No. 20-1888

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ISLAND CREEK COAL COMPANY,
Petitioner,

v.

DANIEL LOONEY, and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

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

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BRIEF FOR THE FEDERAL RESPONDENT

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BRIEF FOR THE FEDERAL RESPONDENT

This appeal concerns coal miner Daniel Looney's claim for benefits under the Black Lung Benefits Act ("BLBA"), 30 U.S.C. §§ 901-44. Despite having ample opportunity to raise its Appointments Clause argument, U.S. Const. art. II, § 2, cl. 2, while the case was before the Administrative Law Judge ("ALJ"), Island Creek Coal Company waited until after the ALJ ruled against it on the merits to raise the issue for the first time on appeal before the Benefits Review Board. The

Board found that Island Creek forfeited its Appointments Clause challenge. The Director, Office of Workers' Compensation Programs ("OWCP"), U.S. Department of Labor ("DOL") urges this Court to affirm the Board's decision and to hold, as the Sixth Circuit has, that Appointments Clause issues must be raised before the ALJ in BLBA cases. *Joseph Forrester Trucking v. Dir., OWCP*, __ F.3d __, 2021 WL 386555 (6th Cir. 2021) ("*JFT*").

STATEMENT OF THE ISSUE

Did Island Creek forfeit its Appointments Clause challenge by not raising it before the ALJ?[1]

STATEMENT OF THE CASE

I. District director and ALJ proceedings

Daniel Looney filed his BLBA claim on February 7, 2013. J.A. 504. Island Creek responded, contesting Mr. Looney's entitlement and its own liability and arguing that various BLBA regulations were unconstitutional. S.A. 560-81. On October 4, 2013, the district director issued a proposed decision and order finding Mr. Looney entitled to benefits and Island Creek liable to pay them. J.A. 505.

[1] The Director takes no position on Island Creek's other arguments. Opening Br. ("OB") 8-31.

Island Creek then requested a de novo hearing before DOL's Office of Administrative Law Judges ("OALJ"). Its request challenged entitlement and liability, but raised no constitutional issues. S.A. 582-86. The district director then prepared Form CM-1025, which identified the issues Island Creek had contested before the district director and incorporated by reference Island Creek's earlier filings, including its constitutional challenges to BLBA regulations. J.A. 500-01 (citing S.A. 560-86). Because Island Creek had raised no Appointments Clause concerns, it was not listed as an issue on the form.

The case eventually was assigned to ALJ Paul Almanza. On July 25, 2016, he issued a Notice of Hearing and Prehearing Order that warned

> [o]nly those issues indicated on [Form CM 1025] or other issues raised in writing before the District Director will be considered, unless it is an issue that was not reasonably ascertainable while the claim was pending before the District Director. 20 C.F.R. § 725.463. New issues must be raised in writing at least 20 days prior to the hearing.

S.A. 588-89. Relatedly, the Notice directed each party to file a prehearing statement summarizing "(1) all of its claims or contentions; (2) the parties' stipulations…; (3) issues that are contested and conceded; (4) all objections and grounds for all motions that have been, or will be, made," and (5) "any additional information that may aid the parties' preparation for the hearing or the disposition of the proceeding." S.A. 591 (citing 29 C.F.R. § 18.80). Island Creek duly filed a prehearing statement, including a six-page, single-spaced "supplement" describing

in detail its constitutional and other challenges to various BLBA regulations. Notably, Island Creek did not raise an Appointments Clause challenge. S.A. 594-602.

At the November 30, 2016 hearing, Island Creek "preserved" an objection to the BLBA's evidence-disclosure regulation, 20 C.F.R. § 725.413. The ALJ then consulted Island Creek's prehearing statement and Form CM-1025 to identify the disputed issues and asked Island Creek if he had correctly stated the issues. Island Creek answered yes. J.A. 393-95. At the hearing's conclusion, the ALJ confirmed that Island Creek was withdrawing certain issues based on Mr. Looney's testimony and asked if there was anything further to address. Island Creek answered no. J.A. 425-26. Island Creek never mentioned the Appointments Clause.

The ALJ set April 28, 2017, as the deadline for closing briefs. J.A. 505. As before, Island Creek's closing brief did not raise the Appointments Clause. S.A. 623-51. On January 29, 2019, ALJ Almanza issued a decision and order awarding benefits and finding Island Creek liable. J.A. 504-39.

II. Appointments Clause litigation

While Mr. Looney's case was pending before the ALJ, the courts of appeals and the Supreme Court considered whether Securities and Exchange Commission (SEC) ALJs were "inferior officers" who must be appointed in accordance with the Appointments Clause under the Supreme Court's 1991 decision, *Freytag v.*

Commissioner of Internal Revenue, 501 U.S. 868 (1991). On December 27, 2016—four months before Island Creek's closing brief was due—the Tenth Circuit held that, "[b]ased on *Freytag*," SEC ALJs were inferior officers and improperly appointed, as they were appointed by SEC staff and not the Commission itself. *Bandimere v. SEC*, 844 F.3d 1168, 1170 (10th Cir. 2016). Consequently, the court "set aside" the SEC's decision finding that Mr. Bandimere violated securities laws. *Id.* at 1188. *Bandimere* created a circuit split, as the D.C. Circuit had reached the opposite conclusion in *Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016). Both cases were appealed to the Supreme Court.

On December 21, 2017, while *Bandimere* and *Lucia* were pending before the Supreme Court—and while Mr. Looney's case was still pending before ALJ Almanza—the Secretary of Labor ratified the appointments of ALJ Almanza and other incumbent ALJs. The ratification was "intended 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." DOL ALJ Ratification Letters (Dec. 21, 2017).[2] The Secretary also began personally appointing new ALJs, in compliance with the Appointments Clause. *See, e.g.*, DOL ALJ Appointment Letters (Sept. 12, 2018).[3]

For a short period in 2018, the Board began to address Appointments Clause violations in BLBA cases by having now-properly-appointed ALJs reconsider their decisions and, if appropriate, ratifying them. *See, e.g.*, *Miller v. Pine Branch Coal Sales, Inc.*, __ Black Lung Rep. (MB) __, 2018 WL 8269864, at *1-2 (Ben. Rev. Bd. 2018) (en banc) (Board remand and ALJ ratification in March 2018).

On June 21, 2018, the Supreme Court decided *Lucia v. SEC*, 138 S. Ct. 2044 (2018). Noting that "*Freytag* says everything necessary to decide this case," the Court held that SEC ALJs were inferior officers and were improperly appointed. *Id.* at 2053-54. The Court further determined the remedy for a timely

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[2] *Available at* https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Secretarys_Ratification_of_ALJ_Appointments_12_21_2017.pdf.

[3] *Available at* https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Appointment_Letters_Alford_thru_Wang_09_12_2018_posted_Redacted.pdf.

Appointments Clause challenge was to reassign the case to a different, properly-appointed ALJ for a new hearing, as an ALJ who had already heard a case could not be expected to consider it as though he had not already adjudicated it before. *Id.* at 2055. In response, the Board and DOL ALJs began to address timely challenges by reassigning cases for new hearings with new ALJs. *See, e.g.*, *Miller*, 2018 WL 8269864, at *2-3; *Billiter v. J&S Collieries*, No. 18-0256 (Ben. Rev. Bd. Aug. 9, 2018) (addendum); *McNary v. Black Beauty Coal Co.*, No. 2014-BLA-05373 (OALJ Aug. 22, 2018);[4] *Mullins v. Prestige Coal Co., Inc.*, No. 2017-BLA-06241 (OALJ Aug. 22, 2018);[5] *Powell v. Garrett Mining, Inc.*, No. 2012-BLA-05298 (OALJ Aug. 20, 2018).[6]

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[4] *Available at* https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2014/MCNARY_OLIS_W_v_BLACK_BEAUTY_COAL_CO_2014BLA05373_(AUG_22_2018)_143516_ORDER_PD.PDF.

[5] *Available at* https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2017/MULLINS_TOLBERT_P_v_PRESTIGE_COAL_CO_DIR_2017BLA06241_(AUG_22_2018)_110106_ORDER_PD.PDF.

[6] *Available at* https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2012/RICHARDSON_ROGER_

Island Creek did not stand idly by during this time. It raised Appointments Clause challenges in multiple other cases where, as here, the ALJs held hearings or took other significant actions before their appointments were ratified in December 2017. ALJ Almanza and other ALJs responded by offering reassignment. *See, e.g.*, *Reynolds v. Island Creek Coal Co.*, No. 2016-BLA-05832 (OALJ Oct. 16, 2018);[7] *Johnson v. Island Creek Coal Co.*, No. 2016-BLA-06009 (OALJ Sept. 11, 2018).[8] In another case similar to Mr. Looney's, an ALJ held that Island Creek forfeited its Appointments Clause argument by requesting reassignment in a motion for reconsideration after the ALJ issued his decision on the merits. *Allen v.*

F_v_GARRETT_MINING_INC_D_2012BLA05298_(AUG_20_2018)_184501_ORDER_PD.PDF.

[7] *Available at* https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2016/REYNOLDS_PHILLIP_R_v_ISLAND_CREEK_COAL_an_2016BLA05832_(OCT_16_2018)_093646_ORDER_PD.PDF.

[8] *Available at* https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2016/ISLAND_CREEK_COAL_an_v_JOHNSON_TEX_2016BLA06009_(SEP_11_2018)_125204_ORDER_PD.PDF.

Island Creek Coal Co., No. 2013-BLA-05933 (OALJ Dec. 18, 2018).[9] Despite strong evidence that *Lucia* relief was available for pre-decision Appointments Clause challenges, Island Creek never raised an Appointments Clause challenge in Mr. Looney's case before the ALJ.[10]

III. Benefits Review Board proceedings

ALJ Almanza issued his decision on January 29, 2019, seven months after *Lucia*. Island Creek appealed to the Board, where it argued for the first time that ALJ Almanza's appointment violated the Appointments Clause and requested a new hearing before a different ALJ. S.A. 657-74. The Board twice denied that request, finding that Island Creek forfeited the issue by not raising it before the ALJ. S.A. 675-77; J.A. 540-54.

Island Creek timely appealed to this Court. J.A. 555-59.

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[9] *Available at* https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2013/ALLEN_DALE_L_v_ISLAND_CREEK_KENTUCK_2013BLA05933_(DEC_18_2018)_153830_MODIS_PD.PDF.

[10] In 2018, Island Creek also attempted to raise Appointments Clause issues for the first time in motions for reconsideration to the Board and in a reply brief to a court of appeals, and actively litigated whether it had forfeited those arguments by raising them too late. *See Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 744-45 (6th Cir. 2019); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018).

SUMMARY OF ARGUMENT

Island Creek could have had the relief it now seeks from this Court—a new hearing before a different ALJ—simply by asking for it while the case was before the ALJ. All of the pieces of the puzzle were in place at that time, and Island Creek had requested and was offered *Lucia* relief in similar cases. Instead, it stayed silent here.

As the Sixth Circuit recently held, DOL's regulations require parties to identify contested issues—including Appointments Clause challenges—for adjudication by the ALJ or risk their forfeiture. *JFT*, 2021 WL 386555, at *3-5. So does forty years of binding Board and judicial precedent applying a prudential, judicially-imposed issue exhaustion requirement. Island Creek failed to follow these rules and thus forfeited its Appointments Clause argument.

Island Creek's arguments for excusing its forfeiture lack merit. Asking the ALJ for *Lucia* relief obviously would not have been futile as Island Creek was afforded *Lucia* relief in other cases when it timely asked. Nor was Island Creek misled by the Board's unpublished, non-precedential decisions in *Younce v. P & J Coal Co., Inc.*, No. 18-0288 BLA, 2019 WL 523798 (Ben. Rev. Bd. Jan. 30, 2019), and *Gamblin v. Island Creek Kentucky Mining*, Nos. 18-0299 BLA, -0300 BLA, 2019 WL 1075378 (Ben. Rev. Bd. Feb. 28, 2019). *Younce* and *Gamblin* were

decided after the ALJ's decision here and are outliers in the Board precedent. The Court should find Island Creek's Appointments Clause challenge forfeited.

ARGUMENT

Appointments Clause challenges are non-jurisdictional and thus "subject to ordinary principles of waiver and forfeiture." *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 678 (6th Cir. 2018). There are three sources for administrative issue exhaustion. *Sims v. Apfel*, 530 U.S. 103, 107-10 (2000); *Bryan*, 937 F.3d at 746. First, issue exhaustion can be a "creature[] of statute." *Probst v. Saul*, 980 F.3d 1015, 1019 (4th Cir. 2020). Second, "where an agency has adopted an issue-exhaustion requirement in the regulations governing its internal review process, courts customarily 'ensure against the bypassing of that requirement by refusing to consider unexhausted issues.'" *Id.* at 1019 (quoting *Sims*, 530 U.S. at 108). Third, "when neither a statute nor a regulation speaks to exhaustion in the relevant context, the decision of whether to impose such a requirement is left to 'sound judicial discretion.'" *Id.* at 1020 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992)).

Black lung proceedings before DOL ALJs require issue exhaustion under the second and third categories. Regarding the second category, the Sixth Circuit recently held that DOL's BLBA regulations direct the parties to identify the issues

to be adjudicated by the ALJ and that Appointments Clause issues not raised to the ALJ are forfeited. *JFT*, 2021 WL 386555, at *1. This Court should do the same.

Alternatively, the Court should hold that issue exhaustion is required under category three. BLBA proceedings, unlike the Social Security proceedings in *Probst*, are adversarial. The parties are expected to develop their cases through several levels of adjudication and thereby limit the issues for review by the Board and the courts of appeals much as litigants in Article III courts must raise issues at trial before seeking relief in the courts of appeals. Holding otherwise in this case would encourage sandbagging and harm BLBA claimants', DOL's, and the courts' individual and institutional interests.

I. DOL's regulations require issues exhaustion before the ALJ.

DOL's regulations "require that litigants raise issues before the ALJ as a prerequisite to review by the Benefits Review Board." *JFT*, 2021 WL 386555, at *3. The regulations create a system of progressive issue exhaustion meant to narrow the issues for consideration by the ALJ, the Board, and the courts, by requiring parties to dispute them or lose their right to do so.

As a general matter, the private parties to a BLBA claim are expected to develop the issues in their cases at the very beginning, while the claim is before the district director. *See id.* at *1. For example, a potentially liable coal mine operator must respond within 30 days of notice of a claim by disputing its liability or waive

the right to challenge it in future proceedings. 20 C.F.R. § 725.408(a)(3). Similarly, the parties are expected to submit their own evidence in response to the district director's preliminary analysis of the case. *Id.* §§ 725.410(a)(2), (b), 725.412(a)(2), 725.414. Once they have done so and "all contested issues, if any, are joined," the district director then issues a proposed decision and order deciding the claim. *Id.* § 725.418(a). This decision becomes final if not challenged within 30 days. *Id.* § 725.419(d).

A party seeking de novo ALJ review must "specify the findings and conclusions with which [it] disagrees," *id.* § 725.419(b), which "tee[s] up those issues for an ALJ." *JFT*, 2021 WL 386555, at *2. When forwarding the claim file to the OALJ, the district director transmits a "statement…of contested and uncontested issues in the claim" on Form CM-1025. 20 C.F.R. § 725.421(b)(7). As seen here, the district director fills out Form CM-1025 based on the issues the parties have raised. *See* J.A. 500-01 (incorporating by reference Island Creek's contested issues).[11]

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[11] Island Creek argues the limited space on various forms used by the district director misleads parties into thinking that they do not need to raise constitutional issues to the district director. OB 50-52. But Island Creek raised constitutional arguments before the district director and they were incorporated into Form CM-1025. Clearly Island Creek was not misled or deterred by any forms. J.A. 501 (citing S.A. 560-86).

Against this backdrop, the case proceeds to OALJ, where additional regulations further restrict the issues for decision. The ALJ "is charged with 'resolv[ing] contested issues of fact or law.'" *JFT*, 2021 WL 386555, at *2 (quoting 20 C.F.R. § 725.455(a)). Section 725.463 specifies that "the hearing shall be confined to those contested issues which have been identified by the district director (see § 725.421) or any other issue raised in writing before the district director." 20 C.F.R. § 725.463(a). The ALJ "may consider a new issue only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director." *Id.* § 725.463(b). This section also establishes procedures for raising new issues:

> Such new issue[s] may be raised *upon application* of any party, or upon an [ALJ's] own motion, with notice to all parties, at any time after a claim has been transmitted by the district director to the [OALJ] and prior to decision by an [ALJ]. If a new issue is raised, the [ALJ] may, in his or her discretion, either remand the case to the district director with instructions for further proceedings, hear and resolve the new issue, or refuse to consider such new issue.

Id. (emphasis added). "[A] party may, *upon request*, be granted an appropriate continuance," if the ALJ will consider a new issue. *Id.* § 725.463(c) (emphasis added). Section 725.463 thus requires parties to affirmatively raise any issues not previously identified by the district director in order to have them considered by the ALJ.

General DOL regulations governing OALJ procedures also require the parties to identify issues for adjudication. 29 C.F.R. § 18.80(a) requires each party to file a prehearing statement. The statement must identify "[t]he issues of law to be determined with reference to the appropriate statute, regulation, or case law," "a precise statement of the relief sought," the facts in dispute, and any stipulations. *Id.* § 18.80(c). As seen in this case, the prehearing statement is used in BLBA claims to further narrow the issues listed on Form CM-1025. J.A. 393-95, 425-26; S.A. 595. It also helps identify "new issue[s]" to be presented to the ALJ under 20 C.F.R. § 725.463.[12]

Finally, the Board's limited scope of review also demonstrates that issues must be raised at the ALJ level. *JFT*, 2021 WL 386555, at *4. The Board may not "engage in a de novo proceeding or unrestricted review of a case brought before it," but can only review "the findings of fact and conclusions of law on which the decision or order appealed from was based." 20 C.F.R. § 802.301(a). In other

[12] As Island Creek notes, OB 37, the general OALJ rules apply unless inconsistent with a "governing statute, regulation, or executive order." 29 C.F.R. § 18.10(a). Prehearing statements are regularly utilized in BLBA proceedings, as here, because prehearing statements help ALJs identify contested issues.

words, issues first must be presented to the ALJ *before* they can be appealed to the Board.

Taken together, 20 C.F.R. §§ 725.463, 802.301, and 29 C.F.R. § 18.80, require parties in black lung proceedings before the ALJ to identify contested issues for adjudication by the ALJ or risk their forfeiture. *JFT*, 2021 WL 386555, at *3-5.[13] This includes Appointments Clause issues. As the Sixth Circuit held, "[s]imply put, in the absence of a developed legal and factual Appointments Clause challenge, the Board is unable to address the issue without engaging in a prohibited 'de novo' or 'unrestricted' review of the ALJ decision." *Id.* at *4. This Court should hold the same and affirm the Board's conclusion that Island Creek forfeited its Appointments Clause challenge.[14]

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[13] Island Creek argues that 20 C.F.R. § 725.463 and 29 C.F.R. § 18.80, like SSA's regulations, do not require issue exhaustion because they do not expressly state that issues not raised will be considered forfeited. OB 37-39 (citing *Probst*, 980 F.3d at 1020 n.3). However, footnote 3 in *Probst* is dicta, as SSA conceded its regulations did not require issue exhaustion. *Probst*, 980 F.3d at 1020, 1025-26 (Richardson, J., concurring). Moreover, such an interpretation of DOL's regulations would be inconsistent with this Court's longstanding practice of requiring issue exhaustion at the Board level. *See, e.g.*, *Armco, Inc. v. Martin*, 277 F.3d 468, 476 (4th Cir. 2002). Board regulation 20 C.F.R. § 802.211 (requiring identification of "specific issues to be considered" by the Board) mandates issue exhaustion, even though it does not specifically warn that the failure to raise particular issues will preclude judicial review of those issues. *Bryan*, 937 F.3d at 749.

[14] We refute Island Creek's contention that these regulations have been inconsistently applied *infra* pp. 27-30.

II. Issue exhaustion before the ALJ in BLBA claims should be required as a prudential matter.

If the Court decides that issue exhaustion is required by regulation, the Court need not address prudential issue exhaustion. *JFT*, 2021 WL 386555, at *3. In the alternative, the Court should hold that issue exhaustion is required before the ALJ as a prudential matter. "The basis for a judicially imposed issue-exhaustion requirement is an analogy to the rule that appellate courts will not consider arguments not raised before trial courts." *Sims*, 530 U.S. at 108-09. "Where the parties are expected to develop the issues in an adversarial administrative proceeding,…the rationale for requiring issue exhaustion is at its greatest." *Id*. at 110. 20 C.F.R. §§ 725.463, 802.301, and 29 C.F.R. § 18.80, although sufficient on their own to create regulatory exhaustion, are part of a comprehensive body of procedural norms and Board case law forming a two-tiered administrative system of trial and appellate review in BLBA claims that mirrors adversarial litigation before the courts. This tradition goes back more than forty years, and the Court should formally recognize it by enforcing a judicially-imposed prudential issue exhaustion requirement.

Probst held that claimants in Social Security Administration ("SSA") cases need not raise an Appointments Clause challenge to an SSA ALJ's authority before

the ALJ. 980 F.3d at 1018.[15] In so holding, the Court determined that the "nature of the claim presented," the "characteristics of the particular administrative procedure provided," and other individual and institutional interests weighed against imposing an issue exhaustion requirement for Appointments Clause challenges. *Id.* at 1020-23 (citing *McCarthy*, 503 U.S. at 146). In BLBA cases, however, these factors cut the other way.

A. BLBA adjudications are highly adversarial.

As Island Creek concedes, OB 50, unlike "inquisitorial" Social Security proceedings, BLBA adjudications are "highly" adversarial. *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 733 (1990) (Marshall, J., concurring); *BethEnergy Mines, Inc. v. Cunningham*, 104 F. App'x 881, 883-84 (4th Cir. 2004) (issue exhaustion is favored in black lung cases under *Sims* because ALJ hearings are adversarial). In BLBA proceedings, "it falls to each party to shape and refine its case, subject of course to the risk that its adversary will discredit it." *Fox ex rel. Fox v. Elk Run Coal Co., Inc.*, 739 F.3d 131, 137 (4th Cir. 2014); *Day v. Johns Hopkins Health*

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[15] *Accord Cirko ex rel. Cirko v. Comm'r of Soc. Sec.*, 948 F.3d 148 (3d Cir. 2020); *Ramsey v. Comm'r of Soc. Sec.*, 973 F.3d 537 (6th Cir. 2020). *But see Carr v. Comm'r of Soc. Sec.*, 961 F.3d 1267 (10th Cir.) (Appointments Clause challenges must be raised before SSA ALJ), *cert. granted,* __ S. Ct. __, 2020 WL 6551771 (2020); *Davis v. Saul*, 963 F.3d 790 (8th Cir.), *cert. granted,* __ S. Ct. __, 2020 WL 6551772 (2020).

Sys. Corp., 907 F.3d 766, 770 (4th Cir. 2018) (BLBA "proceedings between the miner and the company borrow heavily from judicial process").

The trial-court quality of ALJ hearings is reinforced by the Board's limited standard of review. The parties stay in an "adversarial posture" as cases proceed to the Board on appeal. *Fox*, 739 F.3d at 133. Unlike the SSA's Appeals Council, which can consider new evidence submitted after the ALJ decision, 20 C.F.R. § 404.970(a)(5), the Board must treat ALJ factual findings as "conclusive" if supported by substantial evidence. 33 U.S.C. § 921(b)(3); 20 C.F.R. § 802.301. This "circumscribes the Board's review" so that parties do not get a "do over" on appeal. *Bryan*, 937 F.3d at 750. Because BLBA ALJ proceedings are similar to trial court proceedings, the Court should hold that the same trial-level issue exhaustion requirements used in the courts apply to BLBA proceedings.

Such a holding would be consistent with the Board's precedent, which imposes, "with near black-letter authority," a prudential exhaustion requirement on all manner of factual, evidentiary, and legal questions not raised before the ALJ. *JFT*, 2021 WL 386555, at *2 (citing cases); *Kiyuna v. Matson Terminals, Inc.*, __ Ben. Rev. Bd. Serv. __, 2019 WL 2881243 (2019). The courts have similarly required issue exhaustion before the ALJ. *See Boyd & Stevenson Coal Co. v. Dir., OWCP*, 407 F.3d 663, 666 (4th Cir. 2005) ("In reviewing a decision of the Benefits Review Board, our review is governed by the same standard the Board applies

when reviewing an ALJ's decision."); *BethEnergy Mines, Inc.*, 104 F. App'x at 883-85 (refusing to consider a statute of limitations issue the employer failed to contest before the ALJ); *see also Island Fork Constr. v. Bowling*, 872 F.3d 754, 757-58 (6th Cir. 2017); *Consolidation Coal Co. v. Dir., OWCP*, 732 F.3d 723, 730 (7th Cir. 2013); *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1009 (7th Cir. 1996); *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 727-28 (6th Cir. 1986). Clearly, there is a long history of judicial enforcement of issue exhaustion in ALJ proceedings. Since an Appointments Clause challenge is non-jurisdictional, *JFT*, 2021 WL 386555, at *2, the Board committed no error by adhering to its longstanding practice of requiring issue exhaustion before the ALJ.

In sum, the BLBA administrative structure is clear: ALJ hearings are trials, and the Board reviews ALJ decisions like an appellate court would. Just as courts of appeals generally will not address issues not raised before the Board, *Armco, Inc.*, 277 F.3d at 476, the Board will not address issues not raised before the ALJ. Unlike the SSA proceedings in *Probst*, 980 F.3d at 1022, the analogy to "the rule that appellate courts will not consider arguments not raised before the trial courts" could not be stronger than it is in BLBA cases. *Sims*, 530 U.S. at 108-09.

B. Island Creek's as-applied Appointments Clause challenge could have been easily resolved without judicial intervention.

Probst determined that the nature of an SSA claimant's Appointments Clause challenge weighed against issue exhaustion in part because no SSA ALJ was constitutionally appointed when Probst's hearing occurred. 980 F.3d at 1021. By contrast, DOL here took action in December 2017 to correct any Appointments Clause error and provide appropriate relief while Mr. Looney's case was still pending. By the time the ALJ decided this case in January 2019, the Secretary had ratified the appointments of incumbent DOL ALJs and appointed new ALJs, and the Board and ALJs had afforded *Lucia* relief in "legions" of BLBA cases where the Appointments Clause issue was timely raised, as Island Creek well knew because it was offered *Lucia* relief in similar cases. *JFT*, 2021 WL 386555, at *7; *see supra* p. 8.[16]

There was, therefore, no thorny constitutional problem requiring judicial expertise. Rather, the challenge had become an easily-resolved, as-applied challenge with a virtually-automatic procedural fix, well within the ALJ's authority

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[16] Island Creek argues that the ALJ could not have reassigned Mr. Looney's claim before the November 30, 2016 ALJ hearing because there were no constitutionally-appointed ALJs then. OB 42 n.13, 43 n.14. But the ALJ's decision, not hearing date, is the relevant deadline. 20 C.F.R. § 725.463(b); *JFT*, 2021 WL 386555, at *7.

in the adjudication of BLBA claims. If Island Creek had timely asked, it would have received a new hearing by a properly-appointed ALJ. The Court's futility-related concerns regarding the SSA ALJs in *Probst* are not present here.

C. Other institutional and individual interests weigh in favor of exhaustion and against sandbagging.

Other institutional and individual interests also favor exhaustion. *Probst* found that SSA claimants' interest in their benefits, which often comprise most of their income, weighed against applying a forfeiture rule. 980 F.3d at 1023. Island Creek attempts to analogize itself to SSA claimants, claiming the estimated total cost of each miner's claim is $250,000. OB 53-54. But Island Creek's interests are not at all comparable. The estimated cost of a claim is spread out over the course of the miner's lifetime.[17] Also, requiring an employer (or its insurance carrier) to pay compensation to coal miners disabled by the dangerous work they did for the employer is not the type of "irreparable" harm that weighs in favor of avoiding administrative exhaustion. *See McCarthy*, 503 U.S. at 147 (citing

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[17] The monthly rate for a primary beneficiary in 2021 is $693.60. *See* Black Lung Monthly Benefit Rates for 2021, https://www.dol.gov/agencies/owcp/dcmwc/regs/compliance/blbene.

Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 773 (1947)). Island Creek has not, for instance, suggested that paying its monthly BLBA obligations would cause it to go out of business or the like.[18] *See, e.g.*, *Aircraft & Diesel Equip. Corp.*, 331 U.S. at 778 (a company's mere allegation that it would be deprived of the use of $270,000—in 1943 dollars—was insufficient to avoid administrative exhaustion); *Rivere v. Offshore Painting Contractors*, 872 F.2d 1187, 1191 (5th Cir. 1989) (to stay payment of benefits under 33 U.S.C. § 921(b)(3) (incorporated by 30 U.S.C. § 932(a)), the employer/carrier must show the award is "too heavy…to pay without practically taking all its property or rendering him incapable of carrying on his business," or that "other circumstances" create an "irreparable injury"). The asserted prejudice resulting from the denial of untimely Appointments Clause challenges brought by coal companies (who bring the vast

[18] Island Creek has yet to pay one dime of Mr. Looney's benefits, despite being obligated to do so once the ALJ awarded the claim. *See* 33 U.S.C. § 921(b)(3), (c); 20 C.F.R. § 725.502; *Nowlin v. E. Associated Coal Corp.*, 331 F. Supp. 2d 465, 472 (N.D. W. Va. 2004). Instead, the Black Lung Disability Trust Fund stepped in and began paying interim benefits and medical expenses on Island Creek's behalf in October 2013. 20 C.F.R. §§ 725.522, 725.605; J.A. 501. Mr. Looney is still waiting for Island Creek to pay his back benefits from February-September 2013 and other items the Trust Fund cannot pay. *See* 26 U.S.C. § 9501(d).

majority of such challenges in BLBA cases) thus stands in stark contrast to challenges brought by a denied SSA claimant.

Rather, it is BLBA claimants—who rely on their black lung benefits as an important source of income—whose interests align with SSA claimants. Awarded miners in BLBA cases are totally disabled by pneumoconiosis, an incurable, progressive disease. Awarded miners are frequently of advanced age with little financial means, and additional adjudications take time—sometimes more time than the miner has left.[19] *See JFT*, 2021 WL 386555, at *5 (length of black lung proceedings is a reason "why the Board's regulatory scheme disfavors allowing an operator to undo years of proceedings based upon arguments at its disposal from the start.").

Granting *Lucia* relief to Island Creek would also encourage and reward what Justice Scalia memorably dubbed "'sandbagging': suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later—if the outcome is unfavorable—claiming that the course followed was reversible error." *Freytag*, 501 U.S. at 895 (Scalia, J., concurring in part); *JFT*, 2021 WL 386555, at

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[19] The median length of time from docketing to decision for black lung cases is 20 months; the average is 23 months. OALJ, Quarterly Report on Case Inventory for 4th Quarter FY 2020 at 18-19, https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/Reporting/OALJ_Quarterly_Reporting_FY20_QTR4_Posted.pdf.

*7-8 (requiring exhaustion of Appointments Clause issues before the ALJ in part due to concerns about "sandbagging" and "judge-shopping"). Here, Island Creek's actions constitute classic sandbagging: even though *Lucia* relief was available to it, Island Creek permitted the ALJ to decide the case and, only after he ruled against it, did it challenge his authority. The Court should not allow Island Creek to drag out BLBA proceedings through such gamesmanship.

DOL's institutional interest in having the opportunity to self-correct also weighs in favor of issue exhaustion. *Probst* found SSA's self-correction argument unpersuasive because SSA delayed taking action. 980 F.3d at 1023. But here, DOL's prompt actions show the issue exhaustion rules working as they should—when litigants began raising Appointments Clause challenges, the agency self-corrected and resolved Appointments Clause issues in many cases that otherwise would have flooded the courts. *JFT*, 2021 WL 386555, at *7; *see supra* pp. 5-8. Had Island Creek spoken up earlier, as it and other employers had done in other cases, it would have been heard and already received a new ALJ hearing, without having to go to the Board or to this Court.

Finally, issue exhaustion serves administrative and judicial efficiency by helping the agency and the courts manage the volume of litigation in an orderly fashion. Island Creek concedes as much even as it tries to discount this interest. OB 56-57 (arguing interest should be given "little weight"); *see also Probst*, 980

F.3d at 1025 (explaining that the number of probable Appointments Clause remands would pose "a minor inconvenience" to SSA).[20] Regardless of how heavily this factor should figure in the Court's analysis, it unquestionably cuts against Island Creek and further weakens its case for disregarding issue exhaustion.

In sum, the adversarial nature of BLBA proceedings, the simple automatic fix that Island Creek would have gotten on (timely) demand, and the individual and institutional interests of the private parties, the agency, and the courts all weigh in favor of requiring issue exhaustion at the ALJ level.

III. The Court should not excuse Island Creek's forfeiture.

Finally, Island Creek argues that its forfeiture should be excused because (1) requiring issue exhaustion at the district director and ALJ levels would be futile, and (2) the Board has not consistently required parties to raise their Appointments Clause challenges to the ALJ. OB 40-46. Neither argument is persuasive.

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[20] Compared to SSA, the BLBA program is much smaller and has fewer resources. In 2017, DOL had 41 ALJs compared to SSA's 1,655. Office of Personnel Management, ALJs by Agency, https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency. DOL ALJs hear cases arising from over 80 other statutes and executive orders besides the BLBA. DOL, About the Office of Administrative Law Judges, https://www.dol.gov/agencies/oalj/about/ALJMISSN.

A. Island Creek could have obtained a *Lucia* remedy from the ALJ upon request.

Regarding futility, the Director agrees with Island Creek, OB 40-43, that a *Lucia* challenge to an ALJ's authority need not be raised to the district director. As a practical matter, until a case is assigned to an ALJ, a party does not know which ALJ will preside over the case and therefore does not know what potential problems there may be with that ALJ's appointment. Also, the district director does not control ALJ case assignments, so the district director cannot assign cases to any particular ALJ based on how they were appointed. 20 C.F.R. § 725.452(a) (BLBA hearings are "conducted by an [ALJ] designated by the Chief [ALJ]").

Regardless, Island Creek's arguments on this point are a straw man. As the Sixth Circuit held in *JFT*, "ALJs can entertain as-applied constitutional challenges and provide the requested relief…." 2021 WL 386555, at *7. And by the time ALJ Almanza issued his decision on January 20, 2019, *Lucia* relief was being provided in "legions" of BLBA cases after timely assertion of Appointments Clause arguments. *Id.*; *see supra* pp. 7-8.

B. Board precedent has consistently required issue exhaustion before the ALJ.

The Court should also reject Island Creek's allegation, OB 43-46, that the Board has been inconsistent in applying the ALJ issue-exhaustion rules. The Board's forfeiture decision in this case was consistent with the Board's published,

precedential decision *Kiyuna*, where a party forfeited his Appointments Clause argument by not raising it before the ALJ issued a decision. 2019 WL 2881243. It was also consistent with the Board's earlier precedent, which consistently held that issues are forfeited when not raised before the ALJ. *See JFT*, 2021 WL 386555, at *4.

Island Creek points to two unpublished, pre-*Kiyuna* cases, *Younce* and *Gamblin*, in which the Board held that Appointments Clause issues did not have to be raised at the ALJ level and in which the Director agreed to a remand to a new ALJ. Island Creek asserts that the Board's and the Director's inconsistency "leaves parties without reliable expectations about what they must do to obtain review." OB 44-46, 52 n.17.

Island Creek's suggestion that it relied on *Younce* and *Gamblin* is untenable. The ALJ decision in Mr. Looney's case was issued on January 29, 2019, before the Board issued its decisions in *Younce* and *Gamblin* on January 30 and February 28, 2019, respectively. *Younce*, 2019 WL 523798; *Gamblin*, 2019 WL 1075378. Thus, Island Creek could not have relied on *Younce* and *Gamblin* in deciding not to raise an Appointments Clause issue before ALJ Almanza in this case. Nor can Island Creek credibly claim that it actually relied on the Director's brief in *Gamblin*: it had declined to take any action in the seven months between *Lucia* and receipt of the brief on January 17, 2019. S.A. 670. Conversely, in 2018, Island Creek

repeatedly raised Appointments Clause challenges at the ALJ level in other cases similar to Mr. Looney's and ALJs—including ALJ Almanza—had been offering Island Creek *Lucia* relief. *See supra* p. 8.

Younce and *Gamblin* must also be placed in context. The Board addressed the forfeiture issue in cursory footnotes and issued unpublished, non-precedential decisions, leaving the forfeiture question open to development in future decisions. *Younce*, 2019 WL 523798, at *2 n.5; *Gamblin*, 2019 WL 1075378, at *2 n.7.[21] *Younce* and *Gamblin* are thus outliers when compared to the Board's earlier precedent. "Placed in [their] proper context," *Younce* and *Gamblin* "do[] not contradict the Board's longstanding requirement that issues be exhausted before the ALJ." *JFT*, 2021 WL 386555, at *5.

Moreover, they are distinguishable from Mr. Looney's case. The ALJs issued their decisions in *Younce* and *Gamblin* "against a legal backdrop different than the one in place today." *Id*. at *5. During a short window of time between the Secretary's December 2017 ratification of the ALJs' appointments and the June 2018 *Lucia* decision, DOL addressed Appointments Clause violations by allowing

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[21] Furthermore, the Board relied on *Lucia* for the proposition that issue exhaustion before the ALJ was not required, but *Lucia* is distinguishable. A statute requires issues exhaustion before the "Commission" in SEC proceedings. 15 U.S.C. § 78y(c). In contrast, DOL's regulations require issue exhaustion at various stages in BLBA proceedings, including before the ALJ. *See supra* pp. 12-16.

now-constitutionally-appointed ALJs to reconsider and, if appropriate, ratify their prior decisions. In order to acknowledge the remedy mandated by *Lucia* and to speed administrative processing of those claims, the Director chose not to assert an ALJ forfeiture defense in those cases. Yet the Director also cautioned that he reserved the right to assert waiver (and forfeiture) defenses in other cases as appropriate. S.A. 670.

Mr. Looney's case is an appropriate one in which to enforce forfeiture. Here, unlike in *Younce* and *Gamblin*, the ALJ issued his decision in January 2019, seven months after *Lucia*. Thus, for at least seven months before the ALJ decision, Island Creek knew it could get a new hearing before another properly appointed ALJ. Island Creek had every opportunity to raise its Appointments Clause challenge. Yet, it waited until it lost the case on the merits before belatedly seeking a do-over. To this day, Island Creek has offered no good reason for why it waited so long, especially given its vigorous assertion of Appointments Clause arguments in other cases during this time and its careful preservation of other constitutional issues in this case. *See supra* pp. 3-4, 8. But whether it was due to negligence or gamesmanship, Island Creek waited too long and thus forfeited its right to raise an Appointments Clause argument in this case.

CONCLUSION

For these reasons, the Court should affirm the Board's holding that Island Creek forfeited its Appointments Clause challenge.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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s/Cynthia Liao
CYNTHIA LIAO
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ADDENDUM

Billiter v. J&S Collieries, No. 18-0256 (Ben. Rev. Bd. Aug. 9, 2018)

U.S. Department of Labor

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

BRB Nos. 18-0256 BLA
and 18-0365 BLA
Case No. 16-BLA-5621

KELSIE BILLITER (Survivor of and o/b/o VERNON BILLITER)	)	
Claimant-Respondent	)	DATE ISSUED: AUG - 9 2018
v.	)	
J&S COLLIERIES	)	
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	ORDER

The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand in BRB No. 18-0256 BLA. The Director requests that the Board vacate the administrative law judge's Decision and Order and remand the case for the administrative law judge to reconsider "all prior substantive and procedural actions taken with regard to this claim, and [to] ratify them if [he] believes such action is appropriate." Employer has filed a response, agreeing that this case should be returned to the administrative law judge for reconsideration. Claimant has also filed a response brief.

In addition, employer has filed a Motion to Consolidate the above captioned cases. Employer requests that its appeal, BRB No. 18-0365 BLA be held in abeyance pending a ruling on the Director's motion to remand.

Upon consideration of the positions of the parties, and in light of the recent decision of the United States Supreme Court in *Lucia v. SEC,* 585 U.S. , 2018 WL 3057893 (June 21, 2018), we agree that under these circumstances the proper course of action is to remand both of the cases to the Office of Administrative Law Judges (OALJ) for further action.

20 C.F.R. §802.405(a). Any party adversely affected by the decision of the OALJ may file a new appeal with the Board within thirty (30) days of the date that the decision is filed with the district director. 20 C.F.R. §802.205.

Accordingly, the cases are remanded to the OALJ for further proceedings consistent with this Order. In light of the above, the Board renders employer's Motion to Consolidate and request to hold appeal in abeyance moot.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge