No. 18-3838

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STAR FIRE COALS, INC., et al.

Petitioner

v.

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

and

MARGIE NAPIER

Respondents

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

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BRIEF FOR THE FEDERAL RESPONDENT

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This case involves a claim for survivor benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944, filed by Margie Napier, widow of deceased coal miner Elhannon Napier. On November 25, 2016, Administrative Law Judge (ALJ) Jennifer Gee issued a decision awarding benefits. Petitioner's Appendix (PA) 18. Star Fire Coals, Inc. (Star Fire) appealed this

decision to the United States Department of Labor (DOL) Benefits Review Board on December 19, 2016, 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 ALJ Gee's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

On January 25, 2018, the Board affirmed the award of benefits. PA 7. Star Fire filed a timely motion for reconsideration on February 15, 2018, within the thirty-day period prescribed by 20 C.F.R. § 802.407(a). The Board denied the reconsideration motion on July 5, 2018. PA 3. Star Fire then filed its petition for review on September 4, 2018. PA 1. 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. Napier'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 Star Fire's petition for review.

STATEMENT OF THE ISSUES

1. The Appointments Clause provides that inferior officers are to be appointed by "the President," the "Courts of Law," and the "Heads of Departments." Star Fire argues in its opening brief that ALJ Gee's decision

awarding benefits should be vacated because ALJ Gee was not properly appointed. Star Fire did not raise this challenge before ALJ Gee, 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 Star Fire forfeited its Appointments Clause challenge by failing to timely raise it before the administrative agency.

2. Section 22 of the Longshore and Harbor Workers' Compensation Act, incorporated into the BLBA by 30 U.S.C. § 932(a), permits any party to a claim to request modification of a decision on the ground of a change in condition or because of a mistake in a determination of fact. In BLBA cases, employers may request modification within one year of the last payment of benefits; claimants within one year of the rejection of a claim.

Neither Section 22 nor the implementing black lung regulation, 20 C.F.R. 725.310, limits the number of times a claimant may request modification or requires a subsequent modification request be filed within one year of the very first rejection of a claim. Accordingly, the courts of appeals have permitted the filing of multiple modification petitions so long as a later modification petition is filed within one year of the denial of the preceding modification petition.

A modification petition may be denied if it would not render justice under

the BLBA. ALJ Gee determined that granting Mrs. Napier's fourth modification petition would render justice under the BLBA largely because Mrs. Napier acted with due diligence and a permissible motive, and the need for accuracy outweighed the interest in finality.

The two modification-related issues are whether each successive modification petition must be filed within one year of the initial rejection of a claim, and whether ALJ Gee acted within her discretion in finding that granting Mrs. Napier's modification petition would render justice under the BLBA.

STATEMENT OF THE CASE

Mrs. Napier filed the instant claim for survivor benefits in 2002.[1] DX 3. The district director issued a proposed decision and order denying benefits, DX 26, which became a final decision when Mrs. Napier did not request an ALJ hearing and decision. 20 C.F.R. § 725.419(a), (d). Instead, Mrs. Napier petitioned for modification pursuant to 20 C.F.R. § 725.310. DX 30. ALJ Thomas Phalen, Jr., denied this modification request on the ground that neither pneumoconiosis nor death due to pneumoconiosis was not established. PA 64. Mrs. Napier then petitioned for modification a second time. DX 54. The district director issued a

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[1] Mr. Napier's lifetime claim for disability benefits was denied in September 1996 for failure to establish the presence of pneumoconiosis. Director's Exhibit (DX) 1. Mr. Napier died on November 9, 2001. DX 11.

proposed decision and order denying benefits, DX 59, which Mrs. Napier let stand as a final decision. Mrs. Napier then filed a third modification request. DX 60. ALJ John P. Sellers, III, granted modification – he modified the prior denial by finding pneumoconiosis established -- but he denied benefits because Mrs. Napier failed to prove that her husband's death was due to pneumoconiosis. PA 33.

Thereafter, Mrs. Napier filed the current, her fourth, modification petition. DX 97. Following the district director's denial (DX 101) and a formal hearing, ALJ Gee issued a decision and order granting modification and awarding benefits. Star Fire appealed, but the Benefits Review Board affirmed the award and denied Star Fire's motion for reconsideration (which argued for the first time that under the Appointments Clause ALJ Gee lacked authority to adjudicate the claim).

Star Fire then petitioned this Court for review. Before briefing commenced, it filed a motion to remand, arguing that ALJ Gee lacked the authority to adjudicate the claim under *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018). On February 6, 2019, the Court denied the motion without prejudice. Star Fire's opening brief followed.

STATEMENT OF THE FACTS

A. Statutory and regulatory background

In addition to disability benefits for miners who are totally disabled by pneumoconiosis, the BLBA provides survivors' benefits to the qualifying dependents of miners who die from the disease. 30 U.S.C. §§ 901(a), 922, 932(c).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. (Longshore Act), provides:

> Upon his own initiative, or upon the application of any party in interest * * *, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of *7 compensation, * * * or at any time prior to one year after the rejection of a claim, review a compensation case * * * [and] issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

33 U.S.C. § 922.[2] That provision is incorporated into the BLBA by 30 U.S.C. § 932(a) and is largely reiterated in the Department of Labor's black lung regulation 20 C.F.R. § 725.310.

Section 22, as implemented by DOL, alters the ordinary principles of res judicata by providing that "[u]nsuccessful black lung claimants may, within a year of the final order, request modification of the order." *Jessee v. Director, OWCP*, 5 F.3d 723, 724 (4th Cir. 1993); 20 C.F.R. § 725.310(a); *see also Youghiogheny and*

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[2] The deputy commissioner, now called the district director, 20 C.F.R. § 725.101(a)(11), is DOL's initial adjudication officer for black lung claims, see 20 C.F.R. § 725.350(b). The 1972 amendments to the Longshore Act, however, removed the authority of district directors to conduct hearings and transferred that authority to ALJs. *See* 33 U.S.C. 919(d). All powers vested in the deputy commissioners with respect to such hearings were transferred to the ALJs. *Id.*; s*ee Eifler v. OWCP*, 926 F.2d 663, 665-666 (7th Cir. 1991).

Ohio Coal Co. v. Milliken, 200 F.3d. 942, 951-953 (6th Cir. 1999) (one year period runs from date of final denial of claim; court of appeals decision becomes final when mandate issues); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 229-230 (6th Cir. 1994) (subsequent claim filed within one year of prior denial is treated as modification request); *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 462-465 (1968). Moreover, as the Supreme Court has held, Section 22 vests the factfinder with "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet- General Shipyards, Inc.*, 404 U.S. 254, 256 (1971) (per curiam); *see also Consolidation Coal Co.*, 27 F.3d at 230.

Consistent with Congress's intent that modification be available whenever "desirable in order to render justice under the act," *Banks*, 390 U.S. at 464 (quoting S. Rep. No. 588, 73d Cong., 2d Sess. 3-4 (1934); H.R. Rep. No. 1244, 73d Cong., 2d Sess. 4 (1934)), courts uniformly have concluded that any factual mistake may be corrected, including the ultimate issue of entitlement to benefits. *See*, *e.g.*, *O'Keeffe*, 404 U.S. at 255; *Banks*, 390 U.S. at 464-465; *Consolidation Coal Co.*, 27 F.3d at 230; *Keating v. Director, OWCP*, 71 F.3d 1118, 1123 (3d Cir. 1995); *Jessee*, 5 F.3d at 725; *Amax Coal Co. v. Franklin*, 957 F.2d 355, 358 (7th Cir. 1992). It is thus well established that the Longshore and Black Lung Acts have

"perhaps the most permissive 'mistake' reopening rule on record." 13 Arthur Larson, *Larson's Workers' Compensation Law* § 131.05(2)(b), at 131-51 (2000).

In promulgating § 725.310, DOL clearly rejected "numerical or temporal limitations (*e.g.*, limiting claimants to a maximum number of modification requests, or no more than a certain number in a given time period) on a claimant's right to seek modification." 65 Fed. Reg. 79977 (Dec. 20, 2000). DOL explained that

> Congress's overriding concern in enacting the Black Lung Benefits Act was to ensure that miners who are totally disabled due to pneumoconiosis arising out of coal mine employment, and the survivors of miners who die due to pneumoconiosis, receive compensation. Because any limitation on the right to file modification petitions could deny, or delay, the payment of compensation to eligible claimants, the Department does not believe that such limitations are appropriate.

Id.[3] This Court has likewise recognized the absence of limits on the number of modification requests that can be made. *Youghiogheny and Ohio Coal Co.*, 200 F.3d at 956; *accord Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 540 (7th Cir. 2002); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 500 (4th Cir.

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[3] There is also no limit to the number of modification requests that coal mine operators may file. *See* 20 C.F.R. § 725.310(e)(6) (permitting operators to file successive modification requests provided they pay outstanding benefits to the claimant or repay any interim benefits paid by the Black Lung Disability Trust Fund).

1999); *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1364 (4th Cir. 1996).

Finally, both the courts and the Board have agreed with the Director that a denial of a modification petition is a "rejection of a claim," as that phrase is used in Section 22, and therefore, a new modification petition may be filed within one year of the denial of a prior petition. *Old Ben Coal Co.*, 292 F.3d at 540; *Betty B Coal Co.*, 194 F.3d 499-500; *Garcia v. Director, OWCP*, 12 Black Lung Rep. (MB) 1-24, 1-26 (Ben. Rev. Bd. 1988). *See also Keating*, 71 F.3d at 1123 (awarding benefits based on claimant's second modification petition filed within one year of denial of prior petition and approximately five years after original denial of claim).

B. Relevant record evidence

The Director is not addressing Star Fire's arguments regarding ALJ Gee's weighing of the medical evidence. The facts relevant to Star Fire's Appointments Clause challenge and its arguments concerning Mrs. Napier's modification petition are described in the statement of the case above, and the summary of the prior decisions below.

C. Decisions below

1. ALJ Gee grants modification and awards benefits. (PA 18)

ALJ Gee first addressed Mrs. Napier's modification petition. She found that ALJ Sellers had committed two mistakes in his determinations of fact. First, he failed to explain – and the medical evidence did not support – his finding that Mr.

Napier had suffered from coal mine dust-related emphysema, but died due to a different, non-dust-related form of emphysema. PA 24. Second, she found that ALJ Sellers "erroneously equated silica dust with coal mine dust throughout his decision," which caused him to misinterpret and accord less weight to Dr. Perper's opinion.[4] *Id*.

On the merits, ALJ Gee found that Mrs. Napier had established the presence of coal workers' pneumoconiosis based on the x-ray evidence and autopsy tissue slides. PA 25. She further found that that Mrs. Napier had also established the presence of legal pneumoconiosis by proving that Mr. Napier's coal mine dust exposure had contributed to his emphysema.[5] PA 27. ALJ Gee then credited Dr. Perper's opinion to find that Mr. Napier's pneumoconiosis had contributed to his

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[4] Dr. Perper's opinion, submitted by Mrs. Napier in support of her previous modification petition, concluded, *inter alia*, that Mr. Napier's coal workers' pneumoconiosis "was a substantial cause of his pulmonary impairment and disability and ultimately contributed to and hastened his death." PA 82, 122.

[5] "Pneumoconiosis comes in two forms: clinical pneumoconiosis and legal pneumoconiosis. 'Clinical pneumoconiosis' refers to certain lung diseases that the medical community recognizes to be caused by exposure to coal dust—in the words of the applicable regulation, diseases 'characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment.' 20 C.F.R. § 718.201(a)(1). 'Legal pneumoconiosis' is a broader and less definite term that refers to any chronic lung disease that was caused in this instance by exposure to coal dust. 20 C.F.R. § 718.201(a)(2)." *Central Ohio Coal Co. v. Director, OWCP*, 762 F.3d 483, 486 (6th Cir. 2014) (internal citation omitted).

death, while rejecting Dr. Oesterling's contrary opinion. PA 28-29.

As a final matter, ALJ Gee concluded that granting Mrs. Napier's modification petition rendered justice under the BLBA. ALJ Gee considered four factors: "(1) the need for accuracy, (2) the quality of the new evidence, (3) the diligence and motive of the parties seeking modification, and (4) the futility or mootness of a favorable ruling." PA 29. She determined that "the need for accuracy, clearly weighs in favor of granting the Claimant's request for modification" because "the accuracy of the outcome of a claim is more important than the finality of an earlier decision on it." PA 29. She noted that the second factor was "not pertinent here as the claim did not include any new evidence," but found that Mrs. Napier had met the third factor by timely filing her modification petition. PA 29-30. ALJ Gee concluded that Mrs. Napier had met the final factor because she acted "to obtain the benefits to which she is entitled. This is not a case in which modification would be futile or moot, as it would be where an employer sought modification of benefits for a miner that is deceased and without an estate from which to recover overpayments." PA 30.

2. The Benefits Review Board affirms. (PA 7)

The Board first rejected Star Fire's argument that the case should have been assigned to ALJ Sellers on modification, holding that Star Fire had waived the argument by failing to raise it before ALJ Gee. PA 10. Additionally, the Board

affirmed ALJ Gee's finding that granting modification rendered justice under the BLBA, holding that she had not abused her discretion. PA 15-16. The Board also affirmed ALJ Gee's finding that Mr. Napier had pneumoconiosis, which contributed to his death. PA 12-15.

3. The Benefits Review Board denies reconsideration. (PA 3)

Star Fire challenged ALJ Gee's authority to adjudicate Mrs. Napier's claim for the first time in a motion for reconsideration. The Board held that Star Fire had waived its Appointments Clause challenge: "Because [Star Fire] first raised the Appointments Clause issue fourteen months after it filed its appeal, one year after it filed its opening brief, and only after the Board issued its decision on the merits, [Star Fire] waived the issue." PA 3-4 n.1.

4. This Court denies Star Fire's motion to remand without prejudice.

Soon after filing its petition for review, Star Fire again raised its Appointments Clause challenge in a motion to remand. The Court denied the motion, however, because Star Fire's Appointments Clause challenge was a merits issue rather than a jurisdictional one, and thus "more suitable for consideration by the merits panel." Order at 3.

SUMMARY OF THE ARGUMENT

Star Fire forfeited its Appointments Clause challenge because it did not timely raise the issue before the agency. Star Fire did not mention the issue before

ALJ Gee 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 Star Fire had failed to raise it in its opening brief to the Board.

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

Star Fire also attacks the granting of Mrs. Napier's modification petition. While not disputing that a denied claimant may file more than one modification petition, it nonetheless contends that each such petition must be filed within one year of the initial rejection of the claim. Such a limitation would, in practical effect, allow claimants one modification petition because it typically takes much longer than one year to adjudicate a black lung claim. Employers, on the other hand, would have no such practical restriction because their right to petition for modification is triggered by each payment of compensation, which is an ongoing (monthly) obligation.

In any event, Star Fire's argument finds no support in the plain text of the statutory provision providing for modification, 33 U.S.C. § 922, or the black lung

implementing regulation, 20 C.F.R. § 725.310. Both permit claimants to file modification petitions "at any time" within one year of a denial of claim, rather than within one year of the first denial of a claim. Accordingly, all courts that have addressed the issue and the Board have rejected Star Fire's argument.

A modification petition can be denied if it does not render justice under the BLBA (or if no mistake of fact or change in condition is found). ALJ Gee properly considered the four factors relevant to the "renders justice" inquiry: accuracy, the quality of the new evidence, the petitioning party's diligence and motive, and whether a favorable ruling would be futile or moot. She reasonably concluded that the value of an accurate adjudication outweighed the value of finality; that Mrs. Napier had acted diligently and with the permissible motive of attempting to obtain benefits; and that an award would not be futile or moot.

ARGUMENT

A. Standard of review

Whether Star Fire 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 the Board's determination that Star Fire did not timely raise the challenge because it was not presented in its opening brief to the Board

under an abuse of discretion standard. *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 quotations omitted).

Whether a claimant must file each and every modification petition within one year of an initial denial of benefits is a question of law that is reviewed de novo. *Arch of Ky.,* 556 F.3d at 477. This issue, however, is informed by black lung regulations that implement the statutory right to modification. The Director's interpretation of the BLBA, as expressed in implementing regulations, is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Island Creek Kentucky Min. v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013). Finally, courts review a decision to grant modification for an abuse of discretion. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. at 256; *Sharpe v. Director, OWCP*, 495 F.3d 125, 130 (4th Cir. 2007); *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 429 (6th Cir. 1998).

B. Star Fire's challenge – that the decision below must be vacated because ALJ Gee was not appointed in accordance with the Appointments Clause – should be rejected.

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

Star Fire failed to make a timely Appointments Clause challenge before ALJ Gee or Board. In more than *five* years – from August 2012 (when the district director forwarded the case for the most recent ALJ hearing) through January 2018 (when the Board issued its decision affirming the award of benefits – Star Fire never challenged the authority of DOL ALJs to decide black lung cases. In fact, it first argued just the opposite before the Board: it contended that the case must be *remanded and reassigned* to one particular DOL ALJ, Judge Sellers, who, as it happens, was improperly appointed at the time.[6] Only *after* Star Fire could not get its preferred adjudicator and *after* the Board rejected its appeal did Star Fire raise the Appointments Clause in a motion for reconsideration.

By then, it was too late. The Board properly refused to consider Star Fire's new issue, holding "[b]ecause [Star Fire] first raised the Appointments Clause issue fourteen months after it filed its appeal, one year after it filed its opening

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[6] The Director agrees that ALJs who preside over BLBA proceedings are inferior officers, and that ALJ Gee below was not properly appointed when she adjudicated the case. To remedy this, the Secretary of Labor in December 2017 ratified ALJ Gee's appointment and the appointments of other then-incumbent Department of Labor ALJs. *See infra* at 26-27.

brief, and only after the Board issued its decision on the merits, [Star Fire] waived the issue." PA 4. The Board properly refused to reconsider its initial decision based on Star Fire's utterly new, and completely inconsistent, theory of the case. 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 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 (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)

194.; *Eversole v. Shamrock Coal Co.*, BRB No. 17-0629 BLA (Apr. 24, 2018) (same), SA 196. 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 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); *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 filed*, 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 filed*, 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 BLA (July 30, 2018) (post-briefing motion) *appeal filed*, 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).

The Board procedure of declining to hear an issue not raised in an opening brief is certainly inoffensive given that it closely parallels this Court's own rule on the subject. *Youghiogheny and Ohio Coal Co.*, 200 F.3d at 955 (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 employer's Appointments Clause challenge because it was not raised before the Court until employer'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 marks 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, Star Fire failed to preserve its Appointments Clause challenge before the agency.

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

Star Fire'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. And, contrary to Star Fire's argument, Petitioner's Opening Brief (OB) 17 n.8, Appointments Clause challenges can be forfeited.

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*, 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 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 failed to properly and timely object, the challenge to an ALJ's appointment cannot succeed." Amici Br. 15, *Lucia v. S.E.C.*, No. 17-130, 2018 WL 1733141 (U.S. Apr. 2, 2018).[7]

Unlike the challenger in *Lucia*, Star Fire failed to timely raise and preserve its Appointments Clause challenge before the agency. It waited over five years, (from August 2012 to January 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.

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[7] 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").

Under longstanding principles of administrative law, Star Fire may not now raise in 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 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.[8]

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[8] As previously discussed, Star Fire'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. Star Fire 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.").

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 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"); *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 20; *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, 699, 2018 WL 6523096, at *1 (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.*, 898 F.3d at 677 (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 (finding litigant forfeited Appointments Clause challenge by failing to raise it before agency). Similarly, this Court, as well as the Ninth and D.C. Circuits have found Appointments Clause challenges forfeited when the petitioner failed to raise it in its opening brief before

the court. *Wilkerson*, 910 F.3d at 256; *Kabani & Co.*, *supra*; *Intercollegiate Broadcast Sys.*, 574 F.3d at 755-56.

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 Star Fire 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).[9] 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) __, BRB No. 18-0325 BLA, slip op. at 4 (Oct. 22, 2018) (en banc) (vacating improperly appointed ALJ's award and remanding the case for reassignment to a different ALJ)[10]; *Billiter v. J&S Collieries*, BRB No. 18-0256 (Aug. 9, 2018) (same), SA 198; *Noble v. Cumberland River Coal Co.*, BRB No. 18-0419 BLA (Feb. 27, 2019) (same), SA 200. Had Star Fire timely raised the issue, it may have obtained appropriate relief. But it did not do so.

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

3. There are no grounds to excuse Star Fire's forfeiture.

Star Fire points to no excuse sufficient to justify its failure to timely raise the Appointments Clause challenge before DOL. It seeks a ruling that ALJ Gee was not constitutionally appointed, that her decision must therefore be vacated, and that a new ALJ decision must be rendered by a different, properly-appointed ALJ. The

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

[10] Available at: https://www.dol.gov/brb/decisions/blklung/published/18-0323.pdf.

Board has issued many such orders already, *supra* at 27, 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.*[11] If Star Fire had timely acted before the agency, it could have obtained effective relief.

Star Fire attempts to justify its administrative inaction by reliance on this Court's decision in *Jones Brothers*. OB 15. That decision, however, provides no excuse. Indeed, the decision confirms that Star Fire'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

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[11] 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 BRBS 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.").

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, Star Fire did not timely identify the Appointments Clause issue to the Board. Moreover, Star Fire 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 27, and has broadly interpreted its authority to decide substantive questions of law, including certain other constitutional issues. *See supra* at 28 n.11 (citing instances where Board addressed constitutional issues). *Jones Brothers* is simply inapposite.

Moreover, Star Fire 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, Star Fire also had enough time to raise the issue – *Bandimere* was decided before ALJ Gee's decision awarding the claim in May 2017, and before Star Fire filed its brief with the Board. Any suggestion that Star Fire's forfeiture should be excused because *Lucia* was not foreseeable should be rejected.

Star Fire's remaining excuses do not bear scrutiny. Its argument that Appointments Clause challenges are structural constitutional defects, and thus not subject to waiver, OB 17 n.8, is belied not only by the plain language of *Lucia*, 138 S.Ct. at 2055 ("one who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief") (emphasis added)), but by the many judicial decisions, including by this Court, finding such challenges waived. *See, e.g.*, *Wilkerson*, 910 F.3d at 256;[12] *Intercollegiate Broad Sys.*, 574 F.3d at 755-56; *In re DBC*, 545 F.3d at 1377, 1380 & n.4; *Kabani & Co.*, 733 F. App'x at 918.

Moreover, Star Fire's contention (OB 15-16 n.7) that it would have been futile to raise an Appointments Clause challenge to ALJs because they 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 16) on *Old Ben Coal Co. v. Director, OWCP*, 62 F.3d 1003, 1007 (7th Cir. 1995) is misplaced. There, the

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[12] Star Fire also asks this Court to "reconsider" its holding in *Wilkerson* that Appointments Clause challenges are not jurisdictional and thus subject to ordinary principles of waiver and forfeiture. OB 17 n.8. Of course, as a published decision, *Wilkerson* "remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision." *Salmi v. Secretary of Health and Human Serv.*, 774 F.2d 685, 689 (6th Cir. 1985).

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 Star Fire has done here, and it is not excusable.[13]

Finally, if the Court were to excuse Star Fire's forfeiture, there would be real world consequences. To the best of our knowledge, there are nearly six hundred

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[13] By the time Star Fire filed its opening Board brief in February 2017, there had been eleven different reported court opinions that discussed Appointments Clause challenges to ALJs. *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.

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 Star Fire's forfeiture here – where Star Fire 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' worth of administrative proceedings. For the Black Lung 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 Star Fire to timely raise its Appointments Clause challenge before the agency. Star Fire's attempt to justify its failure to do so is unavailing. The Court should therefore find that Star Fire forfeited its right to challenge ALJ Gee's authority under the Appointments Clause.

C. Mrs. Napier's petition for modification was timely because it was filed within one year of the final denial of her prior modification petition. ALJ Gee acted within her discretion in finding that the grant of modification would render justice under the BLBA.

Star Fire challenges both the timeliness of Mrs. Napier's modification petition and ALJ Gee's finding that granting modification here would render

justice under the BLBA.[14] Both arguments are meritless.

1. The one-year deadline to petition for modification resets after each final denial of benefits.

In a lengthy footnote, Star Fire concedes that Section 22 of the Longshore Act, 33 U.S.C. § 922, incorporated into the BLBA by 30 U.S.C. § 932, permits the filing of successive modification petitions, but argues all petitions must be filed within one year of the "first final or formal rejection" of a claim. OB 22 n.10.[15] Like its Appointments Clause challenge, Star Fire has waived this argument. It failed to raise it before the district director, ALJ Gee, or the Board. Accordingly, the Court should decline to consider Star Fire's timeliness argument because it was not raised below. *See Bailey*, 106 F.3d at 144; *Brandywine Explosives & Supply*, 790 F.3d at 663; *Hix*, 824 F.2d at 527.

In any event, Star Fire's argument is without merit. The plain language of Section 22 permits a claimant to petition for modification "at any time prior to one

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[14] Star Fire also argues that ALJ Gee erred in finding a mistake in a prior determination of fact. OB 26. Because we do not address ALJ Gee's weighing of the medical evidence, we express no opinion on whether substantial evidence supports her finding of a mistake of fact.

[15] The meaning of this phrase is not entirely clear. Presumably, Star Fire is using the word "final" in the sense that the denial of benefits is no longer open to direct appeal. *See* 20 C.F.R. §§ 725.419(d), 725.479(a), 802.406; *see also Youghiogheny and Ohio Coal Co*., 200 F.3d at 951(one year period runs from issuance of mandate by courts of appeals).

year after the rejection of a claim." 33 U.S.C. § 922. Likewise, Section 725.310 permits a claimant to file for modification "at any time before one year after the denial of a claim." 20 C.F.R. § 725.310(a). Neither text is limited to the very *first* rejection (or denial) of a claim. Moreover, a modification request receives de novo review and is processed similarly to an initial claim. 20 C.F.R. § 725.310(b). Thus, the courts and Board (agreeing with the Director) have rejected Star Fire's view, permitting both multiple modification requests, *see supra* at 8-9, and holding that a denial of a modification petition is itself a "rejection of a claim" that resets the one-year deadline. *See supra* at 9, *citing Old Ben Coal Co.*, 292 F.3d at 540; *Betty B. Coal Co.*, 194 F.3d 499-500; *Garcia*, 12 Black Lung Rep. at 1-26. As a practical matter, Star Fire's interpretation would limit a claimant to one modification petition because the petition likely would not be resolved within one year of the first denial. *See Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 390 (6th Cir. 1998) (claimant entitled to ALJ hearing on modification petition). By contrast, an employer could file multiple petitions (regardless of how long each takes) because its right to modification is triggered by the payment of compensation, due on an ongoing, monthly basis. *See* 33 U.S.C. § 922; 20 C.F.R. §§ 725.310(e)(6); 725.502(b)(1). At bottom, Star Fire's cramped, and greatly imbalanced, reading is at fundamentally odds with Congress's intent in expanding Section 22 in 1938 to make modification even more accessible to claimants by

allowing them to pursue it even after their claims are denied. *See Banks*, 390 U.S. at 464.

The case law Star Fire cites does not support its argument. Star Fire's reliance (OB 22 n.10) on *Metropolitan Stevedore Co. v. Rambo,* 521 U.S. 121 (1997) is entirely misplaced. There, the Court confronted the question of how to compensate an injured claimant for future loss of wage-earning capacity under the Longshore Act. Star Fire relies on a footnote in that decision where the Court rejected as "implausible" a reading of that statutory scheme that would allow a claimant to "preserve a right to compensation in the future by reapplying within the one-year period and successively each year thereafter" under Section 22. 521 U.S. 134 n.6 (Star Fire incorrectly cites the footnote as footnote 2. OB 22 n.10.). But the Court rejected that reading not because it viewed Section 22 as forbidding successive modification petitions, but rather because it apparently assumed that although such petitions are permitted, it would be irrational to require a claimant to use the modification procedure to "repeatedly file reapplications knowing his disability to be without present effect and ... himself without any good-faith claim to the present compensation sought." *Id.* Indeed, elsewhere the Court noted that a claimant is "barred from seeking a new, modified award after one year from the date of *any* denial or termination of benefits." *Id.* at 129 (emphasis added). Thus, in context, the Court's statement two sentences later that "a losing claimant loses

for all time after one year from the denial or termination of benefits," 521 U.S. at 129, is completely consistent with the Director's view of modification.

Equally unavailing is Star Fire's curious reliance (OB 22 n.10) on *Peabody Coal Co. v. Abner,* 118 F.3d 1106 (6th Cir. 1997). This decision does not address modification petitions at all. Rather, it addresses the effect of motions for reconsideration on the jurisdictional time limits for appeal. Moreover, it recognizes that successive motions for reconsideration are in fact permitted, despite only the first one tolling the time for appeal. *Abner,* 118 F.3d at 1108 (recognizing that a party may file a second motion to alter or amend under Fed. R. Civ. P. 59(e)). Furthermore, *Abner* relied on case law construing Federal Rule Civil Procedure 59(e) because, in federal civil practice, a motion for reconsideration is construed as a motion to alter or amend. 118 F.3d at 1108. Accordingly, *Abner* provides no support for Star Fire's contention that Rule 59(e) provides an analog in the context of a petition for modification, or would forbid a second modification petition filed within a year of the denial of the first.

Finally, Star Fire's reliance on *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 637 F.3d 280 (4th Cir. 2011) is off-the-mark. There, the Court addressed whether an employer's voluntary payment of medical benefits constituted "compensation" – as used in Section 22's phrase "any time prior to one year after the date of the last payment of compensation" – and therefore, reopened

the one-year period for filing a modification petition to revise a monetary compensation order. *Id*. at 287. In finding that the voluntary medical payments did not reopen the modification filing period, the Court reasoned, in part, that a claimant could effectively circumvent the one-year limitation period by seeking follow-up medical care long after monetary compensation had been paid. *Id*. at 288. Unlike the payment of medical benefits, however, Section 22 and Section 725.310 explicitly identify the rejection/denial of a claim as a trigger for the one-year period to file for modification. In addition, the Fourth Circuit had already ruled before *Wheeler* (in *Betty B Coal Co.*, *supra* at 9) that the denial of a modification request is itself such a "rejection of claim." That *Wheeler* did not even question, let alone overrule, *Betty B* confirms Star Fire overbroad misreading of *Wheeler*.

2. <u>ALJ Gee acted within her discretion in finding that granting Mrs.Napier's modification petition would render justice under the BLBA</u>.

A modification petition can be denied if it does not "render justice under the [A]ct." *Banks*, 390 U.S. at 464; *Sharpe v. Director, OWCP*, 495 F.3d 125, 131-32 (4th Cir. 2007). In finding that granting Mrs. Napier's modification petition would render justice under the BLBA, ALJ Gee considered the factors set out in *Sharpe*, namely, the need for accuracy, the requesting party's diligence and motive, and whether modification would be futile. PA 29-30. ALJ Gee correctly found that Mrs. Napier had acted diligently in filing her modification petition within one year

of the prior denial, and her motive – establishing her entitlement to black lung benefits – was permissible. ALJ Gee further determined that a favorable ruling would not be futile since Mrs. Napier is alive to collect benefits. Finally, she concluded that the need for accuracy – determining whether Judge Sellers had committed a mistake in a determination of fact – outweighed the need for finality. *Id*. ALJ Gee thus acted within her discretion in finding that modification of the prior denial would render justice under the BLBA.

Star Fire's argument that "[t]he ALJ considered none of the relevant factors" (OB 23) is, simply put, wrong. As described above, ALJ Gee weighed the *Sharpe* factors and found that they favored Mrs. Napier's modification petition. A comparison of the rare cases denying modification on the ground that justice would not be rendered underscores the reasonableness of ALJ Gee's determination.

In *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23 (1st Cir. 1982), the employer filed for modification in order to assert a new argument based on existing law regarding the limits of its liability. The court held that granting modification would not render justice under the Longshore Act: "Parties should not be permitted to invoke s[ection] 22 to correct errors or misjudgments of counsel, nor to present a new theory of the case when they discover a subsequent decision arguably favorable to their position." *Id*. at 26. Mrs. Napier, by contrast, is not blaming her attorney for past denials, relying on recently discovered

precedent, or presenting a new argument. She is simply alleging that ALJ Sellers made a mistake in weighing the medical evidence.

In *Westmoreland Coal Co., Inc. v. Sharpe*, 692 F.3d 317 (4th Cir. 2012), the operator filed a petition for modification of the award in a miner's claim seven years after he was awarded benefits and, not coincidentally, less than two months after his widow filed for survivor's benefits. The court affirmed the Board's decision that the ALJ had erred in granting modification (and in denying the miner's claim), holding that the operator's motive in filing for modification was "patently improper:" The operator was using modification to attack the complicated pneumoconiosis finding from the miner's claim which, if allowed to stand, would guarantee the widow's entitlement because the operator would have been collaterally estopped from contending that the miner had not suffered from the disease.[16] The court explained, "At bottom, allowing employers to regularly use modification to evade application of the collateral estoppel doctrine and the irrebuttable presumption of death due to pneumoconiosis would effectively eradicate those entrenched legal principles." *Id*. at 329. The court further noted, as

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[16] A finding of complicated pneumoconiosis creates "an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, that a miner's death was due to pneumoconiosis, or that a miner was totally disabled due to pneumoconiosis at the time of death[.]" 20 C.F.R. § 718.304.

did ALJ Gee in Mrs. Napier's claim (PA 29), "the modification statute's general 'preference for accuracy over finality in the substantive award,'" and that "modification does not always require 'a smoking gun factual error, changed conditions, or startling new evidence.'" *Id*. at 330. Here, Mrs. Napier was not attempting to indirectly circumvent entrenched principles; she was simply using a tool that Congress made available to her in the way that Congress provided.

In *McCord v. Cephas*, 532 F.2d 1377 (D.C. Cir. 1976), the employer refused to participate in a claim under the Longshore Act. When benefits were awarded against him, the employer filed a modification petition. The ALJ granted the petition and reversed the award, but the Board found the modification petition untimely. Although the court found the petition timely and accordingly remanded to the Board, it instructed the Board to consider whether granting modification would render justice under the Longshore Act based on the employer's "history of great[] reluctance, of great[] recalcitrance, of great[] callousness towards the process of justice, and of great[] self-serving ignorance[.]" *Id*. at 1381. If the D.C. Circuit could not hold as a matter of law that the employer's complete disregard of legal process defeated his modification petition, then there should be no question that ALJ Gee acted within her discretion in finding that Mrs. Napier pursued her claim in a diligent and timely fashion.

And in *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533 (7th Cir. 2002),

the court held that an ALJ had erred in concluding that an operator's modification petition would not render justice under the BLBA. The court found that the ALJ had improperly denied modification merely because the operator's new evidence had been available to the operator prior to the modification petition. It explained that "finality simply is not a paramount concern of the Act" and that "the ALJ gave no credence to the statute's preference for accuracy over finality[.]" *Id*. at 546. Here, ALJ Gee likewise correctly favored accuracy over finality, and cited *Old Ben Coal* in support. PA 29.

Star Fire nonetheless criticizes Mrs. Napier's persistence by arguing that her "pursuit of modification in this case reflects little more than ALJ shopping." OB 25. The company has no foundation for this argument. Indeed, serial modification petitions are permissible because of the BLBA's preference for accuracy over finality. *Youghiogheny and Ohio Coal Co.*, 200 F.3d at 956 (noting the court "obviously cannot amend the statute or disregard the way the Supreme Court has interpreted it"); *Betty B Coal Co.*, 194 F.3d at 500; *and see Old Ben Coal*, 292 F.3d at 546 ("a modification request cannot be denied out of hand based solely on the number of times modification has been requested"). As discussed above, ALJ Gee "exercised [her] discretion intelligently" *Youghiogheny and Ohio Coal Co.*, 200 F.3d at 956, with the result that this is the rare case where a "never-say-die-litigant[]" ultimately prevails. *Id*.

Although Mrs. Napier did not support this modification request with new evidence (as she may do, *see Consolidation Coal Co.*, 27 F.3d at 230), she did develop and submit new evidence (Dr. Perper's report) as part of her prior modification request. PA 82. Significantly, ALJ Gee relied on Dr. Perper's report in finding modification and awarding her claim, lending credence to Mrs. Napier's belief that Judge Sellers had committed a mistake of fact in denying benefits. Rather than condemn Mrs. Napier's persistence, perhaps her patience should be praised. In short, ALJ Gee acted well within her discretion in finding that modification would render justice under the BLBA.

CONCLUSION

The Court should reject Star Fire's Appointments Clause challenge and affirm ALJ Gee's finding that granting modification would render justice under the BLBA.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The Director does not object to Star Fire'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 10,527 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 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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