



BRB No. 18-0272 BLA  
Case No. 2012-BLA-05370

BIGE MESSER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ANDALEX RESOURCES,	)	
INCORPORATED	)	DATE ISSUED: 07/30/2019
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	ORDER on
Party-in-Interest	)	RECONSIDERATION

Employer has timely filed a motion for reconsideration of the Board’s decision, affirming the award of benefits on remand. *Messer v. Andalex Res., Inc.*, BRB No. 18-0272 BLA (May 17, 2019) (Gilligan, J., concurring in the result) (unpub.); 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407(a). Claimant did not file a response brief. The Director, Office of Workers’ Compensation Programs (the Director), responds, contending the Board should deny employer’s motion to hold the case in abeyance and affirm its conclusion that employer untimely raised its Appointments Clause challenge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).

Employer initially moves that the Board hold this case in abeyance pending the decision by the United States Court of Appeals for the Fifth Circuit on the appeal of *Texas*

*v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018).<sup>1</sup> Employer’s Motion for Reconsideration at 7-8. The Director responds that the district court stayed its ruling striking down the Affordable Care Act (ACA), *see Texas v. United States*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), and thus the decision does not preclude application of the amendments to the Black Lung Benefits Act found in the ACA. Director’s Response at 6-7. We agree with the Director. Moreover, the United States Supreme Court upheld the constitutionality of the ACA in *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214-15 (2010), *aff’d sub nom. W.Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). We thus deny employer’s motion to hold this case in abeyance.

Employer next reiterates its Appointments Clause challenge to the administrative law judge’s authority to hear and decide this case. Employer’s Motion for Reconsideration at 2-4. For the reasons stated in our decision, *Messer*, slip op. at 4-5, we affirm our holding that employer untimely raised its *Lucia* challenge by failing to raise it when the case was first appealed to the Board. *See Lucia*, 138 S. Ct. at 2055; *Freytag v. Comm’r*, 501 U.S. 868 (1991); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018); Director’s Response at 4-6.

Employer lastly asserts the Board erred by affirming the administrative law judge’s finding that claimant established more than fifteen years of qualifying coal mine employment sufficient to invoke the Section 411(c)(4) presumption. Employer’s Motion for Reconsideration at 5-7. We reject this contention as employer has not demonstrated error in the Board’s application of *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402-07 (6th Cir. 2019), *reh’g denied*, No. 17-4313 (6th Cir. May 3, 2019).

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<sup>1</sup> The full cite of the case is *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018), *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), *appeal docketed*, No. 19-10011 (5th Cir. Jan. 7, 2019). The Fifth Circuit held oral argument in the case on July 9, 2019. As described by the Director, the district court in *Texas* ruled that the “ACA individual mandate [was] unconstitutional and that the remainder of the legislation was not severable.” Director’s Response at 6.

Accordingly, we deny employer's motion to hold the case in abeyance and its motion for reconsideration. The Board's May 17, 2019 decision is affirmed. 20 C.F.R. §§801.301(c), 802.407(d), 802.409.

SO ORDERED.

GREG J. BUZZARD  
Administrative Appeals Judge

RYAN GILLIGAN  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge