

No. 18-3838

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 06, 2019
DEBORAH S. HUNT, Clerk

STAR FIRE COALS, INC., et al.,)
)
Petitioners,)
)
v.)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, et al.,)
)
Respondents.)

ORDER

Before: KEITH, MOORE, and GIBBONS, Circuit Judges.

Petitioners, Star Fire Coals, Inc. and Old Republic Insurance Company (“Star Fire”) petition for review of the July 5, 2018 decision by the Benefits Review Board, United States Department of Labor (“BRB”), denying a motion for reconsideration of the BRB’s January 25, 2018 decision affirming an administrative law judge’s (“ALJ”) decision to grant Margie Napier survivor benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901–945. Star Fire moves to remand the case, asserting that the ALJ was not properly appointed under the Appointments Clause of the United States Constitution, Article II, Section 2, Clause 2. The Director, Office of Workers’ Compensation Programs, United States Department of Labor, and Margie Napier respond in opposition. Star Fire replies and has supplemented its reply.

Star Fire contends that this case warrants a remand because the Department of Labor ALJs presiding over their case were not properly appointed. *See* art. II, § 2, cl. 2. Star Fire relies on

Lucia v. S.E.C., 138 S. Ct. 2044 (2018). The Supreme Court in *Lucia* held that Security and Exchange Commission ALJs are inferior officers of the United States and therefore can only be appointed by the President, “Courts of Law,” or “Heads of Departments.” *Lucia*, 138 S. Ct. at 2055; *see also Freytag v. C.I.R.*, 501 U.S. 868, 881 (1991) (holding that special trial judges of the United States Tax Court must be appointed in accordance with the Appointments Clause). The Director concedes that the Department of Labor ALJs were wrongly appointed but asserts that Star Fire forfeited this argument by not raising it before the BRB prior to the motion for reconsideration.

Appointments Clause challenges, which are structural constitutional challenges, “are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.” *Jones Bros., Inc. v. Sec’y of Labor*, 898 F.3d 669, 678 (6th Cir. 2018). Generally, litigants forfeit any issue or objection not raised in the court below. *Foster v. Barilow*, 6 F.3d 405, 407 (6th Cir. 1993); *Armstrong v. City of Melvindale*, 432 F.3d 695, 699–700 (6th Cir. 2006) (“the failure to present an issue to the district court forfeits the right to have the argument addressed on appeal”). This rule applies equally to issues not raised before the BRB. *See Hix v. Director, Office of Workers’ Comp. Programs*, 824 F.2d 526, 527 (6th Cir. 1987).

BRB precedent precludes consideration of issues raised for the first time on reconsideration. *See Zumwalt v. Nat’l Steel & Shipbuilding Co.*, 2018 WL 5292373, at *1 (DOL Ben. Rev. Bd. Sept. 6, 2018); *Williams v. Humphreys Enters., Inc.*, 1995 WL 931607, at *2 (DOL Ben. Rev. Bd. Aug. 31, 1995). Similarly, we deem arguments not raised in a party’s opening brief to be forfeited. *See Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018). However, there can be exceptions to a forfeiture. *See Freytag*, 501 U.S. at 879 (holding that forfeiture may be excused in “rare” cases). Whether there has been a forfeiture in the instant case

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is not a jurisdictional issue. Rather it is a merits issue that is more suitable for consideration by the merits panel.

Accordingly, the motion to remand is **DENIED** without prejudice to consideration by the merits panel.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", written in a cursive style.

Deborah S. Hunt, Clerk