U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 22-0425 BLA

HAZEL POTTS (o/b/o JERRY L. POTTS, deceased) Claimant-Respondent v. BLACK BEAUTY COAL COMPANY DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/26/2024 DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Paul R. Almanza, Associate Chief Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for Claimant.

Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Employer.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

BUZZARD and JONES, Administrative Appeals Judge:

Employer appeals Associate Chief Administrative Law Judge (ALJ) Paul R. Almanza's Decision and Order on Remand Awarding Benefits (2011-BLA-05820) rendered on a claim filed on January 22, 2010, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1] This case is before the Benefits Review Board for a second time.

The primary question raised in this appeal is whether ALJ Almanza had the authority under the Appointments Clause to consider the case on remand from the Board, despite Employer having not challenged his authority prior to him issuing his first decision in this claim or when it appealed that initial decision to the Board. We hold Employer forfeited its Appointments Clause challenge by failing to pursue it until after the claim had been remanded by the Board, first raising the issue nearly ten years after this claim was filed. The relevant, lengthy procedural history follows.

Initial Proceedings Before ALJs Reilly, Colwell, and Almanza

This now-fourteen-year-old claim was initially assigned to ALJ Stephen M. Reilly, who held a hearing on April 11, 2012. ALJ Reilly's January 25, 2012 Notice of Hearing and Pre-Hearing Order. Over two years later, a second ALJ, William S. Colwell, issued an order informing the parties that the case would be reassigned to yet another ALJ due to ALJ Reilly's retirement. ALJ Colwell's August 14, 2014 Order. He advised the parties that, absent objection, a decision would be issued by the new ALJ based on the existing record developed before ALJ Reilly. *Id.* Employer initially requested a de novo hearing before the new ALJ but, after the claim was reassigned to ALJ Almanza, stated it had no objection to ALJ Almanza deciding the claim based on the existing record. Employer's August 21, 2014 Letter to ALJ Colwell; Employer's January 9, 2015 Letter to ALJ Almanza.

In his initial Decision and Order dated December 29, 2015, ALJ Almanza credited the Miner with over fifteen years of underground coal mine employment and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). ALJ Almanza therefore determined the Miner invoked the presumption of total disability due

[1] Claimant is the widow of the Miner, who died on April 20, 2017, and is pursuing the miner's claim on his behalf. Claimant's August 3, 2018 Letter to ALJ Almanza; Decision and Order on Remand at 6.

to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4). He further found Employer did not rebut the presumption and awarded benefits.

Employer's First Appeal to the Benefits Review Board

In consideration of Employer's appeal, the Board affirmed ALJ Almanza's finding that the Miner was totally disabled. *Potts v. Black Beauty Coal Co.*, BRB No. 16-0199 BLA, slip op. at 4-6 (Jan. 25, 2017) (unpub.). However, it vacated his determination that the Miner invoked the Section 411(c)(4) presumption, and consequently the award of benefits, because he did not properly consider whether the Miner performed his surface coal mine employment in conditions substantially similar to conditions in underground mines.[3] *Id.* at 2-3. But, in the interest of judicial economy, the Board affirmed ALJ Almanza's determination that Employer did not rebut the presumption. *Id.* at 6-9. Thus, the Board remanded the case for reconsideration of whether the Miner had fifteen years of qualifying coal mine employment to invoke the Section 411(c)(4) presumption.[4]

Remand Proceedings Before ALJ Almanza

While the case was pending before ALJ Almanza on remand, the Secretary of Labor, in response to separate litigation questioning the constitutionality of the appointments of Securities and Exchange Commission (SEC) ALJs, ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017.[5] On June 21, 2018, the

[2] Section 411(c)(4) provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] The Miner died after the Board's decision and while the case was on remand to ALJ Almanza. Claimant's August 3, 2018 Letter to ALJ Almanza.

[4] Relatedly, if ALJ Almanza found the Miner's employment was not qualifying, it instructed him to consider whether the Miner affirmatively established entitlement without the Section 411(c)(4) presumption. *See* 20 C.F.R. Part 718.

[5] The Secretary of Labor issued a letter to ALJ Almanza on December 21, 2017, stating:

> In my capacity as head of the [DOL], and after due consideration, I hereby ratify the Department's prior appointment of you as an Associate Chief Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by,

United States Supreme Court issued its decision in *Lucia v. SEC*, holding that SEC ALJs are "inferior officers" subject to the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[6] *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).[7]

On November 6, 2019, two and a half years after the Board had remanded the claim to him and more than sixteen months after the Supreme Court issued *Lucia*, ALJ Almanza issued a Notice of Assignment and Briefing Schedule instructing the parties to "submit briefs pertaining to the issues to be addressed on remand" and sua sponte asserting the parties were entitled to have the case reassigned to a different ALJ in light of the Supreme Court's decision in *Lucia*, if they so chose. On November 14, 2019, Employer responded, agreeing with ALJ Almanza's conclusion that *Lucia* entitled it to have the case transferred to a different ALJ and therefore "any briefing" was premature until the new ALJ holds de novo proceedings. Employer's November 14, 2019 Letter to ALJ Almanza. Then-Director Julia K. Hearthway responded to ALJ Almanza's order, stating that "in the interest of judicial economy" she was not requesting reassignment of the case.[8] Director's November 20, 2019 Response to Notice and Order. Claimant, however, objected to reassignment as

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> administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Almanza.

[6] Article II, Section 2, Clause 2, sets forth the appointing powers:

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

U.S. Const. art. II, § 2, cl. 2.

[7] The DOL has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[8] The current Director is Christopher J. Godfrey.

unnecessary and to Employer's argument that briefing was premature on the issues remanded by the Board.[9] Claimant's November 18, 2019 Letter to ALJ Almanza.

Reassignment Proceedings Before ALJ Bland

ALJ Almanza did not issue a subsequent decision resolving the disagreement among the parties as to whether the claim should be reassigned or remand briefing should be suspended. However, the record demonstrates he ultimately reassigned the case because, on November 23, 2020, District Chief ALJ Carrie Bland issued a Notice of Assignment and Notice of Hearing, stating Employer's reassignment request "is GRANTED" in accordance with *Lucia*, advising the parties that the case had been reassigned to her, and scheduling a telephonic hearing for January 26, 2021.

Prior to the telephonic hearing, Employer filed a motion asking ALJ Bland to hold the case in abeyance or transfer liability to the Black Lung Disability Trust Fund on the grounds that "all the ALJs in this case," including ALJ Bland, were not constitutionally appointed under *Lucia* and thus their actions are "null and void." Employer's December 28, 2020 Motion for Abeyance or to Transfer Liability. It specifically asserted that the Secretary's ratification of the ALJs' appointments was not sufficient to cure the constitutional defect, and removal protections for ALJs are also unconstitutional. *Id.* In response, the Director and Claimant argued ALJ Bland's appointment was valid and that her removal protections are constitutional. Director's Response to Employer's Motion for Abeyance or to Transfer Liability; Claimant's Response to Motion to Hold Claim in Abeyance or Transfer Liability. On January 26, 2021, ALJ Bland held the scheduled telephonic proceeding and asked the parties to brief whether the development of new evidence was required by *Lucia*.

On February 5, 2021, Employer filed a brief with ALJ Bland asserting that *Lucia* requires a de novo proceeding, which includes the right to develop and submit new evidence. Employer's February 5, 2021 Brief Addressing the Necessity of New Evidentiary Development. It alternatively contended that development of new medical evidence was warranted because the existing record was "stale" based on the availability of newer medical records dating from over five years prior to the Miner's death. *Id.* at 4.

The Director did not squarely address whether *Lucia* required the development of an entirely new evidentiary record but did not object to the development of "additional" evidence on the grounds that, "based on the passage of time" the existing evidence in the

[9] Claimant also advised ALJ Almanza that she had not received a complete copy of his November 6, 2019 Notice and therefore reserved the right to amend her response after receipt of the complete Notice of Assignment and Briefing Schedule.

record was "stale." Director's Amended Response to Employer's Brief Addressing the Necessity of New Evidentiary Development. Further, the Director asserted that Employer "[a]rguably" waived its right to request reassignment pursuant to *Lucia* by failing to raise the argument at any time prior to ALJ Almanza sua sponte raising it on remand, "including while this case was on appeal to the [Board]." *Id.* at 4. The Director, however, stated she was not pursuing waiver as an argument before ALJ Bland because the case had already been reassigned and because the Director believed, mistakenly, that no party had objected to reassignment of the case before ALJ Almanza.[10] *Id.* at 2, 4; *but see* Claimant's November 18, 2019 Letter to ALJ Almanza (objecting to reassignment as unnecessary and to any delay in remand briefing).

Meanwhile, Claimant again objected to Employer's *Lucia* arguments, asserting it forfeited its Appointments Clause challenge by failing to raise it at any time when the claim was before ALJ Reilly who held the hearing, ALJ Almanza when he issued his first decision, or the Board on Employer's first appeal. Claimant's Response to Employer's Brief Addressing the Necessity of New Evidentiary Development at 4-5. She further asserted ALJ Almanza erred in raising the issue sua sponte, proceedings on remand should be limited to "only those issues raised by the Board's remand order after the parties have had an opportunity to brief those issues[,]" and the evidentiary record should be based on the record "as it stood at the time of the Board's remand."[11] *Id.* at 4-6.

By order dated September 16, 2021, ALJ Bland conducted a thorough review of the procedural history of this claim and the parties' *Lucia* and Appointments Clause arguments. Because Employer itself had "challenge[d] [her] authority to decide this case," ALJ Bland "considered whether this case is properly before [her]" including "the basis for the re-assignment" from ALJ Almanza. Relying on *Lucia*, the Sixth Circuit's decision in *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254 (6th Cir. 2018), and the Board's decision in *Luckern v. Richard Brady & Assocs.*, 52 BRBS 65 (2018), ALJ Bland determined that *Lucia* did not constitute a change in law allowing Employer to raise its Appointments Clause challenge at any given time during this claim. September 16, 2021 Order Reassigning Case at 7. Rather, she stated, "in order for any Appointments Clause challenge

[10] The Director stated, however, that his "position in this brief is not a waiver of any potentially applicable defense to an Appointments Clause challenge, including waiver, in this or any other case." Director's Amended Response to Employer's Brief Addressing the Necessity of New Evidentiary Development at 4.

[11] Employer also filed a Motion for Leave to file a Reply Brief and a Reply Brief responding to Claimant's arguments. Claimant filed a Motion to Strike Employer's Reply Brief and Employer responded to Claimant's motion.

to Judge Almanza's authority to be timely, it needed to have been raised while the case was before him for the first time, *i.e.* in 2014 or 2015." *Id.* Because Employer did not raise an Appointments Clause challenge at any time prior to the Board remanding the claim to ALJ Almanza, she concluded ALJ Almanza erred in raising the issue sua sponte and thus erred in reassigning the claim to her. *Id.* She therefore reassigned the claim back to ALJ Almanza "for consideration of the issues identified in the Board's Decision and Order."[12] *Id.*

Employer filed a request for reconsideration with ALJ Bland, alleging that it had not forfeited its argument because raising it before ALJ Almanza in 2014 or 2015 would have been futile. Employer's September 27, 2021 Motion to Reconsider. Claimant and the Director objected to Employer's motion and its futility argument. The Director elaborated that Employer failed to comply with regulatory issue exhaustion requirements and thus forfeited the issue both before ALJ Almanza and the Board; Claimant reiterated her position that Employer forfeited its arguments. Director's Opposition to Employer's Motion for Reconsideration; Claimant's Response to Employer's Motion for Reconsideration. By Order dated February 2, 2022, ALJ Bland denied Employer's motion and reaffirmed her earlier determination. *See* February 4, 2022 Order Denying Employer's Motion to Reconsider Order Reassigning Case.

Transfer of the Case Back to ALJ Almanza for Remand Proceedings

On April 21, 2022, after the claim had been transferred back to ALJ Almanza, Employer filed a Motion for De Novo Proceedings or, in the Alternative, Briefing on Remand, reiterating a number of its contentions about the Appointments Clause. In response, Claimant argued ALJ Almanza should issue a decision on the existing record that "carr[ies] out the Board's instructions on remand." Claimant's Response to Employer's Motion for De Novo Proceedings or in the Alternative, Briefing on Remand at 4. The Director also urged ALJ Almanza to reject Employer's Appointments Clause challenge and request for a new hearing, agreeing with and "supporting" ALJ Bland's forfeiture findings. The Director, however, asserted the ALJ should "reopen the record for new evidence" that complies with the evidentiary standards at 20 C.F.R. §725.414, given the age of the evidence. Director's Response to Employer's Motion for De Novo Proceedings.

On June 15, 2022, ALJ Almanza issued a Decision and Order on Remand Awarding Benefits. He denied Employer's Motion for De Novo Proceedings or, in the Alternative,

[12] She also denied Employer's request to hold the case in abeyance or transfer liability to the Black Lung Disability Trust Fund. September 16, 2021 Order Reassigning Case at 7.

Briefing on Remand, agreeing with ALJ Bland that Employer's Appointments Clause challenge was forfeited. Consistent with ALJ Bland's determination, ALJ Almanza determined Employer did not raise the issue "at the appropriate time," including at any time prior to his initial decision in the claim, i.e., "litigants [must] raise issues before the [ALJ] as a prerequisite to review by the [Board]," or when that initial decision was first appealed to the Board. Decision and Order on Remand at 2 (quoting *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 587 (6th Cir. 2021)). Due to the "limited scope of the Board's remand instructions," in which the Board identified only "one error in [his] analysis," i.e., failing to address whether the Miner's above-ground employment was in conditions substantially similar to those underground, the ALJ proceeded to address that issue. *Id.* at 3. And because the Miner had died and was thus unavailable "to provide any additional description of the dust conditions of his aboveground coal mine employment," the ALJ declined to re-open the record. *Id.*

Finally, on the merits, ALJ Almanza determined the Miner's "credible" and "reliable" testimony and responses to interrogatories establishes the Miner had more than fifteen years of qualifying surface coal mine employment. Decision and Order on Remand at 5. Because the Board previously affirmed his total disability findings, he determined Claimant invoked the Section 411(c)(4) presumption. *Id.* And given the Board previously affirmed his finding that Employer failed to rebut the presumption, ALJ Almanza again awarded benefits. *Id.*

Current Proceedings Before the Board: Employer's Second Appeal

In the current appeal, Employer maintains it did not forfeit its Appointments Clause challenge, all of the ALJ proceedings are "null and void," and thus it is entitled to "a reopened record, with de novo proceedings where the tribunal addresses all legal and factual issues anew based on a newly constructed and fresh record." *See* Employer's Brief at 6-21; Employer's Replies to the Director and Claimant. Claimant responds in support of the award of benefits, reiterating her position that Employer forfeited its Appointments Clause challenge. Claimant's Brief at 9-14.

The Director, despite previously asking both ALJ Bland and ALJ Almanza to reaffirm ALJ Bland's forfeiture determination, now contends that ALJ Almanza's initial decision to transfer the case to ALJ Bland effectively excused Employer's forfeiture and both the Director and Claimant "forfeited their own forfeiture arguments" by "fail[ing] to oppose" Employer's acceptance of ALJ Almanza's initial offer to reassign the claim. Director's Brief at 4. Thus, while the Director believes Employer did in fact forfeit its arguments, he also believes Employer is nevertheless entitled to a new adjudication and hearing before a different ALJ pursuant to *Lucia*. *Id.*

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order on Remand if it is rational, supported by substantial evidence, and in accordance with applicable law.[13] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Employer Forfeited Its Appointments Clause Challenge

Although the procedural history of this claim is lengthy and at times convoluted, this appeal presents a relatively straightforward question: Did ALJ Almanza (and ALJ Bland before him) properly determine that Employer forfeited its Appointments Clause challenge by failing to raise it at any point prior to his initial decision on the claim or when that initial decision was appealed to the Board? Stated another way, did ALJ Almanza properly limit his decision on remand to the Board's instructions following Employer's first appeal to the Board? Under the law and facts, the answer to both questions is yes.

Appointments Clause issues are "non-jurisdictional" and thus are subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Edd Potter Coal Co. v. Dir., OWCP* [*Salmons*], 39 F.4th 202, 207 (4th Cir. 2022) (because Appointments Clause challenges are not jurisdictional, "they are 'subject to ordinary principles of waiver and forfeiture'") (quoting *Davis*, 987 F.3d at 587); *see also Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013) (employer waived argument by failing to raise it before the ALJ).

To recapitulate, Employer first challenged ALJ Almanza's appointment and requested a de novo hearing before a different ALJ on November 14, 2019, nearly eight years after the case was originally transferred to the Office of Administrative Law Judges (OALJ); seven and a half years after ALJ Reilly held the hearing; nearly five years after Employer agreed to have the case transferred to ALJ Almanza *and* to allow him to decide the claim based on the existing record developed before ALJ Reilly; nearly four years after ALJ Almanza issued his initial decision awarding benefits; more than two and a half years after the Board decided Employer's appeal, affirming several of the ALJ's findings but remanding on a limited issue; over a year after the Supreme Court issued *Lucia*; and only in response to ALJ Almanza's Notice sua sponte asking if the parties wanted the case to be reassigned to a different ALJ. *See Lucia*, 138 S. Ct. 2044; *Potts*, BRB No. 16-0199 BLA;

[13] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because the Miner performed his coal mine employment in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 43; Director's Exhibit 3.

Employer's November 14, 2019 Letter to ALJ Almanza; November 6, 2019 Notice of Assignment and Briefing Schedule; Director's Exhibit 50.

As for why it is entitled to a de novo hearing before a different ALJ, Employer's arguments are quite limited and can be answered by straightforward application of existing law. It first asserts Appointments Clause challenges cannot be forfeited as part of these administrative adjudicatory proceedings because neither the ALJ nor the Board "have the authority to decide structural questions of constitutional dimension" and, thus, raising the issue earlier in the proceedings (or apparently at all) would have been futile. Employer's Brief at 8-9. Yet, the United States Courts of Appeals for the Fourth, Sixth, and Tenth Circuits have held otherwise, determining that ALJs and the Board have authority to consider such challenges and grant the requested relief, if warranted. *See Salmons*, 39 F.4th at 211-12 ("allegations of futility ring hollow" as both ALJs and the Board are able to address "as-applied" Appointments Clause challenges and provide the requested relief); *Davis*, 987 F.3d at 591-92 ("ALJs can entertain as-applied constitutional [Appointments Clause] challenges and provide the requested relief); *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 753 (6th Cir. 2019) ("The Board had the authority to address this constitutional [Appointments Clause] issue and provide effective relief[.]"); *Energy West Mining Co. v. Lyle*, 929 F.3d 1202, 1206 (10th Cir. 2019) (failure to raise Appointments Clause argument to the Board is forfeiture as "the Board could have remedied a violation").

Employer next asserts, in the alternative, that pursuing an Appointments Clause challenge on remand, after ALJ Almanza's and the Board's initial decisions, is timely "under the regulations" because those earlier decisions "addressed no Appointments Clause issue" and thus the Board's remand order "returned the parties to the status quo ex ante (sic)." Employer's Brief at 7-9. But the fact that the ALJ and the Board did not address any Appointments Clause arguments in their initial decisions is the very factor that establishes forfeiture. The issue was not addressed because *Employer did not raise it.*

As the Board explained in *Bailey v. E. Assoc. Coal Co.*, 25 BLR 1-323, 1-327-32 (2022) (en banc), "[t]he regulations implementing the Act clearly set out the steps a party must take to preserve an issue before the district director, ALJ, and Board." The ALJ hearing "shall be confined to those contested issues which have been identified by the district director . . . or any other issue raised in writing before the district director." 20 C.F.R. §725.463(a). While an ALJ may consider certain "new issue[s] . . . upon application of any party, or upon an administrative law judge's own motion," 20 C.F.R. §725.463(b), none of the parties (or the ALJs) identified the Appointments Clause as a "new issue" to be considered by ALJ Reilly when he held the hearing or by ALJ Alamanza when, *with*

Employer's agreement, he issued a decision in the case based on the record developed before ALJ Reilly.

The Board, in turn, is limited to reviewing "conclusions of law on which the decision or order appealed from was based," with the added requirement that the appellant identify for the Board "the specific issues to be considered on appeal." 20 C.F.R. §§802.211(a), 802.301(a). But here again, none of the parties even attempted to raise the issue in Employer's first appeal to the Board.

Consistent with the regulatory issue exhaustion requirements, "the Board routinely declines to consider arguments not properly raised below, including untimely Appointments Clause challenges." *Bailey*, 25 BLR at 1-328-29 (citing *Salmons*, 39 F.4th at 210 (affirming the Board's holding that the employer forfeited its Appointments Clause challenge by waiting to raise it until after the Board had remanded the case to the ALJ); *Davis*, 987 F.3d at 588 (affirming the Board's holdings that three employers forfeited Appointments Clause arguments as consistent with the Board's decades-long, "near blackletter" application of "the principle that issues not raised before the ALJ are forfeited"); *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019) (Appointments Clause argument not raised to the ALJ is forfeited); *Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 11 (2019) (Appointments Clause argument forfeited when first raised in a motion for reconsideration to the ALJ)). Like the employer in *Salmons*, Employer in this claim forfeited its Appointments Clause argument "not once but twice" – initially before the ALJ and then on appeal to the Board – instead waiting to pursue the argument until after the Board remanded the claim. *See Salmons*, 39 F.4th at 212.

And contrary to Employer's assertion, first pursuing the argument at that juncture is inconsistent with the "mandate rule," which itself requires "the lower body [to] 'implement both the letter and spirit' of the [Board's] mandate." *Salmons*, 39 F.4th at 210 (quoting *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993)). Thus, "[o]n remand, parties may not raise whatever new issues they would like if they have previously failed to bring those issues to the attention of the ALJ and the Board." *Id.* at 210. Rather, "governing regulations and the Board's [consistent application of the mandate rule]" dictate that "any issue that could have been but was not raised on appeal is waived and thus not remanded." *Id.* (quoting *Doe v. Chao*, 511 F.3d 461, 465 (4th Cir. 2007)); *see* 33 U.S.C. §921(b)(4) (Board remands claims to ALJs "for further appropriate action"); 20 C.F.R. §§802.404(a) (Board remands claims for actions "consistent with the decision of the Board"), 802.405(a) ("Where a case is remanded, such additional proceedings shall be initiated and such other action shall be taken *as is directed by the Board*.") (emphasis added).

Having affirmed the ALJ's findings that the Miner had greater than fifteen years of coal mine employment and was totally disabled, and that Employer's evidence failed to

rebut the Section 411(c)(4) presumption, the Board remanded the claim for ALJ Almanza to determine the limited question of whether the Miner's surface coal mine employment was qualifying for invoking the presumption. *Potts*, BRB No. 16-0199 BLA. That remand order neither absolved Employer of its earlier forfeiture nor "open[ed] the floodgates" for ALJ Almanza to grant an untimely request to reassign the case to a different ALJ for a de novo hearing, including on findings adverse to Employer that the Board already affirmed as part of its earlier mandate. *See Salmons*, 39 F.4th at 209-10 ("It is difficult to imagine how introducing new issues [on remand]—especially out of left field, never once mentioned before—could be consistent with or follow the directions of the Board."); *Davis*, 987 F.3d at 592 (granting a new hearing based on forfeited Appointments Clause arguments would invite sandbagging).

Employer's argument that its forfeiture should be excused because *Lucia* represented a "change in law" is also unavailing. The Board and federal Circuits have routinely rejected this argument, explaining that Appointments Clause arguments were "very much present before *Lucia*" and thus required "awareness," not "clairvoyance." *Salmons*, 39 F.4th at 212 ("*Lucia* plainly stated that *Freytag* – a case decided in 1991 – 'says everything necessary to decide this case.'") (citation omitted); *see also Wilkerson*, 910 F.3d at 257 ("No precedent prevented the company from bringing the [Appointments Clause] claim before [*Lucia*]."); *Luckern*, 52 BRBS at 68 n.3 (rejecting the assertion that *Lucia* constitutes a "change in law" entitling the claimant to first raise the issue on appeal to the Board).

Given the Board's "routine," "consistent," and "near blackletter" application of regulatory issue exhaustion requirements and the mandate rule, including with respect to Appointments Clause arguments, we also reject Employer's general assertion that declining to remand this claim constitutes "uneven treatment" by the Board. *See Salmons*, 39 F.4th at 209; *Davis*, 987 F.3d at 588; *Bailey*, 25 BLR at 1-328-29; Employer's Brief at 16-17. We are not persuaded by Employer's identification of a limited number of cases in which the Board had sua sponte asked unrepresented claimants whether they wished the Board to address *Lucia* in the context of their individual cases. Pro se claimants are not required to raise *any* issues to the Board; thus, in those appeals, the Board reviews the entirety of the ALJ's decision to ensure it complies with law and is supported by substantial evidence. 20 C.F.R. §802.211(e); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). Given Employer is represented by counsel who has routinely raised Appointment Clause challenges and is well-versed on the issue, the attempt to compare these cases is unavailing.

Nor are we persuaded by Employer's citation to a limited number of cases in which the Board had remanded claims for new proceedings pursuant to *Lucia*, without first considering whether the represented parties forfeited their Appointments Clause

arguments. In this appeal, the issue of forfeiture is squarely before the Board given that both ALJs who considered the issue – first ALJ Bland and then ALJ Almanza whose order is the subject of this appeal – held Employer forfeited its challenge. Thus, our consideration of the ALJs' findings (and affirmance thereof), in conjunction with the arguments raised on appeal, is consistent with the Board's limited scope of review.[14] 33 U.S.C. §921(b)(3); 20 C.F.R. §802.301(a) (Board must affirm an ALJ's "findings of fact and conclusions of law" if they are "supported by substantial evidence in the record considered as a whole or in accordance with law").

The Director's Arguments are Unavailing

The Director's arguments throughout this claim have been varied and, at critical junctures, inaccurate. By our count, the Director has set forth at least five different positions on the Appointments Clause issue.

First, as previously discussed, when ALJ Almanza initially raised the possibility of reassignment sua sponte, then-Director Hearthway stated she was not pursuing reassignment "in the interests of judicial economy," but otherwise did not address whether reassignment was required under *Lucia* or whether the issue had been forfeited. Director's November 20, 2019 Response to Notice and Order.

Second, when the matter was transferred to ALJ Bland, current Director Godfrey asserted that Employer "arguably" forfeited the issue by failing to raise it to the Board in its initial appeal, but he declined to pursue that argument because the case had already been reassigned and because he believed, incorrectly, that neither Director Hearthway nor Claimant had objected to the case's reassignment before ALJ Almanza. Director's Amended Response to Employer's Brief Addressing the Necessity of New Evidentiary Development at 2-4. Yet, as Claimant readily points out in this appeal (and as discussed *supra*), she did object to reassigning the case, instead arguing to ALJ Almanza that he should proceed with the scheduled briefing on the issues remanded by the Board. Claimant's Brief at 4 n.3, 11 n.4; Claimant's November 18, 2019 Letter to ALJ Almanza.

Third, after ALJ Bland determined Employer forfeited its Appointments Clause arguments and thus ALJ Almanza errantly reassigned the claim to her, the Director urged her to reject Employer's motion for reconsideration. He specifically argued Employer's

[14] Given that the question before the Board in this appeal, squarely raised and addressed by all parties, is whether *ALJs Bland and Almanaza* properly determined that Employer forfeited its Appointments Clause challenge, we are perplexed by our concurring colleague's assessment that we have reached our "holding on [our] own, sua sponte." *See infra* at 21 n.18.

failure to comply with the regulatory issue exhaustion requirements constituted forfeiture both before ALJ Almanza and the Board. Director's Opposition to Employer's Motion for Reconsideration.

Fourth, after ALJ Bland sent the case back to ALJ Almanza to comply with the Board's earlier remand order, the Director continued to urge rejection of Employer's arguments as forfeited. Although the Director "admitted" he did not "timely assert[] forfeiture in response to [Employer's] acceptance of ALJ Almanza's [sua sponte] reassignment offer," he asserted that fact "does not preclude [him from] supporting ALJ Bland's sua sponte determination" that Employer forfeited its argument and ALJ Almanza errantly transferred the claim to her. Director's Response to Employer's Motion for De Novo Proceedings at 5, n.1. Notably, the Director's argument incorrectly identifies ALJ Bland as raising forfeiture "sua sponte" when, in fact, Claimant specifically raised forfeiture to her and ALJ Bland found she was required to consider the issue based on the fact that *Employer itself* challenged her authority to decide the case on reassignment.

Fifth, and finally, on appeal from ALJ Almanza's most recent decision awarding benefits and finding Employer's Appointments Clause arguments forfeited (the decision that is the subject of this appeal), the Director reverts to an argument similar but not identical to his *Second* argument summarized above. He now posits that Employer "twice forfeited its Appointments Clause challenge" before ALJ Almanza and the Board, but ALJ Almanza acted within his discretion in "offering to reassign the case" and "excus[ing] [Employer's] forfeitures." Director's Brief at 3. According to the Director, both he and Claimant "forfeited their own forfeiture arguments against reassignment when they failed to oppose [Employer's] acceptance of ALJ Almanza's offer." *Id.* at 3 (citing *Freeman United Coal Mining Co. v. Director, OWCP* [*Shelton*], 957 F.2d 302, 304 (7th Cir. 1992)). Thus, he concludes that "ALJ Bland erred in finding forfeiture" and the case must be remanded to the OALJ to begin proceedings on this fourteen-year-old claim "anew." *Id.*

The Director's latest argument to the Board suffers from several fundamental flaws. He again bases his position on an incorrect assessment that Claimant "failed to oppose" Employer's acceptance of ALJ Almanza's offer to reassign the case. As already discussed, Claimant did object, arguing it was unnecessary and urging him to reject Employer's request to suspend briefing on the issues remanded by the Board so that a new judge could consider the claim de novo.[15] Claimant's Brief at 4 n.3, 11 n.4; Claimant's November 18,

[15] Moreover, the Board, sitting en banc, has rejected the view that adjudicators may enforce issue exhaustion requirements for Appointments Clause challenges *only* if another party immediately objects on forfeiture grounds. *Bailey*, 25 BLR 1-330-31 n.10 (proper for the Board to entertain the Director's and the claimant's forfeiture arguments over objections that they had "forfeited their [forfeiture] defense") (citing *United States v.*

2019 Letter to ALJ Almanza ("Based on what [Employer] relates in his response, that briefing [on the merits] is premature [as the case needs to be reassigned], the Claimant would disagree.").

Regardless of Claimant's alleged forfeiture-of-forfeiture, other than making general references to an ALJ's authority to decide procedural matters, the Director does not attempt to explain how it was within ALJ Almanza's discretion to raise the Appointments Clause issue sua sponte on Employer's behalf rather than complying with the Board's mandate. *Salmons*, 39 F.4th at 209 (when a claim is remanded by the Board, the scope of remand is limited; "the ALJ [must] follow orders rather than to go rogue" by introducing a new issue at that stage); Director's Brief at 3 (citing *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63-64 (2004) (en banc) (ALJs have broad discretion regarding procedural issues)). The Director provides no reason for the Board to deviate from its consistent application of the mandate rule. *Salmons*, 39 F.4th at 210 (citing with approval *Kunselman v. Canterra Coal Co.*, BRB No. 98-1339 BLA, 2000 WL 35927535, at *3 (Feb. 28, 2000) (unpub.) ("[T]he [ALJ] erred in failing to follow the Board's remand instructions [because an] inferior court has no power or authority to deviate from the mandate issued by an appellate court."); *Dobson v. Todd Pac. Shipyards Corp.*, BRB No. 91-2160 BLA, 1995 WL 17960189, at *7 (Apr. 11, 1995) (unpub.) ("It is error for an [ALJ] to fail to follow the Board's instructions on remand.")). As ALJ Bland found, ALJ Almanza transferred the claim to her in error rather than complying with the Board's remand order.

Additionally, we disagree with the Director that ALJ Almanza's initial offer to reassign the case can be construed as an excusal of Employer's forfeiture. Director's Brief at 3-4. Not only was his sua sponte raising of the Appointments Clause issue well outside the scope of the Board's remand order, he made no findings whatsoever that could form a basis for excusing Employer's forfeiture. *See Freytag*, 501 U.S. at 879; *Davis*, 987 F.3d at 588-93 (employer failed to identify any exception that would allow the court to "excuse [its] noncompliance" with black lung issue exhaustion regulations); *Wilkerson*, 910 F.3d at 256-57 ("[n]one of the explanations for excusing a forfeiture applie[d]"). Indeed, ALJ Almanza simply granted reassignment based solely on Employer's response to his Order, which made no mention of excusal or reasons to justify it, and then failed to address Claimant's contrary position that reassignment was unnecessary and briefing on the remand issues should continue as scheduled. Director's November 20, 2019 Response to Notice and Order; Claimant's November 18, 2019 Letter to ALJ Almanza. Further, when

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Oliver, 878 F.3d 120 (4th Cir. 2017); *Long v. Atl. City Police Dep't*, 670 F.3d 436 (3d Cir. 2012); *United States v. Gaytan-Garza*, 652 F.3d 680 (6th Cir. 2011); *United States v. Mitchell*, 518 F.3d 740 (10th Cir. 2008); *Zhong v. U.S. Dep't of Just.*, 480 F.3d 104, *en banc reh'g denied*, 489 F.3d 126 (2d Cir. 2007)).

given the opportunity to reconsider the issue when ALJ Bland transferred the claim back to him, ALJ Almanza specifically found the issue forfeited and thus limited his decision to the "one error" identified in the Board's earlier remand order. Decision and Order on Remand at 2-3.

Accepting the Director's argument that Employer's blatant forfeiture was excused, or should be excused by this Board, would require us to overlook several critical factors, all for the sake of sending a nearly fourteen-year-old claim, twice-adjudicated by ALJ Almanza, back for proceedings "anew" before a different ALJ: 1) Employer did not object to ALJ Reilly's authority to hold a hearing in this claim in 2012; 2) it *specifically agreed* to allow ALJ Almanza to decide this claim on the then-existing record following ALJ Reilly's retirement; 3) it did not raise an Appointments Clause challenge at any point during ALJ Almanza's initial consideration of the case; 4) it did not raise an Appointments Clause challenge when it appealed the initial award of benefits to the Board; 5) the Board remanded the claim to ALJ Almanza on a limited issue, while affirming several of his findings decided against Employer; 6) ALJ Almanza sua sponte raised the Appointments Clause issue outside the scope of the Board's remand order and transferred the claim to ALJ Bland without considering Claimant's objections; 7) ALJ Bland properly found the issue forfeited and outside the scope of the Board's remand order – not sua sponte as the Director alleges but in response to Employer's challenge to her authority to decide the claim and Claimant's specific arguments in favor of a forfeiture finding; and 8) upon Employer's renewal of its request to have the claim transferred to a different ALJ, ALJ Almanza himself found the issue forfeited and thus proceeded to fulfill the Board's earlier remand order.

Under these circumstances, remanding this claim for the submission of new evidence and another hearing would not only be unwarranted, it would be unjust to Claimant and her deceased husband, the Miner, who have faithfully – and timely – exercised their rights and preserved their interests under the Act. *See Salmons*, 39 F.4th at 212 ("[W]e cannot close our eyes to the fact that allowing parties to raise issues for the first time on remand does nothing to discourage sandbagging. . . . Allowing this could not help but disrupt the ordinary processes of black-lung decision-making."); *Davis*, 987 F.3d at 592-93 (granting untimely Appointments Clause challenges encourages "sandbagging" and "judge-shopping" in the already-attenuated black lung litigation process) (citations omitted).

Conclusion on Appointments Clause Challenge

For this multitude of reasons, we reject Employer's and the Director's contentions that Employer's untimely Appointments Clause challenge entitles it to a new hearing before a different ALJ. We see no error in ALJ Bland's proper action in returning the case

to ALJ Almanza to consider the Board's original remand instructions or ALJ Almanza's conclusion that Employer forfeited its right to challenge his authority to decide the case. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc) (ALJ has broad discretion over procedural matters); September 16, 2021 Order Reassigning Case; Decision and Order on Remand at 2-3. As Employer's requests for a de novo hearing and to submit new evidence are premised on its Appointments Clause challenge, we also reject them.[16] Employer's Brief at 21; Employer's Reply to Claimant's Brief at 1-2.

Removal Protections

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 9 n.2; Employer's Reply to the Director's Brief at 1-3. It generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion in *Lucia*. Employer's Brief at 9 n.2. In addition, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd*., 561 U.S. 477 (2010), *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), and *Arthrex, Inc. v. Smith & Nephew, Inc.*, 594 U.S. , 141 S. Ct. 1970 (2021), as well as Justice Gorsuch's concurring opinion in *Collins v. Yellen*, 141 S. Ct. 1761 (2021). *Id.* It also asserts the United States Court of Appeals for the Ninth Circuit wrongly decided *Decker Coal Co. v. Pehringer*, 8 F.4th 1123 (9th Cir. 2021), because it ignored the practical realities of DOL adjudications. *Id.*

For the reasons already discussed with respect to the Appointments Clause issue, Employer's challenge to ALJ removal protections, which it also did not raise while the case was initially before ALJ Almanza or the Board on its first appeal, is also forfeited.[17] *See*

[16] Employer also asserts that ALJ Almanza's reliance on "stale evidence" violated its due process rights and the Administrative Procedure Act. Employer's Brief at 5-6, 18, 21. We see no error in ALJ Almanza relying on the record that had already been developed in accordance with the regulations, in declining to reopen the record on remand, or in denying Employer's motion for de novo proceedings. *See Clark*, 12 BLR at 1-153; Decision and Order on Remand at 2, 5 n.5. As discussed *supra*, Employer itself agreed to allow ALJ Almanza to decide the claim based on the record developed before ALJ Reilly; and, after the Board remanded the claim, ALJ Almanza rationally found no basis to reopen the record because the Miner had since died and thus was unavailable to provide additional information on the limited question remanded by the Board (the dust conditions of his above-ground coal mine employment).

[17] While we hold Employer forfeited the issue for purposes of our review, whether Employer's forfeiture before the Board implicates its right to raise the issue on appeal to a

Fleming v. USDA, 987 F.3d 1093, 1097 (D.C. Cir. 2021) (constitutional arguments concerning the 5 U.S.C. §7521 removal provisions are subject to issue exhaustion). Because Employer has not identified any basis for excusing its forfeiture of the issue, we see no reason to further entertain its arguments. *See Davis*, 987 F.3d at 591-92. Further, even had Employer preserved its argument, we would reject it for the reasons set forth in *Howard v. Apogee Coal Co*., 25 BLR 1-301, 1-307-08 (2022).

Invocation of the Section 411(c)(4) Presumption

Qualifying Coal Mine Employment

Finally, we turn to the actual merits of this claim – and the one issue on which the Board remanded the case to ALJ Almanza in 2017 – whether the Miner's above-ground coal mine work qualifies for invoking the Section 411(c)(4) presumption. To qualify, the Miner must have worked at least fifteen years in underground coal mines or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001).

In accordance with the Board's remand instructions, ALJ Almanza reconsidered the evidence relevant to the conditions of the Miner's surface coal mine work, including the Miner's testimony, interrogatories, and Social Security Administration earning records. Decision and Order on Remand at 3-5; Hearing Transcript at 24-31; Director's Exhibits 5, 6, 19. ALJ Almanza determined the Miner was a "credible witness and a reliable historian" and that his uncontradicted testimony and statements established he was regularly exposed to a significant amount of coal mine dust during his surface coal mine employment with Jader Fuel Company, Coal Processors, Sugar Camp Coal Company, and Employer from 1988 or 1989 through 2009. Decision and Order on Remand at 5. Therefore, ALJ Almanza

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circuit court is a separate question. In that regard, we note the Fourth Circuit recently held, in *K & R Contractors, LLC v. Keene*, 86 F.4th 135, 139 (4th Cir. 2023), that an employer's forfeiture of the removal issue before the Board did not preclude the employer from raising it on appeal to the Circuit, in part because, unlike Appointments Clause challenges, "the Board has no authority to remedy the alleged separation-of-powers violation." *Id.* at 144-45. The court nevertheless denied the employer's request for a new hearing because the employer did not show that the alleged "constitutional violation caused [it] harm." *Id.* at 149. So too here.

found the Miner worked more than fifteen years of surface coal mine employment in conditions that were "substantially similar" to an underground mine and thus Claimant invoked the Section 411(c)(4) presumption. *Id.*

To begin, Employer's initial brief to the Board in this appeal does not raise any objections to the ALJ's finding. Thus, the objections it raises in its reply brief are forfeited. *See Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (Board generally will not consider new issues raised by the petitioner after it has filed its opening brief); Employer's Brief at 6 n.1, 6-21; Employer's Reply to Claimant's Brief at 2 n.1, Ex. A. Additionally, the arguments are not persuasive. While Employer asserts ALJ Almanza erred in determining the Miner had over fifteen years of coal mine employment, it does not explain why its own calculations omit the Miner's coal mine employment from 1999 through 2009 – years of coal mine employment that ALJ Almanza considered and found qualifying. Employer's Reply to Claimant's Brief at 2 n.1, Ex. A; *see* Decision and Order on Remand at 3-5; Director's Exhibits 3, 5, 6, 19. Additionally, at the hearing, Employer stipulated to the Miner having twenty years of coal mine employment. *See Burris*, 732 F.3d at 730 (voluntary stipulations are binding); Hearing Transcript at 6.

Employer does not raise any other specific challenges to ALJ Almanza's determinations beyond generally asserting it was preserving "its objections to the ALJ's medical merits determinations for all purposes." Employer's Brief at 6 n.1, 6-21. We thus affirm his finding that the Miner had greater than fifteen years of qualifying coal mine employment. 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

In light of the Board's prior affirmance of ALJ Almanza's finding that the Miner had a totally disabling respiratory or pulmonary impairment, we further affirm ALJ Almanza's determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *Potts*, BRB No. 16-0199 BLA, slip op. at 6, 9; Decision and Order on Remand at 5. As the Board previously affirmed ALJ Almanza's finding that Employer failed to rebut the presumption, ALJ Almanza properly reinstated the award of benefits. *Potts*, BRB No. 16-0199 BLA, slip op. at 9; Decision and Order on Remand at 5-6.

Accordingly, we affirm ALJ Almanza's Decision and Order on Remand Awarding Benefits.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GRESH, Chief Administrative Appeals Judge, concurring:

I concur with my colleagues that the contentions of Employer and the Director, Office of Workers' Compensation Programs (the Director), that Employer's untimely Appointments Clause challenge entitles it to a new hearing before a different, properly appointed ALJ should be rejected. However, I write separately to express my view that even if, as the Director asserts, the Director and Claimant did not sufficiently or timely raise as an affirmative defense that Employer failed to timely raise its Appointments Clause challenge in violation of the Black Lung Benefits Act's (BLBA) mandatory claim-processing regulations, Employer's untimely Appointment's Clause challenge nevertheless unfairly prejudiced Claimant, so it would be an abuse of discretion for Employer to raise its untimely challenge now, in accordance with Seventh Circuit precedent, within whose jurisdiction this case arises.

My colleagues hold that Employer forfeited its Appointments Clause challenge of the ALJ's authority to decide this case by not timely raising it while this case was pending before the district director or in its request for a hearing to the Office of Administrative Law Judges (OALJ) in contravention of the black lung issue exhaustion regulations, by not timely raising it before ALJ Reilly, who held the hearing, or ALJ Almanza when the claim originally was before him, and by not timely raising it before the Board when it first

appealed ALJ Almanza's original award of benefits. *See also Bailey v. E. Assoc. Coal Co*, 25 BLR 1-323, 1-327-32 (2022) (en banc).

On the other hand, the Director asserts that both the Director and Claimant "forfeited their own forfeiture arguments" by "fail[ing] to oppose" Employer's request that the case be reassigned to a properly appointed ALJ. Director's Brief at 4. Thus, the Director disagrees that Employer's Appointment's Clause challenge is precluded as untimely raised pursuant to the black lung issue exhaustion regulations and therefore is forfeited. In essence, in the Director's view, whether Employer's Appointments Clause challenge was untimely raised and therefore forfeited constitutes an affirmative defense, so Claimant and the Director had to raise it as an affirmative defense at the time that Employer raised its Appointments Clause challenge, otherwise they forfeited the defense.[18]

Thus, due to Claimant's and the Director's failure to preserve the issue of the untimeliness of Employer's Appointments Clause challenge and therefore that Employer's challenge was forfeited, the Director contends that Employer's Appointments Clause challenge has been nevertheless sufficiently raised before the ALJ and now before the Board, no matter the unfairness of such an outcome to Claimant or the unfairness of consideration of the issue at this point in the litigation, over thirteen years after the claim was filed. Consequently, because ALJ Almanza was not properly appointed at the time he originally considered this claim in accordance with the holding in *Lucia v. SEC*, 585 U.S.

[18] By holding on its own, sua sponte, that Employer's Appointment's Clause challenge is precluded as untimely raised, the majority treats compliance with mandatory claims-processing rules as a jurisdictional requirement. *But see, e.g.*, *Bailey*, 25 BLR 1-340-42 (Rolfe and Gresh, JJ., concurring) (citing *Fort Bend Cnty v. Davis*, 587 U.S. , 139 S. Ct. 1843, 1846 (2019) (claims processing-rules are not jurisdictional, so they "must be timely raised to come into play"); *George v. Youngstown State Univ.*, 966 F.3d 446, 469 (6th Cir. 2020) (circuit precedent "prohibits sua sponte enforcement of [administrative exhaustion requirements]" in the face of defendants' "forfeiture for fail[ure] to raise the defense") (citations omitted)); *see also Fleming v. USDA*, 987 F.3d 1093, 1097-99 (D.C. Cir. 2021) (noting the difference between mandatory claims-processing rules and jurisdictional rules; enforcement of the claims-processing rules at issue were dependent on the government's timely raising noncompliance). Such an approach overlooks the distinction between jurisdictional requirements, which must be enforced by a reviewing tribunal on its own accord, and the mandatory issue exhaustion regulations at issue here, which a party must timely raise "to come into play." *Fort Bend Cnty.*, 139 S. Ct. at 1846 (the charge-filing precondition to suit that is set out in Title VII to the Civil Rights Act of 1964 is a non-jurisdictional issue exhaustion rule creating an affirmative defense that was forfeited when the government failed to timely assert it).

, 138 S. Ct. 2044 (2018), the Director agrees with Employer and asserts that this case must be remanded for a new hearing before a different, constitutionally appointed ALJ.

A mandatory claim-processing rule is not jurisdictional and, therefore, is "subject to forfeiture if not properly raised by the appellee." *See Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 19 (2017), *vacating* 835 F.3d 761 (7th Cir. 2016). While I generally agree that non-jurisdictional issue exhaustion rules or mandatory claims-processing rules must be timely raised as an affirmative defense to come into play, *see Bailey*, 25 BLR at 1-340-42 (Rolfe and Gresh, JJ., concurring), the Director overlooks another relevant factor that must be considered in this case arising within the jurisdiction of the Seventh Circuit.[19] The Seventh Circuit has recently held in a strikingly similar case that a court (such as the ALJ or the Board in this case) may consider a late affirmative defense (such as Employer's Appointment's Clause challenge in this case), so long as "the plaintiff [such as Claimant in this case] does not suffer prejudice from the delay." *Burton v. Ghosh*, 961 F.3d 960, 965 (7th Cir. 2020).[20] In *Burton*, the defendants raised an affirmative defense for the first time seven years into the lawsuit; in this case, Employer's Appointments Clause challenge was raised nine years after the claim was filed and after the case had already been appealed to the Board and remanded back to ALJ Almanza. An Appointments Clause challenge serves as an affirmative defense. *Tilton v. SEC*, 824 F.3d 276, 288 (2d Cir. 2016).

To determine whether Claimant suffered prejudice from the delay in Employer's raising a late Appointments Clause challenge in this case, it is necessary to consider the Seventh Circuit's precedent in *Burton* and in other relevant decisions, but, initially, again consider the relevant procedural timeline in this case, which is as follows:

On January 22, 2010, the Miner filed his claim.

On December 29, 2015, after the Miner had requested a hearing before an ALJ, ALJ Almanza ultimately issued a Decision and Order Awarding Benefits. At no time while the case was before the district director before it was referred to the OALJ or while the case

[19] As the Board noted in its original decision, as the Miner's coal mine employment was in Illinois, Hearing Transcript at 43, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[20] The Supreme Court in *Hamer* specifically reserved the issue of whether mandatory claim-processing rules may be subject to equitable exceptions. *Hamer*, 583 U.S. at 20 n.3. It also did not address whether respondents' failure to raise any objection in the trial court to the overlong time extension, by itself, effected a forfeiture. *Id*. at 27.

was before the OALJ did Employer raise a challenge that Department of Labor (DOL) ALJs, or specifically ALJ Almanza who issued the D&O in this case, lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution.

On January 25, 2017, after Employer appealed, the Board issued a Decision and Order affirming in part and vacating in part ALJ Almanza's D&O awarding benefits, and it remanded the case to him for further consideration. At no time while the case was before the Board did Employer raise an Appointment's Clause challenge of ALJ Almanza's authority to preside over the case.

On April 20, 2017, as is common in black lung claim proceedings, the Miner died without ever seeing his claim resolved. His widow is now pursuing his claim. Claimant's August 3, 2018 Letter to ALJ Almanza; Decision and Order on Remand at 6.

On December 21, 2017, even before *Lucia* was issued, the Secretary of Labor ratified the prior appointments of all sitting DOL ALJs, including ALJ Almanza, in compliance with the Appointments Clause. Secretary's December 21, 2017 Letter to ALJ Almanza.

On June 21, 2018, the United States Supreme Court issued its decision in *Lucia*, holding that prior existing Supreme Court precedent already established some agency ALJs are inferior officers subject to the Appointments Clause. 138 S. Ct. 2044. The DOL has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

On October 30, 2018, consistent with the holding in *Lucia*, the Board published a decision holding that "*Lucia* does not represent a 'change in law[.]'" *Luckern v. Richard Brady & Assocs.*, 52 BRBS 65, 68 n.3 (2018); *see also Lucia*, 138 S. Ct. at 2053 (The 1991 Supreme Court decision addressing the Appointments Clause in "*Freytag* says everything necessary to decide this case.") (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). In a subsequent decision the Board published, the Board reiterated that the "contention that *Lucia* represents 'new law' that was decided 'after both of the administrative decisions herein' is incorrect." *Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 11 (2019).

On November 6, 2019 (nearly three years after the Board's D&O remanding the case, over a year after both *Lucia* was issued and the Board's subsequent published decision in *Luckern* noting that *Lucia* does not represent a "change in law"), ALJ Almanza sua sponte, without the issue being presented to him by any party in this case, issued an order of Notice of Assignment and Briefing asking the parties whether they wanted the case to be reassigned to a different, properly appointed ALJ in light of *Lucia*. Employer had not raised an Appointments Clause challenge at any point prior to ALJ Almanza's sua sponte

order. ALJ Almanza's sua sponte order did not ask the parties to address the appropriateness of a reassignment at that point in time in the litigation of the case or whether a request for reassignment would be considered timely raised or not.

On November 14, 2019, in response to ALJ Almanza's sua sponte order, Employer requested for the first time that the case be reassigned to a different, properly appointed ALJ and that because a new de novo hearing was required, briefing on the merits of the Board's decision remanding the case for reconsideration was premature and should be done before the new ALJ. Employer's November 14, 2019 Letter to ALJ Almanza. Employer's response did not address the appropriateness of a reassignment at that point in time in the litigation of the case or whether its request for reassignment should be considered as timely raised.

On November 18, 2019, Claimant objected, arguing to ALJ Almanza that "Claimant does not consider it necessary to reassign" the case to a properly appointed ALJ and that "[b]ased on what [Employer] relates in [its] response, that briefing [on the merits] is premature [as the case needs to be reassigned], the Claimant would disagree." Claimant's November 18, 2019 Letter to ALJ Almanza (ALJ Exhibits at p. 1306).

On November 20, 2019, the Director responded, stating that "in the interests of judicial economy, she does not request reassignment." Director's November 20, 2019 Response to Notice and Order.

On November 23, 2020, without any discussion of the appropriateness of a reassignment at that point in time in the litigation of the case or whether a request for reassignment would be considered timely raised, and without any specific consideration of Claimant's objection to reassignment or the Director's response that she did not seek reassignment, ALJ Bland issued a Notice of Assignment and Notice of Hearing advising the parties that the case had been transferred to her.

On December 28, 2020, Employer filed a Motion again requesting that a properly appointed officer decide the case or that the case be transferred to another properly appointed ALJ. Employer's December 28, 2020 Motion for Abeyance or to Transfer Liability.

On February 24, 2021, the Director responded to ALJ Bland's request she made at the January 26, 2021 telephonic proceeding asking the parties to brief whether the development of new evidence was required by *Lucia*. The Director noted his "inadvertent failure" to have timely objected to Employer's request for reassignment and that while Employer has "arguably" waived its right to request reassignment by not raising it until ALJ Almanza's sua sponte order, the Director stated that he would not pursue this argument in this case. Director's Amended Response to Employer's Brief Addressing the Necessity

of New Evidentiary Development at 4 (ALJ Exhibits at p. 149). But the Director concluded "the Director's position . . . is not a waiver of any potentially applicable defense to an Appointments Clause challenge, including waiver, in this . . . case." *Id.* The Director also inaccurately stated the case had been reassigned "without apparent objection from any party." *Id.* at 2 (ALJ Exhibits at p. 147).

Apparently, the Director believes that neither Claimant's objection to reassignment in response to ALJ Almanza's sua sponte order or the Director's response that he did not seek reassignment were sufficient to constitute a specific assertion or raising of an affirmative defense that Employer forfeited its Appointment's Clause challenge for failing to timely raise it. But again the Director overlooks that, as the Seventh Circuit has held, a late affirmative defense, such as Employer's Appointment's Clause challenge in this case, may be considered only so long as Claimant "does not suffer prejudice from the delay." *Burton*, 961 F.3d at 965. "[I]f the [affirmative] defense is untimely and the delay prejudices (i.e., significantly harms) the plaintiff, it is forfeited and normally may not be considered by the court," meaning "unfair prejudice" or "that the late assertion of the defense causes some unfairness independent of the potential merits of the [affirmative] defense." *Id.* at 966 (citing *Reed v. Columbia St. Mary's Hosp.*, 915 F.3d 473, 478-79 (7th Cir. 2019)). In addition, a plaintiff must be provided "notice and the opportunity to demonstrate why the defense should not prevail." *Venters v. City of Delphi*, 123 F.3d 956, 967 (7th Cir. 1997).

In *Burton*, the defendant raised an affirmative defense (res judicata) for the first time seven years into the lawsuit, to which the plaintiff in that case did specifically respond that the defense had been waived or forfeited. 961 F.3d at 962. Despite the fact that the plaintiff did specifically respond that the defense had been waived or forfeited, the Seventh Circuit noted the plaintiff had already been prejudiced by the defendants raising a late affirmative defense "without having to address" whether raising the issue seven years into the lawsuit "was appropriate" and saying "nothing" about whether its affirmative defense was timely raised. *Id.* at 970. The Seventh Circuit held that the defendant "should have" had to address those issues without the plaintiff's having to bring those timeliness issues "to the court's attention" via its own specific assertion or raising of his own affirmative defense that the defendant forfeited its affirmative defense by failing to timely raise it. *Id.* Because the "plaintiff was unable to respond as effectively" if defendant had addressed the timeliness of its newly raised affirmative defense, it "unfairly prejudiced" the plaintiff's "ability both to contest the merits of the [affirmative] defense and to encourage the [] court to exercise its discretion to forbid" the defense as untimely raised. *Id.* at 970-71. Thus, because the defendant's untimely affirmative defense prejudiced the plaintiff, the Seventh Circuit held

that "it would be an abuse of discretion to allow" the defendant to raise its untimely affirmative defense seven years into the lawsuit. *Id*. at 972.

Just as in *Burton*, neither ALJ Almanza's sua sponte order nor Employer's subsequent response that the case should be reassigned to a different, properly appointed ALJ addressed the appropriateness of a reassignment at that point in time in the litigation of this case or whether a request for reassignment would be considered timely raised or not. Thus, as in *Venters*, Claimant was not given adequate "notice and the opportunity to demonstrate why the defense should not prevail." *Venters*, 123 F.3d at 967. As in *Burton*, because Claimant "was unable to respond as effectively" if either ALJ Almanza or Employer had addressed the appropriateness and timeliness of a reassignment to a new ALJ, it "unfairly prejudiced" Claimant's "ability . . . to encourage [ALJ Almanza] to exercise [his] discretion to forbid" the defense as untimely raised or, in other words, to raise his own affirmative defense. *Burton*, 961 F.3d at 970-71.[21]

Moreover, the Seventh Circuit notes in *Burton* that "[i]f a defendant could not have reasonably known of the availability of an affirmative defense," such as Employer's Appointments Clause challenge in this case, until the time that it raised it, raising the late defense "should be considered timely." 916 F.3d at 965. But again, as the Board has held, "*Lucia* does not represent a 'change in law[.]'" *Luckern*, 52 BRBS at 68 n.3; *see also Lucia*, 138 S. Ct. at 2053 (The 1991 Supreme Court decision addressing the Appointments Clause in "*Freytag* says everything necessary to decide this case.") (citing *Freytag*, 501 U.S. 868); *Kiyuna*, 53 BRBS at 11.[22] Thus, even though an Appointments Clause challenge of the ALJ's authority to decide this case was available to be raised when this case was originally before the ALJ Almanza, neither Employer nor ALJ Almanza raised the issue at that time.

Instead, ALJ Almanza subsequently sua sponte raised the issue of reassignment, even though it did not represent a change in law, without adequately providing the parties

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[21] Consequently, because neither ALJ Almanza's sua sponte order nor Employer's response addressed the appropriateness of a reassignment at that point in time in the litigation of this case or whether a request for reassignment would be considered timely raised or not, Claimant's objection to reassignment in response to ALJ Almanza's sua sponte order was, in the factual circumstances of this case, sufficient to constitute a specific assertion or raising of an affirmative defense that Employer forfeited its Appointment's Clause challenge.

[22] *See e.g.*, *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000) (Appointments Clause challenge of FDIC ALJ raised in 2000).

the opportunity to address whether a request for reassignment at that point in time would be considered timely raised. Nor did ALJ Almanza's order adequately provide Claimant the opportunity to "respond . . . effectively" and assert an affirmative defense that a request for reassignment would be untimely. Moreover, as "essentially passive instruments of government[,]" courts must "wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties." *United States v. Sineneng-Smith*, 590 U.S. , 140 S. Ct. 1575, 1579 (2020) (alterations in original) (citation omitted). Courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). Here, ALJ Almanza did not wait for Employer to raise whether the case should be reassigned to a different, properly appointed ALJ, but raised the issue on his own sua sponte and, therefore, did not comply with his role as a "neutral arbiter" of "matters the parties present."

While the Director is wedded to its belief that neither Claimant nor the Director sufficiently asserted or raised an affirmative defense that Employer forfeited its Appointment's Clause challenge for failing to timely raise it, that is not the end of the inquiry as to whether Employer timely raised its Appointment's Clause challenge. Contrary to the Director's assertion, because Employer's untimely Appointment's Clause challenge unfairly prejudiced Claimant, "it would be an abuse of discretion to allow" Employer to raise its untimely affirmative defense now. *See Burton*, 961 F.3d at 972.

Finally, exceptional circumstances nevertheless exist in this case for holding that Employer's Appointments Clause challenge was untimely raised even if Claimant and the Director themselves did not arguably, as the Director asserts, sufficiently or timely raise it as an affirmative defense and therefore forfeited the defense. The Seventh Circuit has held that "[w]hen the government contends . . . that it 'accidentally forfeit[ed] a timeliness argument, our power to decide an appeal on a forfeited ground should be used only in exceptional cases.'" *Anderson v. United States*, 981 F.3d 565, 572 (7th Cir. 2020) (citing *Arreola-Castillo v. United States*, 889 F.3d 378, 383 (7th Cir. 2018) (citation and internal quotation marks omitted)); *see also Freytag*, 501 U.S. at 894 (Scalia, J., concurring) ("truly exceptional circumstances" must exist to overlook the forfeiture of an affirmative defense).

Parties, as a conscious litigation strategy, might prefer to have an ALJ or the Board address the merits of an Appointments Clause challenge and, therefore, not raise an affirmative defense that the Appointments Clause challenge was not timely raised. *See e.g., Bailey*, 25 BLR at 1-330-31 n.10, 1-342 (Rolfe and Gresh, JJ., concurring). But in this case, the Director stated that its failure to have timely objected to Employer's Appointments challenge was "inadvertent" and should not be interpreted as a general waiver of objections in other cases; i.e., the Director admits that this was an "inadvertent" or exceptional case and later concluded that the Director's position "is not a waiver of any

potentially applicable defense to an Appointments Clause challenge, including waiver, in this or any other case." Director's Amended Response to Employer's Brief Addressing the Necessity of New Evidentiary Development at 4 (ALJ Exhibits at p. 149). The pertinent facts in this case are: the Director admits that he dropped the ball in this case in "inadvertent[ly]" failing to timely object to Employer's Appointments Clause challenge and Employer waited for ALJ Almanza's sua sponte order to raise its Appointments Clause challenge, even though it did not represent a change in law. The Director nevertheless asserts that the Board should overlook the circumstances of the Director's "inadvertent" failure to timely object to Employer's Appointments Clause challenge and ALJ Almanza's sua sponte order raising reassignment, even though it did not represent a change in law, and hold that this case must be remanded for a new hearing before a different, constitutionally appointed ALJ. Contrary to the Director's assertion, the exceptional circumstances of this case establish that Employer's untimely Appointment's Clause challenge unfairly prejudiced Claimant, so "it would be an abuse of discretion to allow" Employer to raise its untimely affirmative defense now.

Thus, I concur with my colleagues that Employer's and the Director's contentions that Employer's untimely Appointments Clause challenge entitles it to a new hearing before a different ALJ should be rejected. I further otherwise concur in the majority opinion in all other respects.

DANIEL T. GRESH, Chief
Administrative Appeals Judge