No. 18-3147

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ISLAND CREEK COAL COMPANY,
Petitioner,

v.

JAY H. WILKERSON,
Respondent/Claimant,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Federal Respondent/Party-in-Interest

Petition for Review of a Decision and Order
of the Benefits Review Board, United States Department of Labor

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SUR-REPLY FOR THE FEDERAL RESPONDENT

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Pursuant to the Court's October 11, 2018 Order, the Director, Office of Workers' Compensation Programs, files this sur-reply brief. We submit this brief only to address petitioner's belated claim that the order under review is invalid because the administrative proceedings below involved the participation of an Administrative Law Judge (ALJ) who was not appointed in conformity with the Appointments Clause of the Constitution. The Court should hold that petitioner may not raise a non-jurisdictional argument for the first time in its reply brief in this Court, particularly when petitioner never raised that argument before the adjudicating agency.

INTRODUCTION

This case concerns administrative proceedings under the Black Lung Benefits Act that started in May 2012 and concluded in December 2017. JA10, 284. During the five-and-a-half year administrative proceeding, petitioner Island Creek Coal Co. never raised an Appointments Clause challenge to the appointment of the administrative law judge (ALJ) who conducted a hearing and issued a decision awarding benefits. Island Creek failed to raise the issue at any point in the administrative proceedings. It did not raise this challenge before the ALJ (JA232-271), before the Benefits Review Board (JA272-283), or in its motion for en banc reconsideration by the Board (JA284). During the same time, numerous litigants across the country were raising Appointments Clause challenges to ALJs

in administrative proceedings and in federal court. *See, e.g.*, *Bandimere v. SEC*, 844 F.3d 1168, 1170 (10th Cir. 2016) (holding that the Appointments Clause applies to Securities and Exchange Commission ALJ); *Burgess v. FDIC*, 871 F.3d 297, 304 (5th Cir. 2017) (holding that petitioner "established a likelihood of success on the merits of his Appointments Clause challenge" to an ALJ of the Federal Deposit Insurance Corporation).

Island Creek petitioned for this Court's review on a single issue: Whether the ALJ appropriately concluded that the claimant suffered from a total disability. Opening Br. 3 (statement of the issue); *id.* at 17-49 (argument). Island Creek did not raise an Appointments Clause challenge in its opening brief in this Court. Instead, Island Creek first noted the Appointments Clause issue in a letter submitted under Federal Rule of Appellate Procedure 28(j), and first presented a substantive argument on the Appointments Clause in its reply brief. Consistent with longstanding precedent, this Court should hold that the claim has been forfeited.

ARGUMENT

I. Island Creek forfeited its Appointments Clause challenge by failing to raise it in its opening brief to the Court.

While Island Creek now seeks to raise an Appointments Clause challenge to the ALJ that presided over the administrative hearing below, it failed to preserve the issue by raising the argument in its opening brief to this Court. Instead, Island

Creek's argument focused solely on its claims that the ALJ improperly found that claimant Wilkerson was totally disabled. Opening Br. 17-49. Because the petition for review only concerned an evidentiary dispute between Island Creek and Wilkerson, the Director informed the Court that she did not intend to file a brief. Later, in its reply brief, Island Creek raised an Appointments Clause claim for the first time.

That is too late—this Court has consistently held that "arguments made to us for the first time in a reply brief are waived." *Rogers v. Henry Ford Health Sys.*, 897 F.3d 763, 779 (6th Cir. 2018) (quoting *Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010)); *accord Golden v. Commissioner*, 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."). The same rule applies to issues raised for the first time in letters filed under Fed. R. App. P. 28(j). *United States v. Maliszewski*, 161 F.3d 992, 1015 (6th Cir. 1998).

Courts of appeals have consistently refused to consider Appointments Clause claims that were not raised in the opening briefs on appeal. *Intercollegiate Broad. Sys.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009) (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). Most recently, the Ninth Circuit held that petitioners had "forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency." *Kabani & Co. v. SEC*, 733 F. App'x 918 (9th Cir. 2018) (citing *Lucia*, 138 S. Ct. at 2055).

This Court has similarly confirmed that Appointments Clause challenges are not jurisdictional. *See GGNSC Springfield LLC v. NLRB*, 721 F.3d 403, 406 (6th Cir. 2013); *see also Jones Bros., Inc. v. Secretary of Labor*, 898 F.3d 669, 678 (6th Cir. 2018) (collecting precedent that Appointments Clause challenges "are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture"). Under a straightforward application of this Court's normal forfeiture rules, which are fully applicable here, petitioner failed to preserve its Appointments Clause claim. This Court' should decline to entertain it.

II. Island Creek forfeited its Appointments Clause challenge by failing to raise the issue before the agency.

Even if this Court were to excuse petitioner's failure to abide by this Court's preservation requirements, the Appointments Clause claim is also forfeited because petitioner failed to raise the issue before the agency. Under longstanding principles that govern judicial review of administrative decisions, this Court should not reach a claim that could and should have been pressed before the agency, but was not.

The Appointments Clause provides that inferior officers are to be appointed by "the President," the "Heads of Departments," or the "Courts of Law." U.S. Const. Art. II, sec. 2, cl. 2. In *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Supreme Court held that ALJs of the Securities and Exchange Commission (SEC) are inferior officers who must be appointed consistent with the Constitution's Appointments Clause.[1] 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." *Id.* at 2055 (emphasis added, quotation marks 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 preservations concerns had been raised in *Lucia's* merits briefing, as amici the National Black Lung Association urged the Supreme Court to "make clear that where the losing party

[1] On the merits of the Appointments Clause challenge, the Director agrees that ALJs who preside over Black Lung Benefits Act proceedings are inferior officers, and that the ALJ below was not properly appointed when he adjudicated the case.

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).

Unlike the challenger in *Lucia*, Island Creek never raised an Appointments Clause challenge before the agency. Over five years, from December 2012, when Island Creek first requested an ALJ hearing, until December 2017, when the Board rejected its motion for reconsideration, Island Creek never contested the ALJ's appointment. Instead, Island Creek waited until after it had lost before the ALJ and before the Benefits Review Board, and only then raised the challenge in Court.

Under longstanding principles of administrative law, Island Creek may not now raise in court an argument it failed to present to 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. *Id.* The Supreme Court reversed, holding that the litigant forfeited this claim by failing to raise it before the agency, and explained that "orderly procedure and good administration require 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, the Court 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.

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 Black Lung Benefits Act, the Court will not consider issues that were not raised before the Benefits Review 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 participated in the proceedings, the challenge to personal jurisdiction was forfeited"); *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."); *Gibas v. Saginaw Min. Co.*, 748 F.2d

1112, 1119 (6th Cir. 1984) ("[T]he courts of appeals have refused to decide substantive legal questions not presented to the Board in the first instance.").[2]

These principles apply with full force to Appointments Clause challenges. As noted, this Court has explained that Appointments Clause claims are "nonjurisdictional" and receive no special entitlement to review. *GGNSC Springfield LLC*, 721 F.3d at 406; *see also Jones Bros.*, 898 F.3d at 677 (finding that Appointments Clause challenge was forfeited when litigant failed to press issue before agency, but excusing the forfeiture in light of the unique circumstances of the case). Likewise, the D.C. Circuit and Federal Circuit have held that Appointments Clause claims may be forfeited when a petitioner fails to properly raise them before the agency. *Intercollegiate Broad Sys., Inc.*, 574 F.3d at 755-56 (petitioner "has not given us any reason to depart from our normal forfeiture rule"); *In re DBC*, 545 F.3d at 1377-81 (litigant forfeited Appointments Clause argument by failing to raise it before agency).

Permitting an Appointments Clause challenge to be raised for the first time in court would be particularly problematic in Black Lung Benefits Act cases. In

[2] Island Creek was arguably required to raise its Appointments Clause challenge before both the ALJ and the Benefits Review Board. *See Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-6/7 (1996) (issues not raised before ALJ are deemed waived or forfeited). Whether that is so makes no difference in these agency proceedings, where Island Creek failed to raise an Appointments Clause claim at all.

many cases, like this one, a claimant will receive interim benefits while an initially approved claim continues to be litigated. 20 C.F.R. §§ 725.420(a), 725.502(a)(1), 725.522(a) (providing for interim benefits at various stages of litigation). Typically, the government's Black Lung Disability Trust Fund pays these interim benefits. See 20 C.F.R. §§ 725.420(a), 725.522(a). If the initial award is later overturned based on a coal company's Appointments Clause claim—raised for the first time in court—the claimant may well have spent the interim benefits and be unable to repay them. In that scenario, it is the Trust Fund, not the coal company, which is saddled with the loss. *See* 20 C.F.R. §§ 725.522(b), 725.542. If a coal company believes that there is a defect in the appointment of an agency adjudicator, the agency is entitled to notice and the opportunity to potentially cure the problem.

III. There are no grounds to excuse Island Creek's forfeiture.

A. Island Creek attempts to excuse its forfeiture by relying largely on *Jones Brothers*, but *Jones Brothers* confirms that the Appointments Clause claim here has been forfeited, as this case lacks the special distinguishing features that led the Court to excuse the forfeiture in that case. In *Jones Brothers*, this Court held that a petitioner had forfeited its Appointments Clause claim by failing to raise it before the 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"). Second, petitioner had at least identified the Appointments Clause issue for the Commission's consideration and then squarely raised its Appointments Clause argument in its opening brief in this Court. *Id.* at 677-78. Given that, the Court exercised its discretion to excuse petitioner's forfeiture, but explained that this was an exceptional outcome: "We 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.

Unlike the petitioner in *Jones Brothers*, Island Creek failed to raise an Appointments Clause argument in its opening brief to this court. *Compare* Opening Br. 17-49, *with* Opening Br. 18-20, *Jones Bros. v. Secretary of Labor*, No. 17-3483 (6th Cir. Aug. 11, 2017) ("The [ALJ] who presided over this case is an 'inferior officer' within the meaning of the Appointments Clause, but was not appointed in accordance with the same."). The Court excused Jones Brothers' forfeiture because, although petitioner was "confused" about whether the agency could decide the issue, *id.* at 678, it promptly raised the challenge before an Article III court, *see id.* at 675 (explaining that courts could certainly consider Appointments Clause claims). Island Creek offers no reason why it could not raise

an Appointments Clause claim in its opening brief when Jones Brothers' was able to do so. Indeed, Island Creek identified the Appointments Clause issue only *after* Jones Brothers had already prevailed. But even before this Court decided *Jones Brothers*, other Black Lung Benefits Act litigants had raised Appointments Clause challenges in their opening briefs. *See* Opening Br. 41-45, *Big Horn Coal Co. v. Sadler*, No. 17-9558 (10th Cir. May 2, 2018).[3] Island Creek's failure to follow this normal rule of appellate procedure is inexplicable.

Moreover, there is no confusion concerning the remedial authority of the Benefits Review Board. Congress vested the Board with the statutory power to decide substantive questions of law, including certain constitutional issues. *See Gibas*, 748 F.2d at 1119 (Board may invalidate regulations inconsistent with statutory authority); *Smith v. Aerojet General Shipyards,* 16 BRBS 49 (1983) (addressing due process issue). If Island Creek had timely raised the Appointments Clause issue, the Board could have considered the issue and, if appropriate, provided a remedy. In fact, the Board has done exactly that where litigants have timely raised Appointments Clause challenges before the agency. For instance, in *Miller v. Pine Branch Coal Sales, Inc.,* __ Black Lung Rep. __, BRB No. 18-325

[3] In B*ig Horn Coal Co v. Sadler*, No. 17-9558 (10th Cir.), the petitioner withdrew its Appointments Clause argument after the Director filed an answering brief explaining that the argument was never presented to the agency and had been forfeited. Answering Br. 12-23 (10th Cir. July 20, 2018); Reply Br. 1 n.1 (10th Cir. Aug. 20, 2018).

BLA (Oct. 22, 2018) (included in the addendum to this brief), the Board held that the ALJ had not been properly appointed and that the "parties are entitled to a new hearing before a new, constitutionally appointed administrative law judge." Addendum at 4. *See also Billiter v. J&S Collieries*, BRB No. 18-0256 (Aug. 9, 2018) (same); *Crum v. Amber Coal*, BRB No. 17-0387 (Feb. 26, 2018) (same).[4]

Finally, Island Creek asserts that it generally preserved all possible constitutional claims in the administrative proceedings, citing Joint Exhibit 1 from the administrative proceeding. Reply Br. 7-8 n. 10. Joint Exhibit 1 was a list of contested and uncontested issues between the parties, in which Island Creek stated that it was contesting "for appellate purposes, a challenge to the constitutionality of the Act and regulations, as applied." Joint Exhibit 1 ¶ 14. That general assertion of unspecified constitutional challenges was insufficient to properly raise an Appointments Clause challenge. *Carney v. Oklahoma Dep't of Pub. Safety*, 875 F.3d 1347, 1351 (10th Cir. 2017) (a "vague reference" to a constitutional claim "is simply not enough" to preserve it); *Newby v. Enron Corp.*, 394 F.3d 296, 309 (5th

[4] Island Creek's concerns about convincing the Secretary of Labor to appoint ALJs (Reply Br. 11-12), are misplaced. Regardless of whether the Secretary appointed the Department's ALJs, the Benefits Review Board could nonetheless grant Island Creek relief by ordering that it not be subject to any adverse consequences until it received a hearing before a properly appointed ALJ. And in any event, the Secretary has, in fact, ratified the appointments of the Department's ALJs to comport with the Appointments Clause. *See* https://go.usa.gov/xPmNt (letters ratifying ALJs' appointments).

Cir. 2004) ("Litigants must allege constitutional violations with 'factual detail and particularity.'").

B. Island Creek further argues that the Court should excuse its forfeiture because it had "no cognizable argument" in support of an Appointments Clause challenge before *Lucia*. Reply Br. 14. This argument is meritless. Appointments Clause challenges to different agencies' ALJs were well known before *Lucia*, and many litigants properly preserved those challenges so that they could benefit from any favorable Supreme Court decision. *See*, *e.g.*, Mot. for Remand, *Blackburn v. USDA*, No. 17-4102 (6th Cir. July 13, 2018) (Department of Agriculture's concession that petitioner was entitled to relief on his preserved Appointments Clause claim); Status Report, *J.S. Oliver Capital Mgmt. v. SEC*, No. 16-72703 (9th Cir. June 28, 2018) (similar concession by SEC). And several months before the Supreme Court decided *Lucia*, another coal company—represented by Island Creek's current counsel—filed a rehearing petition that raised an Appointments Clause challenge to the Department's ALJs. Pet. 4-9, *Consolidation Coal Co. v. Latusek*, No. 16-1768 (4th Cir. Feb. 22, 2018).

In fact, there is nothing novel about an Appointments Clause challenge to an ALJ. Almost twenty years ago, the D.C. Circuit considered an Appointments Clause challenge to Federal Deposit Insurance Corporation (FDIC) ALJs, *Landry v. FDIC*, 204 F.3d 1125, 1130 (D.C. Cir. 2000). Although the D.C. Circuit concluded

that the FDIC's ALJs were employees—not officers—who were not subject to the Appointments Clause, the issue remained open for other agencies' ALJs, and in other circuits.

During Island Creek's administrative proceedings, litigants around the country were raising Appointments Clause challenges to ALJs. By the time the Benefits Review Board denied Island Creek's motion for reconsideration on December 18, 2017, there were twelve different court opinions that discussed such Appointments Clause challenges.[5] Although many of these challenges concerned SEC ALJs, litigants also recognized that similar Appointments Clause challenges could be raised against ALJs in proceedings under the Black Lung Benefits Act. *See* Opening Br. 31-32 n.6, *Arch Coal, Inc. v. Acosta*, No. 17-5074, 2017 WL

[5] *Burgess v. FDIC*, 871 F.3d 297, 304 (5th Cir. Sept. 7, 2017); *Bandimere v. SEC*, 844 F.3d 1168, 1170 (10th Cir. 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.

3912782 (D.C. Cir. Sept. 6, 2017) (asserting that "under either *Bandimere* or *Lucia*, DOL ALJs hold their office in conflict with the Appointments Clause").

Island Creek suggests that it was prohibited from raising an Appointments Clause challenge to ALJs based on the D.C. Circuit's decision in *Landry*. Reply Br. 14-15. Island Creek does not explain why another circuit's decision involving another agency's ALJs would have been "authoritative" in this Court (Reply Br. 15), nor does it explain how the petitioners in *Bandimere v. SEC*, 844 F.3d 1168, or *Burgess v. FDIC*, 871 F.3d 297, were able to preserve and succeed on their Appointments Clause claims notwithstanding *Landry*.

C. Requiring litigants to raise Appointments Clause claims before the agency serves the central purposes of forfeiture: "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 (quotation simplified). Second, "it promotes judicial efficiency, as claims generally can be resolved much more quickly and economically in proceedings before the agency than in litigation in federal court." *Id*. at 1379 (quotation simplified). Both of those reasons apply here. If Island Creek had raised the Appointments Clause challenge during the administrative proceedings, the Secretary of Labor could well have provided an appropriate remedy. But because Island Creek chose not to raise the issue, the Secretary was never given an

opportunity to consider and resolve it during the normal course of administrative proceedings.

If the Court were to excuse Island Creek's forfeiture, there would be real world consequences. There are nearly six hundred cases currently pending before the Board. To the best of our knowledge, in approximately five hundred of these cases, no Appointments Clause claim has been raised. Should the Court excuse Island Creek's forfeiture here—where it failed to raise the claim at any stage before the agency, and failed to raise the claim in its opening brief to this Court—every losing party at the Board may seek a re-do of years' worth of administrative proceedings based on an Appointments Clause claim it can raise belatedly in court for the first time. And especially for the black lung benefits program, whose very purpose is to provide financial and medical assistance to totally disabled miners (and their dependent survivors), that is precisely the kind of disruption that forfeiture seeks to avoid. *See L.A. Tucker*, 344 U.S. at 37 ("[C]ourts 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.").

CONCLUSION

The Court should hold that Island Creek forfeited its Appointments Clause claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I certify that this brief complies with the Court's October 11, 2018 order directing supplemental briefing and with Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because it is contains 3,930 words by the count of Microsoft Word 2013.

s/Jeffrey S. Goldberg
JEFFREY S. GOLDBERG
Attorney
U.S. Department of Labor

CERTIFICATE OF SERVICE

I certify that on November 1, 2018, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Jeffrey S. Goldberg
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Addendum

Roppolo

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BRB No. 18-0323 BLA

JOHN MILLER Claimant-Respondent v. PINE BRANCH COAL SALES, INCORPORATED and AMERICAN MINING INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	**PUBLISHED** DATE ISSUED: 10/22/2018 DECISION and ORDER EN BANC

Appeal of the Decision and Order on Remand of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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R

Before: HALL, Chief Administrative Appeals Judge, BOGGS, BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2015-BLA-05642) of Administrative Law Judge John P. Sellers, III, awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim[1] filed on May 27, 2014, and is before the Board for the second time.

Initially, in a Decision and Order dated June 27, 2017, the administrative law judge credited claimant with twenty years of coal mine employment,[2] at least fifteen years of which took place at surface mines in conditions substantially similar to those in an underground mine. He further found that the new evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption[3] and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). He further determined that employer failed to rebut the Section 411(c)(4) presumption, and awarded benefits accordingly.

Employer filed an appeal with the Board, arguing that the administrative law judge lacked the authority to hear and decide the case because he had not been properly appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4]

[1] Claimant's initial claim, filed on January 19, 2006, was denied by reason of abandonment. Director's Exhibit 1. The regulations provide that, "[f]or purposes of §725.309, a denial by reason of abandonment shall be deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Hearing Transcript at 14. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. See Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the evidence establishes fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); see 20 C.F.R. §718.305.

[4] Article II, Section 2, Clause 2, sets forth the appointing powers of the President:

In response, the Director, Office of Workers' Compensation Programs (the Director), noted that the Secretary of Labor, exercising his power as the Head of a Department under the Appointments Clause, ratified the appointment of all Department of Labor (DOL) administrative law judges on December 21, 2017. Consequently, the Director asserted that actions taken by DOL administrative law judges after that date were not subject to challenge on Appointments Clause grounds. However, because Judge Sellers issued his decision in this case before December 21, 2017, the Director conceded that the Secretary's ratification did not foreclose the Appointments Clause argument raised by employer. Director's Motion to Remand at 2. The Director therefore requested that the Board vacate the administrative law judge's Decision and Order and remand the case for the administrative law judge to "reconsider his decision and all prior substantive and procedural actions taken in regard to this claim, and ratify them if [he] believes such action is appropriate." Id. at 3. The Board granted the Director's motion, and remanded the case with instructions to "reconsider the substantive and procedural actions previously taken and to issue a decision accordingly." Miller v. Pine Branch Coal Sales, Inc., BRB No. 17-0555 BLA (Mar. 9, 2018) (Order) (unpub.).

The administrative law judge issued a Decision and Order on Remand awarding benefits on March 29, 2018. In that decision, the administrative law judge stated, "I have reviewed all substantive and procedural actions I have previously taken. Upon review, I ratify them all." Decision and Order on Remand at 2. He then set forth, in full, his "original Decision and Order Awarding Benefits, now ratified . . . ." Id. at 2-35.

On appeal, employer again contends that the administrative law judge lacked the authority to hear and decide this case. Employer argues that the administrative law judge's decision should be vacated and the case remanded for reassignment to a properly appointed administrative law judge. The Director responds that, in light of recent case law from the Supreme Court, the Board should vacate the administrative law judge's decision and remand the case "for reassignment to a new, properly appointed, [administrative law

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> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Art. II, § 2, cl. 2.

judge.]" Director's Brief at 1.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board reviews questions of law de novo. See Gibas v. Saginaw Mining Co., 748 F.2d 1112, 1116 (6th Cir. 1984).

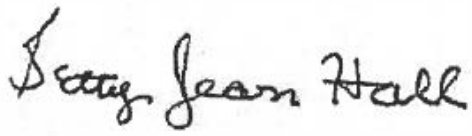
After employer filed its brief in this appeal, the Supreme Court decided Lucia v. SEC, 585 U.S. , 138 S.Ct. 2044 (2018), in which the Court held that Securities and Exchange Commission administrative law judges are inferior officers under the Appointments Clause of the Constitution. Lucia, 138 S.Ct. at 2055. The Court further held that, because the petitioner timely raised his challenge to the constitutional validity of the appointment of the administrative law judge (who had not been appointed in conformance with the Appointments Clause), the petitioner was entitled to a new hearing before a new and properly appointed administrative law judge. Id.

In light of Lucia, the Director acknowledges that "in cases in which the Appointments Clause challenge has been timely raised, and in which the [administrative law judge] took significant actions while not properly appointed, the challenging party is entitled to the remedy specified in Lucia, a new hearing before a new (and properly appointed) administrative law judge." Director's Brief at 3. Although the administrative law judge, on remand, followed the Board's directive to reconsider the substantive and procedural actions that he had previously taken and to issue a new decision, the Supreme Court's Lucia decision makes clear that this was an inadequate remedy. Lucia dictates that when a case is remanded because the administrative law judge was not constitutionally appointed, the parties are entitled to a new hearing before a new, constitutionally appointed administrative law judge.[5]

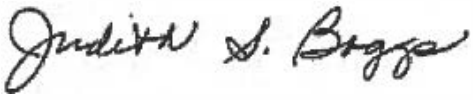
[5] Employer asserts that the Secretary's December 21, 2017 ratification of Department of Labor administrative law judges was insufficient to cure any constitutional deficiencies in their appointment. Employer's Brief at 12-18. Employer also argues that limits placed on the removal of administrative law judges "violate [the] separation of powers." Id. at 15. We decline to address these contentions as premature.

Accordingly, we vacate the administrative law judge's Decision and Order on Remand awarding benefits, and remand this case to the Office of Administrative Law Judges for reassignment to a new administrative law judge and for further proceedings consistent with this opinion.

SO ORDERED.



BETTY JEAN HALL, Chief
Administrative Appeals Judge



JUDITH S. BOGGS
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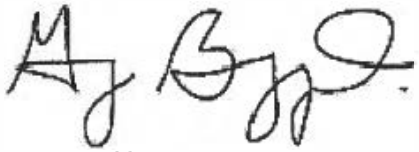

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

CERTIFICATE OF SERVICE

2018-0323-BLA John Miller v. Pine Branch Coal Sales, Inc., American Mining Insurance Co., Director, Office of Workers' Compensation Programs (Case No. 15-BLA-5642)

I certify that the parties below were served this day.

10/22/2018
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