relief).

App'x 716 (6th Cir. 2019) (declining to apply the *Freytag* structural constitutional question exception "[b]ecause the Black Lung Benefits Act's exhaustion mandate is not prudential"). The most relevant teaching from *Carr* here is that issue exhaustion is warranted in adversarial agency proceedings. 141 S.Ct. at 1358, and n.3.

B. Board precedent has consistently required issue exhaustion in cases before it as well as before the ALJ.

The Court should also reject EPCC's allegation, OB 8, 17, that the Board has been inconsistent in applying its own claim-processing, issue-exhaustion requirements as well the ALJ issue-exhaustion rules.

Regarding its own claim-processing rules, the Board's forfeiture decision in this case was consistent with its published, precedential decisions in *Motton* and *Luckern*, where the Board held that the employers waived their Appointments Clause challenges by failing to raise them in their opening briefs to Board. *Motton*, 2018 WL 6303734, at *1 n.1; *Luckern*, 2018 WL 5734480, at *2. The decision below also comports with unpublished Board decisions finding forfeiture where, as here, the employers failed to raise their Appointment Clause challenges when their

cases were first before the Board. *Messer*, 2019 WL 2462927 *2 and *Tackett*, 2019 WL 1075364.[18]

Regarding the ALJ issue-exhaustion rules, the Board's forfeiture decision here was consistent with its published, precedential decision in *Kiyuna*, where a party forfeited his Appointments Clause argument by not raising it before the ALJ issued a decision. 2019 WL 2881243. It was also consistent with the Board's

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[18] EPCC points to the Board's brief policy of asking *pro se* petitioners whether they wanted their cases remanded for consideration by properly appointed ALJs. OB 8. But that is of no help to EPCC. Historically, the Board has been less demanding of unrepresented petitioners. It does not require them to file an opening brief and identify the issues on appeal, but simply determines whether the ALJ's decision "is rational, in accordance with law and supported by substantial evidence." *Shelton v. Claude V. Keene Trucking Co*., 19 BLR 1-88 (1995); *McFall v. Jewell Ridge Coal Corp.*, 12 Black Lung Rep. 1-176, 1989 WL 245209 *1 (Ben. Rev. Bd. 1989); 20 C.F.R. 802.211(e), 802.220; *see generally Haines v. Kerner*, 404 U.S. 519, 520 (1972) (pro se pleadings held to "less stringent standards" than those drafted by lawyers). Thus, the Board policy has no bearing on its regular application of its longstanding rule that represented parties must raise all objections in an opening brief to preserve them for review. Moreover, the policy merely allowed unrepresented claimants an opportunity to raise a *Lucia* challenge when they would not normally be expected to file a brief. Far from altering its normal application of forfeiture and exhaustion principles, the Board policy made clear that it would not examine the *Lucia* issue unless asked, and absent a request, it would conduct its regular *pro se* substantial evidence review.

earlier precedent, which consistently held that issues are forfeited when not raised before the ALJ. *See JFT*, 987 F.3d at 588-89.

Salmons' case is an appropriate one in which to enforce forfeiture. Appointments Clause challenges existed prior to *Lucia*, and nothing prevented EPCC from timely raising such a challenge when the case was first before the ALJ and the Board. Moreover, the Board issued its original decision in November 2018, five months after *Lucia*, yet EPCC elected not to raise an Appointments Clause challenge until after the Board had affirmed its status as the party liable for benefits. EPCC had every opportunity to raise its Appointments Clause challenge. To this day, EPCC has offered no viable reason for waiting so long, especially given its careful preservation of other constitutional issues in this case. *See supra* pp. 12-13, 13 n.10. But whether it was due to negligence or gamesmanship, EPCC waited too long and thus forfeited its right to raise an Appointments Clause argument in this case.[19]

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[19] EPCC cherry-picks text from black lung cases to argue that waiver is a flexible doctrine that may be disregarded when "'the Supreme Court decides a relevant case.'" OB 16-17 (quoting *Consolidation Coal Co. v. OWCP*, 54 F.3d 434, 437 (7th Cir. 1995); and citing *Freeman United Coal Min. Co. v. OWCP*, 957 F.2d 302, 304 (7th Cir. 1992)). EPCC, however, overreads these cases (which address

C. EPCC did not need to be clairvoyant to have timely raised an Appointments Clause challenge.

EPCC maintains that it could not have raised an Appointments Clause challenge before the ALJ or Board because the Supreme Court had not yet issued *Lucia* and the circuit courts were split on the issue. OB 16-17. EPCC ignores *Lucia*'s observation that "*Freytag* says everything necessary to decide this case." *Lucia*, 138 S.Ct. at 2053. EPCC also ignores that a split in the circuits did not justify failing to raise an Appointments Clause challenge. *See Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 257 (6th Cir. 2018) ("No precedent prevented the company from bringing the [Appointments Clause] constitutional claim before [*Lucia*]."). After all, the reason a split existed is that parties raised Appointments

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prudential, not regulatory, issue exhaustion). *Consolidation Coal* held that the employer adequately preserved an argument related to the weighing of the evidence by "consistently challeng[ing the miner's] claim and the strength of the medical evidence." 54 F.3d at 437. *Freeman United* held that although the claimant waived an argument, the employer waived the defense of waiver. 957 F.2d at 304. Perhaps the clearest evidence that EPCC's contention is overwrought comes from the fact that it would render *Carr's* forfeiture analysis entirely superfluous (since the Court issued *Lucia* while the Carr petitioners' SSA disability claims were being litigated).

Clause challenges even when the outcome was unclear. Nothing barred EPCC from challenging the ALJ's authority under the Appointments Clause pre-*Lucia*.[20]

[20] EPCC contends that in light of the unsettled Appointments Clause jurisprudence, an Appointments Clause challenge could have biased the ALJ against it. OB 17-18. But that fear certainly does not justify its failure to timely raise the challenge to the Board. Moreover, any ALJ bias is speculative, particularly because the DOL ALJ rules permit ALJs to remove themselves from cases and have the cases reassigned on a grounds-neutral basis. 29 C.F.R. §§ 18.15, 18.16; *cf. Ramsey v. Comm'r of Soc. Soc.*, 973 F.3d 537, 541 n.2 (6th Cir. 2020) (Social Security disqualification regulation "plainly directed at bias"). A DOL ALJ's belief that they lacked proper constitutional authority during a critical phase of a pending case would certainly justify disqualification.

CONCLUSION

For these reasons, the Court should affirm the Board's holding that EPCC forfeited its Appointments Clause challenge.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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ADDENDUM

Billiter v. J&S Collieries, No. 18-0256 (Ben. Rev. Bd. Aug. 9, 2018)

U.S. Department of Labor

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

BRB Nos. 18-0256 BLA
and 18-0365 BLA
Case No. 16-BLA-5621

KELSIE BILLITER (Survivor of and o/b/o VERNON BILLITER)	)	
Claimant-Respondent	)	DATE ISSUED: AUG - 9 2018
v.	)	
J&S COLLIERIES	)	
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	ORDER

The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand in BRB No. 18-0256 BLA. The Director requests that the Board vacate the administrative law judge's Decision and Order and remand the case for the administrative law judge to reconsider "all prior substantive and procedural actions taken with regard to this claim, and [to] ratify them if [he] believes such action is appropriate." Employer has filed a response, agreeing that this case should be returned to the administrative law judge for reconsideration. Claimant has also filed a response brief.

In addition, employer has filed a Motion to Consolidate the above captioned cases. Employer requests that its appeal, BRB No. 18-0365 BLA be held in abeyance pending a ruling on the Director's motion to remand.

Upon consideration of the positions of the parties, and in light of the recent decision of the United States Supreme Court in *Lucia v. SEC,* 585 U.S. , 2018 WL 3057893 (June 21, 2018), we agree that under these circumstances the proper course of action is to remand both of the cases to the Office of Administrative Law Judges (OALJ) for further action.

20 C.F.R. §802.405(a). Any party adversely affected by the decision of the OALJ may file a new appeal with the Board within thirty (30) days of the date that the decision is filed with the district director. 20 C.F.R. §802.205.

Accordingly, the cases are remanded to the OALJ for further proceedings consistent with this Order. In light of the above, the Board renders employer's Motion to Consolidate and request to hold appeal in abeyance moot.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge