No. 19-3139

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL MINES CORPORATION, et al.

Petitioners

v.

STEVE CONLEY

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

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BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT OF JURISDICTION

This case involves a claim for benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944, filed by former coal miner Steve Conley. On April 27, 2017, United States Department of Labor (DOL) Administrative Law Judge Joseph E. Kane (ALJ) issued a decision and order awarding benefits. National Mines Corporation (National Mines) appealed this

decision to DOL's Benefits Review Board (Board) on May 18, 2017, 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 ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

On June 20, 2018, the Board affirmed the award of benefits. National Mines filed a timely motion for reconsideration on July 12, 2018, within the thirty-day period prescribed by 20 C.F.R. § 802.407(a). The Board denied the reconsideration motion on January 7, 2019. National Mines then filed its petition for review on February 28, 2019. 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 where the injury occurred. Mr. Conley's exposure to coal mine dust – the injury contemplated by 33 U.S.C. § 921(c) – occurred in the Commonwealth of Kentucky, within this Court's territorial jurisdiction. The Court therefore has jurisdiction over National Mines' petition for review.

STATEMENT OF THE ISSUE

The Appointments Clause provides that inferior officers are to be appointed by "the President," the "Courts of Law," and the "Heads of Departments." National Mines argues in its opening brief that the ALJ's decision awarding benefits should be vacated because the ALJ was not properly appointed. National

Mines did not raise this challenge before the ALJ, and raised it before the Board only in a motion for reconsideration after the Board had rejected its appeal. Consistent with its longstanding precedent, the Board found the challenge untimely and declined to hear it. The question presented is whether National Mines forfeited its Appointments Clause challenge by failing to timely raise it before the administrative agency.

STATEMENT OF THE CASE

Conley filed the instant claim for benefits on February 1, 2012.[1] DX 5. Following the district director's proposed decision and order awarding benefits and a formal hearing, the ALJ issued a decision and order awarding benefits. National Mines appealed the ALJ's award, but the Benefits Review Board affirmed the award and denied National Mine's motion for reconsideration (which argued for the first time that under the Appointments Clause the ALJ lacked authority to adjudicate the claim). National Mines then petitioned this Court for review.

STATEMENT OF THE FACTS

A. Relevant record evidence

The facts relevant to National Mines' Appointment Clause challenge are

[1] Conley's previous three claims were denied. Director's Exhibit (DX) 1-626, DX 2-170, and DX 3-142.

described in the statement of the case above and the summary of the prior decisions below. (National Mines identifies no specific error in the ALJ's weighing of the evidence in this case; a summary of the medical evidence and Conley's work and social histories is therefore unnecessary.)

B. Decisions below

1. The ALJ awards benefits.

Dissatisfied with the district director's proposed decision and order awarding benefits, National Mines requested a formal hearing and a *de novo* decision by an ALJ. The claim was transferred to the Office of Administrative Law Judges on April 3, 2013, and a hearing was held on March 22, 2016. Petitioner's Appendix (PA) 29-30. On April 27, 2017, the ALJ found Mr. Conley entitled to benefits. PA 28. The ALJ invoked the presumption of total disability due to pneumoconiosis based on Conley's fifteen years of coal mine employment and his total respiratory disability. PA 37-39; *see* 30 U.S.C. § 921(c)(4). The ALJ then determined that National Mines did not rebut the presumption and awarded benefits. PA 48.

2. The Benefits Review Board affirms.

The Board affirmed Mr. Conley's award of benefits on June 20, 2018. PA 15-27.

3. The Benefits Review Board denies reconsideration.

National Mines challenged the ALJ's authority to adjudicate Mr. Conley's claim for the first time in a motion for reconsideration. The Board held that National Mines had forfeited its Appointments Clause challenge "[b]ecause [National Mines] first raised the Appointments Clause issue only after the Board issued its decision on the merits." PA 10 n.6.

SUMMARY OF THE ARGUMENT

National Mines forfeited its Appointments Clause challenge because it did not timely raise the issue before the agency. National Mines did not mention the issue before the ALJ or in its brief to the Board. Rather, it raised the challenge for the first time in a motion for reconsideration only after the Board had rejected its appeal. The Board, adhering to its longstanding precedent, properly denied this motion, finding the Appointments Clause challenge waived because National Mines had failed to raise it in its opening brief to the Board.

Under longstanding principles of administrative law, National Mine's failure to timely raise its Appointments Clause challenge before the agency means that it cannot raise that challenge now to this Court. National Mines has forfeited the issue, and has pointed to no circumstance sufficient to excuse that forfeiture.

ARGUMENT

A. Standard of review

Whether National Mines forfeited its Appointments Clause challenge by failing to timely raise it before the agency is a question of law. This Court reviews questions of law *de novo*. *Arch of Ky., 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). However, the Court reviews for an abuse of discretion the Board's determination that National Mines did not timely raise the challenge because it was not presented in its opening brief to the Board. *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 639 (6th Cir. 2009) (finding no abuse of discretion in Board's excusing claimant's failure to preserve issue when Director had preserved it); *Gunderson v. U.S. Dept. of Labor*, 601 F.3d 1013, 1021 (10th Cir. 2010) ("[W]e afford considerable deference to the agency tribunal. In general, the formulation of administrative procedures is a matter left to the discretion of the administrative agency.") (internal quotation omitted).

B. National Mine's challenge – that the decision below must be vacated and the case remanded because the ALJ was not appointed in accordance with the Appointments Clause – should be rejected.

1. National Mines failed to timely raise its Appointments Clause challenge when the claim was pending before the agency.

National Mines failed to make a timely Appointments Clause challenge before the ALJ or Board. In more than *five* years – from April 2013 (when the

district director forwarded the case for the ALJ hearing) through June 20, 2018 (when the Board issued its decision affirming the award of benefits) – National Mines never challenged the authority of DOL ALJs to decide black lung cases generally or of ALJ Kane to decide this case. Only after the Board rejected its appeal did National Mines raise the Appointments Clause in a motion for reconsideration.[2]

By then, it was too late. The Board properly refused to consider National Mine's new issue, holding "[b]ecause [National Mines] first raised the Appointments Clause issue only after the Board issued its decision on the merits, [National Mines] forfeited the issue." PA 10 n.6. The Board properly refused to reconsider its initial decision based on National Mine's belated Appointments Clause challenge. In so ruling, the Board properly applied its own precedent that it is procedurally improper to raise an issue for the first time in a reconsideration motion. *Id.*, citing *Williams v. Humphreys Enters., Inc.*, 19 Black Lung Rep. (MB) 1-111, 1-114 (Ben. Rev. Bd. 1995) (declining to consider new issues raised by petitioner after it files opening brief identifying the issues to be considered on

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[2] The Director agrees that ALJs who preside over BLBA proceedings are inferior officers, and that the ALJ here was not properly appointed when he adjudicated the miner's claim. To remedy this, the Secretary of Labor in December 2017 ratified the ALJ's appointment and the appointments of other then-incumbent DOL ALJs. *See infra* at 17.

appeal); and *Senick v. Keystone Coal Mining Co.*, 5 Black Lung Rep. (MB) 1-395, 1-398) (1982) (stating that the Board "will not normally address new arguments raised in reply briefs" and declining to do so); *see also Caldwell v. North American Coal Corp.*, 4 Black Lung Rep. (MB) 1-135, 1-138-39 (Ben. Rev. Bd. 1981) (same, while explaining that its "practice accords with the treatment of reply briefs in the United States Courts of Appeals"); *Ravalli v. Pasha Maritime Servs.*, 36 Ben. Rev. Bd. Serv. 91 (Ben. Rev. Bd. 2002) (issues may not be raised for the first time in a motion for reconsideration).

Following this policy, the Board has routinely declined to consider Appointments Clause challenges raised subsequent to a petitioner's opening brief. *See Pauley v. Consolidation Coal Co.*, BRB No. 17-0554 BLA (Apr. 25, 2018) (declining to consider Appointments Clause challenge raised for first time in post-briefing motion for abeyance), Federal Respondent's Separate Appendix (SA) 49; *Eversole v. Shamrock Coal Co.*, BRB No. 17-0629 BLA (Apr. 24, 2018) (same), SA 51. Even after the Supreme Court decided *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Board has continued to deny as untimely similar belated attempts to challenge an ALJ's authority. *Motton v. Huntington Ingalls Indus.*, 52 Ben. Rev. Bd. Serv. 69, 69 n.1, 2018 WL 6303734, at *1 n.1 (Ben. Rev. Bd. 2018) (Appointments Clause challenge forfeited when first raised in post-briefing motion); *Luckern v. Richard Brady & Assoc.*, 52 Ben. Rev. Bd. Serv. 65, 66 n.3,

2018 WL 5734480, at *2 (Ben. Rev. Bd. 2018) (Appointments Clause challenge forfeited when first raised in reply brief); *Tackett v. IGC Knott County*, 2019 WL 1075364, BRB No. 18-0033 BLA (Feb. 26, 2019) (Appointments Clause challenge not raised in initial appeal to BRB is untimely); *Haynes v. Good Coal Co.*, 2019 WL 523769, BRB Nos. 18-0021 BLA; 18-0023 BLA (Jan. 18, 2019) (post-briefing motion raising Appointments Clause challenge is untimely), *appeal docketed*, No. 19-3142 (6th Cir.); *Young v. Island Creek Coal Co.*, 2018 WL 7046801, BRB No. 18-0064 BLA (Dec. 17, 2018) (post-briefing motion), *appeal docketed*, No. 19-3113 (6th Cir.); *Eversole v. Shamrock Coal Co.*, 2018 WL 7046745, BRB No. 17-0629 BLA (Dec. 12, 2018) (post-briefing motion); *Beams v. Cain & Son, Inc.*, 2018 WL 7046795, BRB No. 18-0051 BLA (Nov. 26, 2018) (post-briefing motion); *McIntyre v. IGC Knott County*, 2018 WL 70466700, BRB No. 17-0583 BLA (Nov. 26, 2018) (post-briefing motion); *Elkhorne Eagle Mining Co. v. Higgins*, 2018 WL 3727423, BRB No. 17-0475 (July 30, 2018) (post-briefing motion), *appeal docketed*, No. 18-3926 (6th Cir.), *Elkins v. Dickenson-Russell Coal Co.*, 2018 WL 3727420, BRB No. 17-0461 BLA (July 5, 2018) (post-briefing motion); *Napier v. Star Fire Coals, Inc.,* BRB No. 17-0149 BLA (July 5, 2018) (motion for reconsideration), *appeal docketed*, No. 18-3838 (6th Cir.), SA 59.

The Board procedure of declining to hear an issue not raised in an opening brief is certainly inoffensive as it closely parallels this Court's own rule on the

subject. *Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942, 955 (6th Cir. 1999) (recognizing similarity between Board and Court rule that issues not raised in opening briefs are generally considered abandoned); *Caldwell*, 4 Black Lung Rep. at 1-138-39 (explaining that rule in courts of appeals is basis for Board practice); *see, e.g., Rogers v. Henry Ford Health Sys.*, 897 F.3d 763, 779 (6th Cir. 2018) ("[A]rguments made to us for the first time in a reply brief are waived."); *Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010) (same); *accord Golden v. Comm'r*, 548 F.3d 487, 493 (6th Cir. 2008) ("[T]heir argument was forfeited when it was not raised in the opening brief."); *Pagan v. Fruchey*, 492 F.3d 766, 769 n.1 (6th Cir. 2007) (en banc) ("It is well established that issues not raised by an appellant in its opening brief . . . are deemed waived.").

Nor was the Board's refusal to afford special treatment to Appointments Clause challenges out of line. This Court confirmed that Appointments Clause challenges "are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture" in *Island Creek Coal Co. v. Wilkerson [Wilkerson]*, 910 F.3d 254, 256 (6th Cir. 2018) (quoting *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 678 (6th Cir. 2018)). The *Wilkerson* panel declined to consider the petitioner's Appointments Clause challenge because it was not raised before the Court until petitioner's reply brief: "Time, time, and time again, we have reminded litigants that we will treat an argument as forfeited when it was not raised in the

opening brief." 910 F.3d at 256 (internal quotation omitted). *See Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009) (holding that petitioner "forfeited its [Appointments Clause] argument by failing to raise it in its opening brief"); *In re DBC*, 545 F.3d 1373, 1377, 1380 & n.4 (Fed. Cir. 2008) (refusing to entertain an untimely Appointments Clause challenge to the appointment of a Patent Office administrative judge); *see also Kabani & Co. v. SEC*, 733 F. App'x 918 (9th Cir. 2018) (citing *Lucia* and holding that petitioners "forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency"), *cert. denied*, __ S.Ct. __, 2019 WL 936267 (May 13, 2019).

This Court will only overturn the Board's procedural rulings for an abuse of discretion. *Greene*, 575 F.3d at 639. The Board's straightforward application here of its longstanding rule against petitioners raising new issues after filing an opening brief falls far short of that standard. Consequently, National Mines failed to preserve its Appointments Clause challenge before the agency.

2. By failing to timely raise the issue before the agency, National Mines forfeited its Appointments Clause challenge before this Court.

National Mine's failure to preserve its Appointments Clause claim results in its forfeiture before this Court. Under longstanding principles governing judicial review of administrative decisions, this Court should not reach a claim that could and should have been preserved before the agency, but was not.

The Appointments Clause provides that inferior officers are to be appointed by "the President," the "Courts of Law," or the "Heads of Departments." U.S. Const. Art. II, sec. 2, cl. 2. In *Lucia*, the Supreme Court held that SEC ALJs are inferior officers who must be appointed consistent with the Constitution's Appointments Clause. In so holding, the Supreme Court explained that it "has held that one who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief," and that Lucia was entitled to relief because he "made just such a *timely* challenge" by raising the issue "before the Commission." 138 S.Ct. at 2055 (emphasis added, internal quotation omitted).

To support that conclusion, the Court cited *Ryder v. United States*, 515 U.S. 177 (1995), which held that the petitioner was entitled to relief on his Appointments Clause claim because he – unlike other litigants – had "raised his objection to the judges' titles before those very judges and prior to their action on his case." *Ryder*, 515 U.S. at 181-83. And forfeiture and preservation concerns had been raised in *Lucia's* merits briefing: as amicus, the National Black Lung Association urged the Supreme Court to "make clear that where the losing party failed to properly and timely object, the challenge to an ALJ's appointment cannot

succeed." Amici Br. 15, *Lucia v. SEC*, No. 17-130, 2018 WL 1733141 (U.S. Apr. 2, 2018).[3]

Unlike the challenger in *Lucia*, National Mines failed to timely raise and preserve its Appointments Clause challenge before the agency. It waited over five years, (from April 2013 to June 2018), and until after the Board rejected its appeal, to first raise the issue. As the Board properly concluded, by then it was too late.

Under longstanding principles of administrative law, National Mines may not now raise before the court an argument it failed to preserve before the agency. In *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 35 (1952), a litigant argued for the first time in court that the agency's hearing examiner had not been properly appointed under the Administrative Procedure Act. Based on the improper appointment, the district court invalidated the agency's order. The Supreme Court held that the litigant forfeited this claim by failing to raise it before the agency, and explained that "orderly procedure and good administration require

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[3] Even if *Lucia*'s repeated references to timeliness could be considered dicta, "[a]ppellate courts have noted that they are obligated to follow Supreme Court *dicta*, particularly when there is no substantial reason for disregarding it, such as age or subsequent statements undermining its rationale." *United States v. Marlow*, 278 F.3d 581, 588 (6th Cir. 2002) (quoting *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996)); *see also Kabani & Co.,* 733 F. App'x at 919 (citing *Lucia* in holding that "petitioners forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency").

that objections to the proceedings of an administrative agency be made" during the agency's proceedings "while it has opportunity for correction [.]" *Id.* at 36-37. Although the Court recognized that a timely challenge would have rendered the agency's decision "a nullity," *id.* at 38, it refused to entertain the forfeited claim based on the "general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Id.* at 37.[4]

This Court has consistently applied these normal principles of forfeiture, and explained that it is "well-settled that this court will not consider arguments raised for the first time on appeal unless our failure to consider the issue will result in a plain miscarriage of justice." *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 143 (6th Cir. 1997). And in cases under the BLBA, the Court will not consider issues that were not raised and preserved before the Board. *See*, *e.g.*, *Island Fork Construction v. Bowling*, 872 F.3d 754, 757-58 (6th Cir. 2017) ("Because KIGA did not raise the issue of its status before the ALJ or the Board, and instead

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[4] As previously discussed, National Mine's initial raising of its Appointments Clause challenge in a motion for reconsideration before the Board was not an "objection made at the time appropriate under its practice." *L.A. Tucker*, 344 U.S. at 37. National Mines thus failed to exhaust its administrative remedies. *See Spectrum Health-Kent Community Campus v. N.L.R.B.*, 647 F.3d 341, 349 (D.C. Cir. 2011) ("[T]o preserve objections for appeal a party must raise them in the time and manner that the [NLRB]'s regulations require.").

participated in the proceedings, the challenge to personal jurisdiction was forfeited."); *Brandywine Explosives & Supply v. Director, OWCP*, 790 F.3d 657, 663 (6th Cir. 2015) ("Generally, this court will not review issues not properly raised before the Board."); *Hix v. Director, OWCP*, 824 F.2d 526, 527 (6th Cir. 1987) ("[W]e hold that even if a claimant properly appeals some issues to the Board, the claimant may not obtain [judicial] review of the ALJ's decision on any issue not *properly* raised before the Board.") (emphasis added).

These principles apply with full force to Appointments Clause challenges. As explained earlier, those challenges are not jurisdictional and receive no special entitlement to review. *See supra* at 10-11; *see also GGNSC Springfield LLC v. NLRB,* 721 F.3d 403, 406 (6th Cir. 2013) ("Errors regarding the appointment of officers under Article II are 'nonjurisdictional.'") (quoting *Freytag v. C.I.R.*, 501 U.S. 868, 878-79 (1991)); *Turner Bros. Inc. v. Conley*, 757 F. App'x 697, 700 (10th Cir. 2018) ("Appointments Clause challenges are nonjurisdictional and may be waived or forfeited."). *Lucia* did not change this. This Court, as well as the Ninth and Tenth Circuits, have all held post-*Lucia* that Appointments Clause claims were forfeited when a petitioner failed to preserve them before the agency. *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018) (finding Appointments Clause challenge forfeited when litigant failed to press issue before agency, but excusing the forfeiture in light of the unique circumstances of the

case); *Kabani & Co.*, 733 F. App'x at 919 ("[P]etitioners forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency."); *Turner Bros.*, 757 F. App'x at 699 (agreeing that "Turner Brothers' failure to raise the [Appointments Clause] issue to the agency is fatal").

Likewise, the Eighth and Federal Circuits reached the same result before *Lucia*. *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 798 (8th Cir. 2013) (holding party waived Appointments Clause challenge by failing to raise the issue before the agency); *In re DBC*, 545 F.3d at 1377-81 (same).

The Federal Circuit has explained that a timeliness requirement for Appointments Clause challenges serves the same basic purposes as those underlying administrative exhaustion: "First, it gives [the] agency an opportunity to correct its own mistakes . . . before it is haled into federal court, and [thus] discourages disregard of [the agency's] procedures." *In re DBC*, 545 F.3d at 1378 (internal quotations omitted). Second, "it promotes judicial efficiency, as [c]laims generally can be resolved much more quickly and economically in proceedings before [the] agency than in litigation in federal court." *Id.* at 1379 (quoting *Woodford v. Ngo*, 548 U.S. 81, 89 (2006)). Both of those reasons apply here. If National Mines had raised the Appointments Clause challenge during the administrative proceedings, the Secretary of Labor or the Board could well have provided an appropriate remedy.

In fact, both the Secretary of Labor and the Board have taken appropriate remedial actions: the Secretary ratified the prior appointments of all then-incumbent agency ALJs "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." *Sec'y of Labor's Decision Ratifying the Appointments of Incumbent U.S. Department of Labor Administrative Law Judges* (Dec. 20, 2017).[5] And the Board has held that where an ALJ was not properly appointed and the issue is timely raised, the "parties are entitled to a new hearing before a new, constitutionally appointed administrative law judge." *Miller v. Pine Branch Coal Sales, Inc.*, __ Black Lung Rep. (MB) __, 2018 WL 82698645, at *2 (Ben. Rev. Bd. 2018) (en banc) (vacating improperly appointed ALJ's award and remanding the case for reassignment to a different ALJ); *Billiter v. J&S Collieries*, BRB No. 18-0256 (Aug. 9, 2018) (same), SA 53; *Noble v. Cumberland River Coal Co.*, BRB No. 18-0419 BLA (Feb. 27, 2019) (same), SA 55. Had National Mines timely raised the issue, it could have obtained appropriate relief. But it did not do so.

[5] Available at: https://www.oalj.dol.gov/Proactive_disclosures_ALJ_appointments.html.

National Mine's failure to timely present its Appointments Clause objection to the agency is quintessential forfeiture.

3. There are no grounds to excuse National Mine's forfeiture.

National Mines points to no excuse sufficient to justify its failure to timely raise the Appointments Clause challenge before DOL. It seeks a ruling that the ALJ was not constitutionally appointed, that his decision must therefore be vacated, and that a new ALJ decision must be rendered by a different, properly-appointed ALJ. The Board has issued many such orders already, *supra* at 7-9, which would have spurred the Secretary of Labor (whose delegatee, the Director, is a party to this suit) to ensure the availability of properly-appointed ALJs, if he had not already done so. *Id.*[6] If National Mines had timely acted before the agency, it could have obtained effective relief.

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[6] More generally, the Board has broadly interpreted its authority to decide substantive questions of law, including certain other constitutional issues. *See Duck v. Fluid Crane and Constr. Co.*, 2002 WL 32069335, at *2 n.4 (Ben. Rev. Bd. 2002) (stating that the Board "possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its jurisdiction"); *Shaw v. Bath Iron Works*, 22 Ben. Rev. Bd. Serv. 73 (1989) (addressing the constitutionality of the 1984 amendments to the Longshore Act); *Herrington v. Savannah Mach. & Shipyard*, 17 Ben. Rev. Bd. Serv. 196 (1985) (addressing constitutional validity of statutes and regulations within its jurisdiction); *Smith v. Aerojet Gen. Shipyards,* 16 Ben. Rev. Bd. Serv. 49 (1983) (addressing an issue involving due process); *see generally* 4 Admin L. & Prac. § 11.11 (3d ed.) ("Agencies have an obligation to address constitutional challenges to their own actions in the first instance.").

National Mines attempts to justify its administrative inaction by reliance on this Court's decision in *Jones Brothers*. OB 16-19. That decision, however, provides no excuse. Indeed, the decision confirms that National Mine's forfeiture of its Appointments Clause challenge here should not be excused, as this case lacks the special distinguishing features that led the Court to excuse the forfeiture in that case. There, the Court held that a petitioner had forfeited its Appointments Clause claim by failing to argue it before the Federal Mine Safety and Health Review Commission, but that this forfeiture was excusable for two reasons.

First, it was not clear whether the Commission could have entertained an Appointments Clause challenge, given the statutory limits on the Commission's review authority. *Jones Bros.*, 898 F.3d at 673-77, 678 ("We understand why *that* question may have confused Jones Brothers[.]") (emphasis in original). Second, Jones Brothers' timely identification in its opening pleading of the Appointments Clause issue for the Commission's consideration was reasonable in light of the uncertainty surrounding the Commission's authority to address the issue. *Id.* at 677-78 (explaining that merely identifying the issue was a "reasonable" course for a "petitioner who wishes to alert the Commission of a constitutional issue but is unsure (quite understandably) just what the Commission can do about it."). Given these circumstances, the court exercised its discretion to excuse petitioner's forfeiture, but explained that this was an exceptional outcome: "[W]e generally

expect parties like Jones Brothers to raise their as-applied or constitutional-avoidance challenges before the Commission and courts to hold them responsible for failing to do so." *Id.* at 677.

No similar exceptional circumstances exist here. Unlike Jones Brothers, which identified the issue in its initial appellate filing, National Mines did not timely identify the Appointments Clause issue to the Board. Moreover, National Mines could not have reasonably believed that the Board would have refused to entertain such a challenge. The Board has repeatedly provided remedies for Appointments Clause violations, *see supra* at 17, and has broadly interpreted its authority to decide substantive questions of law, including certain other constitutional issues. *See supra* at 18 n. 6 (citing instances where Board addressed constitutional issues). *Jones Brothers* is simply inapposite.

Moreover, National Mines cannot plausibly claim to be surprised by *Lucia*. This Court considered and rejected that possibility in *Wilkerson*, explaining that "[n]o precedent prevented the company from bringing the constitutional claim before [*Lucia,*]" and that "*Lucia* itself noted that existing case law 'says everything necessary to decide this case.'" *Wilkerson*, 910 F.3d at 257 (quoting *Lucia*, 138 S. Ct. at 2053). The panel also noted that the Tenth Circuit's decision in *Bandimere v. SEC*, 844 F.3d 1168, 1188 (2016), *cert. denied* 138 S.Ct. 2706 (2018), which reached the same conclusion as the Supreme Court in *Lucia*, was decided in

December 2016, giving the *Wilkerson* petitioner enough time to properly raise the issue. Here, National Mines also had enough time to raise the issue – *Bandimere* was decided before the ALJ's decision awarding the claim in April 2017, and before National Mines filed its brief with the Board. Any suggestion that National Mine's forfeiture should be excused because *Lucia* was not foreseeable should be rejected.

National Mine's remaining excuses do not bear scrutiny. Its contention (OB 18 n.5) that it would have been futile to raise an Appointments Clause challenge to the ALJ because DOL ALJs have no authority to address constitutional violations – an issue this Court need not decide – does not explain why it failed to timely raise its challenge before the Board, the real issue here. Furthermore, its reliance (OB 19) on *Old Ben Coal Co. v. Director, OWCP*, 62 F.3d 1003, 1007 (7th Cir. 1995) is misplaced. There, the court found no waiver of a challenge to an ALJ's weighing of medical evidence, where the operator, while not advocating the precise methodology adopted by the Supreme Court in an intervening decision, had "consistently challenged [the miner's] claim and the strength of the medical evidence." *Id*. In so finding, however, the Court cautioned: "Of course, a litigant cannot simply sit back, fail to make good faith arguments, and then, because of

developments in the law, raise a completely new challenge." *Id*. That is *exactly* what National Mines has done here, and it is not excusable.[7]

Finally, if the Court were to excuse National Mine's forfeiture, there would be real world consequences. To the best of our knowledge, there are nearly six hundred cases from around the country – arising under the BLBA, the Longshore Act, and its extensions – currently pending before the Board. But in the great majority of these cases, no Appointments Clause claim has been raised. Should this Court excuse National Mine's forfeiture here – where National Mines failed to timely raise the claim to the agency – it would be inviting every losing party at the Board to seek a re-do of years of administrative proceedings. For the Black Lung

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[7] By the time National Mines filed its opening Board brief in August 2017, there had been twelve different reported court opinions that discussed Appointments Clause challenges to ALJs. *Helman v. Dep't of Veterans Affairs*, 856 F.3d 920 (Fed. Cir. May 9, 2017); *Bandimere v. SEC*, 844 F.3d 1168, 1170 (10th Dec. 27, 2016); *Bennett v. SEC*, 844 F.3d 174, 177-78 (4th Cir. Dec. 16, 2016); *Lucia v. SEC*, 832 F.3d 277, 283 (D.C. Cir. Aug. 9, 2016), *affirmed by an equally divided en banc court*, 868 F.3d 1021 (D.C. Cir. June 26, 2017); *Hill v. SEC*, 825 F.3d 1236, 1240 (11th Cir. June 17, 2016); *Tilton v. SEC*, 824 F.3d 276, 279-80 (2d Cir. June 1, 2016); *Bennett v. SEC*, 151 F. Supp. 3d 632, 633 (D. Md. Dec. 17, 2015); *Ironridge Global IV, Ltd. v. SEC*, 146 F. Supp. 3d 1294, 1312 (N.D. Ga. Nov. 17, 2015); *Duka v. SEC*, 124 F. Supp. 3d 287, 289 (S.D.N.Y. Aug. 12, 2015); *Gray Fin. Grp. v. SEC*, 166 F. Supp. 3d 1335, 1350 (N.D. Ga. Aug. 4, 2015); *Tilton v. SEC*, 2015 WL 4006165, at *1 (S.D.N.Y. June 30, 2015); *Hill v. SEC*, 114 F. Supp. 3d 1297, 1316 (N.D. Ga. June 8, 2015). In some of these cases, the courts did not reach the merits of the Appointments Clause claim because the litigants had not completed their administrative proceedings, and the courts lacked jurisdiction until those proceedings were completed. *See, e.g.*, *Hill*, 825 F.3d at 1252.

program, whose very purpose is to provide timely and certain relief to disabled workers, that is precisely the kind of disruption that forfeiture seeks to avoid. *See L.A. Tucker*, 344 U.S. at 37 (cautioning against overturning administrative decisions where objections are untimely under agency practice).

In sum, the basic tenets of administrative law required National Mines to timely raise its Appointments Clause challenge before the agency. National Mine's attempt to justify its failure to do so is unavailing. The Court should therefore find that National Mines forfeited its challenge the ALJ's authority under the Appointments Clause.

CONCLUSION

The Court should reject National Mine's Appointments Clause challenge.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The Director does not object to National Mine's request for oral argument, but believes it is unnecessary.

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 5,538 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2019, copies of the Director's brief were served electronically using the Court's CM/ECF system on the Court and the following:

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