Nos. 18-3680, 18-3909

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ISLAND CREEK COAL COMPANY,

Petitioner

v.

MELYNDIA BRYAN, on behalf of and survivor of
BERT FOWLER BRYAN

and

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

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

KATE S. O'SCANNLAIN
Solicitor of Labor
BARRY H. JOYNER
Associate Solicitor
SEAN G. BAJKOWSKI
Counsel for Appellate Litigation
RITA A. ROPPOLO
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2119
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660

Attorneys for the Director, Office of
Workers' Compensation Programs

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STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION

This case involves a 2010 claim for disability benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944, filed by former coal miner Bert Fowler Bryan, and a 2012 claim for survivor's benefits under the Act filed by Melyndia Bryan, the miner's widow. On January 31, 2017, United States Department of Labor (DOL) Administrative Law Judge (ALJ) Peter B. Silvain

issued two decisions: one awarding the miner's claim and the other awarding the widow's claim, and both ordering Island Creek Coal Company (Island Creek or company), the miner's former employer, to pay the awarded benefits. Island Creek appealed these decisions to DOL's Benefits Review Board on February 22, 2017, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). The Board had jurisdiction to review the decisions pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

The Board affirmed the miner's award on February 27, 2018, and affirmed the widow's award on June 15, 2018. On March 29, 2018, Island Creek requested reconsideration of the Board's affirmance of the miner's claim pursuant to 20 C.F.R. § 802.407(a) (allowing reconsideration if request is filed within thirty days of the Board's decision), but the Board denied the request on May 21, 2018. The company requested reconsideration of the Board's affirmance of the widow's claim on July 13, 2018, but the Board denied the request on August 17, 2018.

Island Creek petitioned this Court for review of the miner's claim on July 19, 2018, within sixty days of the Board's May 21, 2018, final decision; and the company petitioned the Court for review of the widow's claim on September 25, 2018, within sixty days of the Board's August 17, 2018, final decision. The Court has jurisdiction over these petitions because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final

Board decision in the court of appeals in which the injury occurred. *See also* 20 C.F.R. § 802.406 (providing that, if a motion for reconsideration is timely, "the sixty-day period for filing [a] petition for review will run from the issuance of the Board's decision on reconsideration"). Finally, the Court has jurisdiction over Island Creek's petitions because the miner had exposure to coal-mine dust – the injury contemplated by 33 U.S.C. § 921(c) – in the Commonwealth of Kentucky, within this Court's territorial jurisdiction.

STATEMENT OF THE ISSUE

The Appointments Clause provides that inferior officers are to be appointed by "the President," the "Courts of Law," and the "Heads of Departments." Island Creek argues in its opening brief that the ALJ's decisions awarding benefits should be vacated because the ALJ was not properly appointed. The company did not raise this argument before the ALJ or the Board at any point during the litigation of the miner's disability claim. And in the widow's claim, it raised the argument only in a motion for reconsideration after the Board affirmed the ALJ's award.

The question presented is whether Island Creek forfeited its Appointments Clause argument by failing to timely raise it before the administrative agency.[1]

[1] The company also challenges the ALJ's decisions on the merits. Opening Brief at (OB) 31-41. This brief does not address that argument.

STATEMENT OF THE CASE

Initial claim processing: Mr. Bryan filed his claim for BLBA benefits in 2010. Appendix at (A.) 123, 156. Upon review, an Office of Workers' Compensation Programs (OWCP) district director initially determined, on October 4, 2011, that Mr. Bryan was not entitled to benefits. Mr. Bryan died on July 1, 2012. Mrs. Bryan, on behalf of her husband, thereupon requested modification of the district director's denial, and at the same time filed her own claim as a survivor. Upon review, the district director determined that both claimants were entitled to benefits and that Island Creek was liable for those benefits.

Proceedings before the ALJ: Dissatisfied with the district director's determinations, the company requested a *de novo* hearing, which was held before the ALJ on November 4, 2015. A.123, 156. On January 31, 2017, the ALJ awarded benefits on both claims in separate decisions. A.122 (miner's claim); A.155 (widow's claim). His award in the miner's claim was based on his conclusion that the medical evidence established that the miner had been totally disabled by pneumoconiosis. A. 150-51. The widow's award was based on section 422(*l*) of the BLBA, 30 U.S.C. § 932(*l*), which provides that the qualifying dependents of miners who are awarded disability benefits are automatically entitled to survivor's benefits after the miner's death. A. 157-58.

At no point during these proceedings before ALJ Silvain did Island Creek challenge his authority to hear the claims under the Appointments Clause.

Proceedings before the Benefits Review Board: Island Creek timely appealed the ALJ's decisions to the Benefits Review Board. The company's brief, filed on May 25, 2017, challenged ALJ Silvain's weighing of the medical evidence, but did not challenge his authority to hear the claims. The Board affirmed the award in the miner's claim on February 27, 2018, finding that the ALJ did not err in weighing the medical evidence relevant to entitlement. A.162. In that decision, the Board incorrectly noted that Island Creek had not appealed the ALJ's decision on the widow's claim. A.163 n.1 & 4.

Island Creek moved for reconsideration of the Board's decision in the miner's claim on March 28, 2018.[2] The motion argued that (1) it had timely appealed the widow's claim, and (2) the Board had erred in affirming the ALJ's weighing of the medical evidence. This motion, like all of Island Creek's filings to this point, did not challenge the ALJ's authority to hear either claim.

On May 21, 2018, the Board denied Island Creek's request to reconsider its affirmation of the ALJ's award of benefits to the miner on the medical merits. A.171-72. But it granted reconsideration on the question of whether Island Creek

[2] An identical copy of this motion for reconsideration was filed on March 29 due to an issue with the Board's electronic filing system.

had timely appealed the widow's award. A.172. The Board pointed out that, in light of its affirmance of the miner's disability award, Mrs. Bryan was presumably entitled to automatic survivor's benefits under 30 U.S.C. § 932(*l*). *Id.* Accordingly, it ordered the parties to show cause why the ALJ's award in the widow's claim should not be affirmed under that provision. *Id.* Island Creek did not respond to this order, and the Board issued a decision affirming Mrs. Bryan's claim for survivor's benefits on June 15, 2018. A.174-76.

On July 13, 2018, Island Creek moved the Board to reconsider its affirmance of the ALJ's award in the widow's claim. In this motion the company argued, for the first time, that the award should be vacated because ALJ Silvain's appointment was invalid under the Appointments Clause. A.184. The Board rejected this argument on August 17, 2018, because the company had failed to raise it prior to the Board's affirmance of the ALJ's award. A.184.

Petitions for review: Island Creek petitioned this Court for review of the award of benefits in the miner's claim on July 19, 2018, A.178; and for review of the award in the widow's claim on September 25, 2018, A.186.[3] In its opening brief, Island Creek asserts that, based upon the Supreme Court's decision in *Lucia*

[3] The Court designated the petition in the miner's claim as Case No. 18-3680, and the petition in the widow's claim as Case No. 18-3909. The Court consolidated the petitions on October 29, 2018.

v. S.E.C., __ U.S. __, 138 S.Ct. 2044 (2018), the ALJ who adjudicated these claims was not properly appointed, and that the remedy is to vacate the awards and remand the case for a hearing before a properly-appointed ALJ.

SUMMARY OF THE ARGUMENT

Island Creek has forfeited its Appointments Clause argument because it did not timely raise the issue before the agency in either the miner's or the widow's claim. The first time the company raised the issue in the miner's claim was in its opening brief to the Court. The company never objected to the ALJ's appointment before the ALJ or the Board at any time during the many years that claim was pending before the ALJ and the Board. In the survivor's claim, Island Creek did not mention the issue before the ALJ or in its brief to the Board. It raised the argument for the first time in a motion for reconsideration after the Board had affirmed the ALJ's award of automatic survivor's benefits to Mrs. Bryan. The Board, adhering to its longstanding precedent, properly denied this motion, finding the Appointment Clause argument waived because Island Creek had failed to raise it in its opening brief to the Board.

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

ARGUMENT

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

A. Standard of Review

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

B. Island Creek failed to timely raise its Appointments Clause challenge when these claims were pending before the agency.

Island Creek failed to make a timely Appointments Clause challenge before the ALJ or the Benefits Review Board. This is most obvious in the miner's claim, where the company *entirely failed* to raise the issue before either tribunal. But it is also true in the widow's claim. From 2012 (when Mrs. Bryan filed her claim for survivor's benefits) through June 2018 (when the Board affirmed the ALJ's award of her claim), the company never challenged the authority of DOL ALJs in general, or ALJ Silvain in particular, to decide black lung cases. Island Creek waited until its motion for reconsideration of the Board's affirmance of the widow's award to raise the issue for the first time.

By then, it was too late. The Board properly refused to reconsider its initial decision based on Island Creek's new argument. A.184 ("Because employer first raised the Appointments Clause issue only after the Board issued its decision affirming the administrative law judge's award of benefits in the survivor's claim, employer waived the issue."). In so ruling, the Board applied its own precedent that it is procedurally improper for a party to raise an issue for the first time in a reconsideration motion. *See Williams v. Humphreys Enters.*, *Inc.*, 19 Black Lung Rep. 1-111, 1-114 (Ben. Rev. Bd. 1995) (declining to consider a new issue raised in a motion for reconsideration); *Ravalli v. Pasha Maritime Servs.*, 36 Ben. Rev. Bd. Serv. 91 (2002) (same); *Cornett v. Director, OWCP*, 9 Black Lung Rep. 1-179, 1-180 (Ben. Rev. Bd. 1986) (party that did not participate in the original appeal "waived his right to raise these issues on reconsideration"); *SSA Terminals, LLC v. Bell*, 653 F. App'x 528, 532 (9th Cir. 2016) (Board properly affirmed the ALJ's refusal to consider issue raised for the first time on reconsideration).

Island Creek does not challenge the Board's longstanding rule against raising new issues in motions for reconsideration, which is a close parallel to this Court's rule on the subject. *See, e.g., United States v. Shafer*, 573 F.3d 267, 275 (6th Cir. 2009) ("We typically do not consider arguments raised for the first time in a petition for rehearing."); *Costo v. United States*, 922 F.2d 302, 302-03 (6th Cir. 1990) ("Generally, an argument not raised in an appellate brief or at oral argument

may not be raised for the first time in a petition for rehearing."); *see also 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 (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 argument because it was not raised before the Court until the 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." (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), *petition for cert. filed*, No. 18-1117 (U.S. Feb. 22, 2019) (citing *Lucia* and holding that petitioners "forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency").

The courts will reverse an agency's decision not to reopen a case only if it constitutes the "clearest abuse of discretion." *Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 278-279, 280 (1987). Here, the Board's straightforward application of its longstanding rule against raising new issues in motions for reconsideration falls far short of that standard. Consequently, Island Creek failed to preserve its Appointments Clause argument before the agency in either the miner's or the widow's claim.

C. By failing to timely raise the issue before the agency, Island Creek forfeited its Appointments Clause challenge before this Court.

The Appointments Clause provides that "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." U.S. Const. Art. II, sec. 2, cl. 2. In *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Supreme Court held that Securities and Exchange Commission ALJs are inferior officers who must be

appointed consistent with the Constitution's Appointments Clause.[4] 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 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).[5]

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

[5] Even if *Lucia*'s repeated references to timeliness could be considered dicta,

Unlike the challenger in *Lucia*, Island Creek failed to timely raise and preserve its Appointments Clause challenge before the agency. It never raised the issue during the administrative litigation of the miner's claim, which stretched from 2010 to 2018. Not until the company filed its motion for reconsideration to the Board in the widow's claim, was the issue raised. As the Board properly concluded, by then it was too late. *See supra* at 9.[6]

Under longstanding principles of administrative law, a party may not raise before the court an argument it failed to preserve before the agency. In *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 35 (1952), a litigant argued for the first time in court that the agency's hearing examiner had not been properly appointed under the Administrative Procedure Act. The Supreme Court held that the litigant forfeited this claim by failing to raise it before the agency, and

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"[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").

[6] Island Creek's failure to raise its Appointments Clause challenge before the ALJ in either claim arguably constituted forfeiture in and of itself. *See Hite v. Dresser Guiberson Pumping*, 22 Ben. Rev. Bd. Serv. 87 (1989) (issue raised for first time in appeal to the Board waived). The Court need not reach that question, however, because Island Creek failed to meet even the minimum obligation of timely raising the issue to the Board.

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.

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 Constr. 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 [Benefits Review] Board."); *Hix v. Director, OWCP*, 824 F.2d

526, 527 (6th Cir. 1987) ("[W]e hold that even if a claimant properly appeals some issues to the Board, the claimant may not obtain [judicial] review of the ALJ's decision on any issue not *properly* raised before the Board.") (emphasis added).

These principles apply with full force to Appointments Clause challenges. As explained earlier, those challenges are not jurisdictional and receive no special entitlement to review. *See supra* at 10; *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*, __ F. App'x __, 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. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018) (finding Appointments Clause challenge forfeited when litigant failed to press issue before agency, but excusing the forfeiture in light of the unique circumstances of the case); *Kabani & Co.*, 733 F. App'x at 919 ("[P]etitioners forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency."); *Turner Bros.*, 2018 WL 6523096 at *1 (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 argument 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. *Island Creek Coal*, 910 F.3d at 256; *Kabani & Co.*, 733 F. App'x at 919; *Intercollegiate Broadcast Sys.,* 574 F.3d 748 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 Island Creek 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).[7] 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)[8]; *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). But because Island Creek never timely raised the issue, neither the

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

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

Secretary nor the Board was given the opportunity to consider and resolve it during the normal course of administrative proceedings.

In sum, Island Creek's failure to present any Appointments Clause objection to the agency in the miner's claim, or to timely present that argument in the widow's claim for automatic benefits, is quintessential forfeiture.

D. There are no grounds to excuse Island Creek's failure to timely raise its Appointments Clause challenge before the ALJ and the Benefits Review Board.

Island Creek attempts to justify its administrative inaction by claiming that neither the ALJ nor the Board could cure the constitutional infirmity by appointing a new ALJ. OB 22-26. But the company mischaracterizes the relief it seeks. It has not asked this Court to appoint a new ALJ (OB 31), for this Court, like the ALJ and Board, is not empowered to do so. Rather, Island Creek seeks a ruling that the ALJ here was not constitutionally appointed, that his decisions must therefore be vacated, and per *Lucia*, that new ALJ decisions must be rendered by a different, properly-appointed ALJ. The Board has issued many such orders already, *supra* at 17, which would have spurred the Secretary of Labor (whose delegatee, the Director OWCP, is a party to this suit) to ensure the availability of properly-

appointed ALJs, if he had not already done so, *id.*[9] So the fact that neither the ALJ nor Board could appoint a new ALJ is no excuse at all. If Island Creek had timely acted before the agency, it could have obtained effective relief.

Island Creek also attempts to justify its administrative inaction by reliance on this Court's decision in *Jones Brothers*. OB 25-28. That decision, however, provides no excuse. Indeed, the decision confirms that the company's forfeiture of its Appointments Clause challenge here should not be excused, as this case lacks the special distinguishing features that led the Court to excuse the forfeiture in that case. There, the court held that a petitioner had forfeited its Appointments Clause claim by failing to argue it before the Federal Mine Safety and Health Review Commission, but that this forfeiture was excusable for two reasons.

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[9] More generally, the Board has broadly interpreted its authority to decide substantive questions of law, including certain other constitutional issues. *See Duck v. Fluid Crane and Constr. Co.*, 2002 WL 32069335, at *2 n.4 (Ben. Rev. Bd. 2002) (stating that the Board "possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its jurisdiction"); *Shaw v. Bath Iron Works*, 22 Ben. Rev. Bd. Serv. 73 (1989) (addressing the constitutionality of the 1984 amendments to the Longshore Act); *Herrington v. Savannah Mach. & Shipyard*, 17 Ben. Rev. Bd. Serv. 196 (1985) (addressing constitutional validity of statutes and regulations within its jurisdiction); *Smith v. Aerojet Gen. Shipyards,* 16 Ben. Rev. Bd. Serv. 49 (1983) (addressing due process issue); *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.").

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, Jones Brothers' timely identification 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, Island Creek did not timely identify the Appointments Clause issue to the Board. *See Turner Bros.*, 2018 WL 6523096 at *1 (distinguishing *Jones Brothers* on ground that coal company did not mention the issue in agency filings). Moreover, Island Creek could not have reasonably believed that the Board would have refused to entertain such a challenge. The Board has repeatedly provided remedies

for Appointments Clause violations, *see supra* at 17, and has broadly interpreted its authority to decide substantive questions of law, including certain other constitutional issues. *See supra* at 19 n.9 (citing instances where Board addressed constitutional issues). *Jones Brothers* is simply inapposite.

Moreover, if the Court were to excuse Island Creek's forfeiture, there would be real world consequences. To the best of our knowledge, there are nearly six hundred cases from around the country – arising under the BLBA, the Longshore Act, and its extensions – currently pending before the Board. But in the great majority of these cases, no Appointments Clause claim has been raised. Should this Court excuse Island Creek's forfeiture here – where the company 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 based on an Appointments Clause claim not raised before the ALJ and untimely raised before the Board. 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).

Finally, Island Creek argues that its forfeiture should be excused because *Lucia* was a change in "practice": OB 17 (*Lucia* "set[] aside years of established

practice under the Administrative Procedure Act[.]"); OB 30 (*Lucia* resulted in "the extraordinary reversal of 70 years of practice under the APA[.]"). This Court considered and rejected a similar argument 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 (10th Cir. 2016), 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, Island Creek also had enough time to raise the issue – *Bandimere* was decided before the ALJ's decisions awarding the claims in January 2017, and long before the Board's decisions affirming those awards the following year. Island Creek's claim that it could not have foreseen *Lucia* should be rejected.

In sum, the basic tenets of administrative law required Island Creek to timely raise its Appointments Clause challenge before the agency. The company's proffered reasons for not doing so in either the miner's or the widow's claim are meritless. The Court should therefore find that Island Creek forfeited its right to challenge the ALJ's authority under the Appointments Clause.

CONCLUSION

Island Creek's argument, that the decisions below should be vacated because ALJ Silvain's appointment violated the Appointments Clause, should be rejected.

Respectfully submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

BARRY H. JOYNER
Associate Solicitor

SEAN G. BAJKOWSKI
Counsel for Appellate Litigation

/s/ Rita A. Roppolo
RITA A. ROPPOLO
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2119
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5653
Blls-sol@dol.gov
roppolo.rita@dol.gov

Attorneys for the Director, Office of Workers' Compensation Programs

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 5482 words, as counted by Microsoft Office Word 2010.

/s/ Rita A. Roppolo
RITA A. ROPPOLO
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov
roppolo.rita@dol.gov

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2019, the Director's brief was served electronically using the Court's CM/ECF system on the Court and the following:

Jeffrey R. Soukup, Esq.
jrsoukup@jacksonkelly.com

Brent Yonts, Esq.
brentyonts@yahoo.com

/s/ Rita A. Roppolo
RITA A. ROPPOLO
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov
roppolo.rita@dol.gov