No. 18-3406

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DAVID STANLEY CONSULTANTS and CHARTIS CASUALTY CO.,

Petitioner,

v.

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

Respondents.

On Petition for Review of an 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

STATEMENT OF JURISDICTION

This case involves a 2012 claim for disability benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944, filed by former coal miner Thomas Peters. On June 8, 2017, United States Department of Labor (DOL) Administrative Law Judge Drew A. Swank (ALJ) issued a decision and order awarding the claim. David Stanley Consultants (DSC) appealed this decision to DOL's Benefits Review Board (Board) on July 7, 2017, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by

30 U.S.C. § 932(a). The Board had jurisdiction to review the decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

The Board affirmed the award of the claim on August 30, 2018. DSC petitioned this Court for review on October 29, 2018, within sixty days of the Board's decision. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. The injury contemplated by 33 U.S.C. § 921(c) – the miner's exposure to coal-mine dust – occurred in Pennsylvania, within this Court's territorial jurisdiction.

STATEMENT OF THE ISSUES

1. The Appointments Clause provides that inferior officers are to be appointed by "the President," the "Courts of Law," and the "Heads of Departments." DSC argues in its opening brief that the ALJ's decision awarding benefits should be vacated because the ALJ was not properly appointed. DSC did not raise this challenge before the ALJ or in its first appeal to the Board. Rather, it only raised the challenge before the Board after briefing in its second appeal had closed. Consistent with its longstanding precedent, the Board found the challenge untimely and declined to hear it. The question presented is whether DSC forfeited

its Appointments Clause challenge by failing to timely raise it before the administrative agency.

2. Parties to federal black lung claims are required to timely exchange medical evidence that they develop in connection with the claim. In accordance with the ALJ's pre-hearing order in this case, Peters notified DSC fifty-six days before the formal hearing that he would submit a medical report by Dr. Robert Cohen. Twenty-four days before the hearing, per the black lung regulations and the ALJ's pre-hearing order, Peters shared Dr. Cohen's report with DSC. Upon receiving Dr. Cohen's report, DSC moved to have Peters undergo complete pulmonary evaluations by its experts after the hearing. The ALJ denied this request, explaining that Peters had timely disclosed and shared Dr. Cohen's report, and nothing prevented DSC from examining Peters as part of its affirmative case in the two years before the hearing. However, consistent with the black lung regulations, the ALJ allowed DSC to submit rebuttal evidence in the form of post-hearing reports from its experts that addressed Dr. Cohen's report and testing. The second question presented is whether the ALJ abused his discretion in limiting DSC to the submission of post-hearing rebuttal evidence?[1]

[1] DSC also challenges the ALJ's weighing of the medical evidence in finding Peters entitled to benefits. Petitioner's opening brief (OB) 49-56. This brief does not address those arguments.

STATEMENT OF RELATED CASES

This case has not previously been before this Court, and the Director is not aware of any related cases before this or other courts.

STATEMENT OF THE CASE

Peters worked as an underground coal miner for at least 33 years before filing this claim for federal black lung benefits on December 31, 2012. Supplemental Appendix for the Federal Respondent (SA) 62 (ALJ decision and order dated December 1, 2015). A district director issued a proposed decision and order denying benefits on September 11, 2013, and Peters requested a formal hearing before an ALJ. On January 22, 2015, the ALJ issued a "Notice of Hearing and Pre-Hearing Order." SA 1. The order, *inter alia*, scheduled the formal hearing for June 26, 2015, and required the parties to exchange a "brief pre-hearing report listing and summarizing the documentary evidence" fifty days before the hearing and to share the actual documentary evidence at least twenty days before the hearing. *Id.* at 1, 3; *see also* 20 C.F.R. § 725.456(a)(2) (requiring parties to exchange medical evidence at least twenty days before hearing).

On April 30, 2015, fifty-six days before the hearing, Peters notified DSC that he would submit, among other evidence, a medical report from Dr. Robert Cohen. SA 8, 13 (cover letter with attached Preliminary Evidence Summary Form). On May 28, 2015, more than twenty days before the hearing, Peters mailed Dr.

Cohen's medical report to DSC (which it received on June 2).[2] SA 19, 21 (Peters' cover letter; DSC's Motion for Extension).

DSC responded to Dr. Cohen's report by requesting an extension of time in which to conduct two complete pulmonary evaluations of Peters by its own medical experts, Drs. Rosenberg and Broudy.[3] SA 20-23 (Motion for Extension). Peters objected to DSC's request on the ground that DSC had elected not to examine or test him in the two previous years, that it was now too late to do so, and that he had timely apprised DSC of Dr. Cohen's report. SA 26 (Claimant's Response to Employer's Motion for Extension). Peters also agreed to allow DSC to submit rebuttal evidence by having its doctors review and comment on Dr. Cohen's report and testing. *Id.*

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[2] Dr. Cohen performed a complete pulmonary evaluation of Peters. Dr. Cohen examined Peters, took social and medical histories, and conducted a chest x-ray, pulmonary function study, and blood gas test. Dr. Cohen also reviewed some of the previously-submitted medical evidence in the case. Claimant's Exhibit (CX) 4. Dr. Cohen concluded that Peters suffers from coal workers' pneumoconiosis and that his 33 years of coal mine employment significantly contributed to Peters' totally disabling respiratory condition. *Id*.

[3] Both doctors had previously submitted several consultative reports in which they reviewed the medical evidence of record, and both were later deposed. However, neither doctor had conducted his own pulmonary examination and testing of Peters. *See* Director's Exhibit (DX) 15, Employer's Exhibits (EX) 1, 2, 3, 4, 5. Dr. Rosenberg opined that Peters did not have pneumoconiosis and was not totally disabled; Dr. Broudy waffled on whether Peters was totally disabled, but believed smoking was the sole culprit regardless. He accordingly diagnosed no pneumoconiosis.

The issue was thoroughly aired at the formal hearing before the ALJ. SA 41-44 (Hearing Transcript). The ALJ observed that Peters had complied with his pre-hearing order by timely informing DSC that Dr. Cohen's report was coming, and that DSC could have exercised its right to develop and conduct two medical examinations of Peters before the hearing:

> [i]t would be one thing if [Peters] refused, and trust me, I would be jumping all over them. It's another if [Peters] had disappeared and you couldn't find him, and I would allow for examinations. But there's nothing here that indicates that you all couldn't have exercised your right before the hearing.

SA 44. The ALJ accordingly declined to order Peters to undergo the requested evaluations, but he did permit DSC to submit two rebuttal reports post-hearing. *Id.* On August 26, 2015, DSC submitted supplemental reports from Drs. Rosenberg and Broudy addressing Dr. Cohen's report and testing.[4] EX 12, EX 13. On December 1, 2015, the ALJ issued a decision and order awarding benefits. SA 59-88.

DSC appealed to the Board. In addition to challenging the underlying medical merits of the award, it argued that the ALJ violated its due process rights by limiting its post-hearing submissions to rebuttal evidence and not ordering

[4] Neither doctor changed his opinion after reviewing Dr. Cohen's report. In fact, both believed the pulmonary function test that Dr. Cohen performed confirmed their views. EX 12, 13. DSC also submitted after the hearing two (negative) readings by its experts of Dr. Cohen's chest x-ray. EX 7, 14.

Peters to undergo two complete pulmonary examinations by its experts. (DSC did not challenge the ALJ's authority to decide the case.) SA 93 (Board decision and order dated December 22, 2016). The Board affirmed the ALJ's evidentiary ruling, observing that there was no dispute that DSC was

> provided an opportunity to develop its case, to submit evidence, or to be heard within the time frames set forth by the regulations and by the administrative law judge. Moreover, [DSC] was not precluded from having [Peters] examined prior to the hearing. We, therefore, agree with the Director that the administrative law judge "is not to blame for [DSC's] decision to sit on its rights," and its failure "to develop a specific type of permitted medical evidence in a timely manner."

Id. Accordingly, the Board concluded that the ALJ did not abuse his discretion in limiting DSC to post-hearing rebuttal evidence. *Id*. Nevertheless, the Board agreed with DSC that the ALJ had erred in weighing the medical evidence, and remanded the case for further findings. SA 97-98.

On June 8, 2017, the ALJ awarded benefits on remand, SA 99-118, and DSC appealed to the Board. In its August 22, 2017, brief, DSC again challenged the underlying merits of the ALJ's award (and reiterated its due process argument).

On July 9, 2018, eleven months after filing its brief with the Board and nine months after briefing had closed, DSC filed a two-paragraph motion to remand based upon *Lucia v. S.E.C.*, __ U.S. __, 138 S. Ct. 2044 (2018). SA 119-121 (Motion for Remand Based on the Failure for the ALJ to have Properly Appointed as Required under the Appointments Clause of the US Constitution Consistent with

the Recent Supreme Court Decision Lucia V. [sic] Lucia). It argued for the first time that Department of Labor ALJs, including the ALJ who decided this claim, were not constitutionally appointed. *Id*. In response, the Director argued that DSC waived its Appointment Clause challenge by failing to raise it in its opening brief to the Board in the second appeal, or in the company's original appeal. SA 122-125 (Director's Response to the Operator's Motion for Remand).

The Board affirmed the award of benefits on August 30, 2018. SA 135. In doing so, it declined to reconsider its prior rejection of DSC's due process argument, citing the law of the case doctrine. SA 131. The Board also rejected DSC's Appointment Clause challenge, holding it waived because DSC had not raised it in its opening brief.[5] SA 130. The Board emphasized that DSC first raised the issue eleven months after filing its opening brief. *Id*.

DSC's opening brief to this Court asserts that the ALJ, who adjudicated this claim, was not properly appointed, and that the remedy is to vacate his decision and remand the case for a hearing before a properly-appointed ALJ. DSC further claims that the ALJ violated its due process rights by limiting it to post-hearing rebuttal evidence addressing Dr. Cohen's report and testing and not ordering Peters to undergo post-hearing pulmonary evaluations by its own experts.

[5] The Board did not address the Director's alternative argument that DSC waived the challenge by failing to raise it in the company's original appeal.

STATEMENT OF THE FACTS

The facts necessary to resolve the procedural and constitutional issues addressed in this brief appear in the preceding "Statement of the Case."

SUMMARY OF THE ARGUMENTS

1. DSC has forfeited its Appointments Clause challenge because it did not timely raise the issue before the agency. DSC did not mention the issue before the ALJ or in its opening brief to the Board. Rather, it raised the challenge for the first time in a motion for remand filed eleven months after its opening brief and nine months after briefing had closed. The Board, adhering to its longstanding precedent, properly denied this motion, finding the Appointments Clause challenge waived because DSC had failed to raise it in its opening brief to the Board.

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

2. The ALJ did not violate DSC's due process rights in limiting it to post-hearing rebuttal evidence. DSC, like any party to federal black lung adjudication, is entitled to procedural due process, including the right to meaningfully participate in the adjudicatory process by developing its own evidence and challenging evidence relied upon by its opponent. Those rights were fully honored in this case.

DSC actively participated throughout the proceedings, and had the opportunity to develop its own affirmative case before the hearing, including subjecting Peters to pulmonary evaluations by its experts, and to submit medical reports rebutting Peters' evidence after the hearing. Neither the Constitution, the Administrative Procedure Act (APA), nor the black lung regulations require more.

Its real complaint is that its litigation strategy of having its experts merely review the medical evidence of record, and not conduct their own pulmonary evaluations, may have backfired. But the protection afforded by due process is not a salve for a party's self-inflicted wounds. The Court should reject DSC's due process argument.

ARGUMENT

A. Standard of Review

Whether DSC forfeited its Appointments Clause challenge by failing to timely raise it below is a question of law. The Court exercises plenary review over questions of law. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 313 (3d Cir. 1995). However, the Court reviews for an abuse of discretion the Board's determination that DSC did not timely raise the Appointments Clause challenge because it was not presented in its opening brief. *See Kephart v. Director, OWCP*, 701 F.2d 22, 26 (3d Cir. 1983) (finding that Board abused its discretion in deeming petitioner's claims abandoned); *Greene v. King James Coal Mining, Inc.*, 575 F.3d

628, 639 (6th Cir. 2009) (finding no abuse of discretion in Board's excusing claimant's failure to preserve issue when Director did); *Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1021 (10th Cir. 2010) ("[W]e afford considerable deference to the agency tribunal. In general, the formulation of administrative procedures is a matter left to the discretion of the administrative agency.") (internal quotations omitted).

The Court also reviews for an abuse of discretion the ALJ's evidentiary ruling. *Shamokin Filler Co., Inc. v. Fed. Mine Safety and Health Review Comm'n*, 772 F.3d 330, 338, 339 n.2 (3d Cir. 2014); ("We review evidentiary rulings for abuse of discretion."); *Thomas J. Smith, Inc. v. Director, OWCP*, 482 F. App'x 683, 685 (3d Cir. 2012) (reviewing for an abuse of discretion ALJ's denial of request to order claimant to undergo post-hearing pulmonary evaluation); *Elm Grove Coal Co. v. Director, OWCP*, 480 F.3d 278, 297-98 (4th Cir. 2007) (reviewing for an abuse of discretion ALJ's application of the black lung evidence-limiting rules);[6] *Gunderson*, 601 F.3d at 1021 (reviewing for abuse of discretion ALJ's exclusion of evidence).

B. DSC's challenge – that the decision below must be vacated because the ALJ was not appointed in accordance with the Appointments Clause – should be rejected.

1. DSC failed to timely raise its Appointments Clause challenge when the claim was pending before the agency.

[6] The evidence-limiting rules are described *infra* at 30.

DSC failed to make a timely Appointments Clause challenge before the ALJ or the Board. For nearly *five* years – from September 2013 (when the district director forwarded the case for a formal hearing before the ALJ), through its original appeal to the Board and a second ALJ decision, to July 2018 (when DSC filed its motion for remand with the Board in its second appeal) – DSC never challenged the authority of DOL ALJs to decide black lung cases. DSC waited until after briefing had closed at the Board in the second appeal to raise the Appointments Clause issue for the first time.[7]

By then, it was too late. The Board properly refused to consider DSC's new issue, holding "[b]ecause [DSC] first raised its Appointments Clause argument eleven months after filing its opening brief …, [DSC] forfeited the issue." SA 130. In so ruling, the Board properly applied its own precedent that it is procedurally improper for a petitioner to raise an issue for the first time after filing its opening brief. *Id*. citing *Williams v. Humphreys Enters.*, *Inc.*, 19 Black Lung Rep. (MB) 1-111, 1-114 (Ben. Rev. Bd. 1995) (declining to consider new issues raised by petitioner after it files opening brief identifying the issues to be considered on

[7] The Director agrees that ALJs who preside over BLBA proceedings are inferior officers, and that the ALJ here was not properly appointed when he adjudicated the miner's claim. To remedy this, the Secretary of Labor in December 2017 ratified the ALJ's appointment and the appointments of other then-incumbent Department of Labor ALJs. *See infra* at 23-24.

appeal); and *Senick v. Keystone Coal Mining Co.*, 5 Black Lung Rep. (MB) 1-395, 1-398 (Ben. Rev. Bd. 1982) (stating that the Board "will not normally address new arguments raised in reply briefs" and declining to so); *see also Caldwell v. North American Coal Corp.*, 4 Black Lung Rep. (MB) 1-135, 1-138-39 (Ben. Rev. Bd. 1981) (same, while explaining that its "practice accords with the treatment of reply briefs in the United States Courts of Appeals"); *Ravalli v. Pasha Maritime Servs.*, 36 Ben. Rev. Bd. Serv. 91 (Ben. Rev. Bd. 2002) (issues may not be raised for the first time in a motion for reconsideration).

Following this policy, the Board has routinely declined to consider Appointments Clause challenges raised subsequent to a petitioner's opening brief. *See Pauley v. Consolidation Coal Co.*, BRB No. 17-0554 BLA (Apr. 25, 2018) (declining to consider Appointments Clause challenge raised for first time in post-briefing motion for abeyance), SA 136-38; *Eversole v. Shamrock Coal Co.*, BRB No. 17-0629 BLA (Apr. 24, 2018) (same), SA 139-141. Even after the Supreme Court decided *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Board has continued to deny as untimely similar belated attempts to challenge an ALJ's authority. *Motton v. Huntington Ingalls Indus.*, 52 Ben. Rev. Bd. Serv. 69, 69 at n.1, 2018 WL 6303734, at *1 n.1 (Ben. Rev. Bd. 2018) (finding claimant waived Appointments Clause challenge by failing to raise it in opening brief to Board); *Luckern v. Richard Brady & Assoc.*, 52 Ben. Rev. Bd. Serv. 65, 66 n.3, 2018 WL 5734480, at

*2 (Ben. Rev. Bd. 2018) (finding employer waived Appointments Clause challenge by failing to raise it in opening brief to Board); *Tackett v. IGC Knott County*, 2019 WL 1075364, BRB No. 18-0033 BLA (Feb. 26, 2019) (Appointments Clause challenge not raised in initial appeal to BRB is untimely); *Haynes v. Good Coal Co.*, 2019 WL 523769, BRB Nos. 18-0021 BLA; 18-0023 BLA (Jan. 18, 2019) (post-briefing motion raising Appointments Clause challenge is untimely), *appeal docketed*, No. 19-3142 (6th Cir.); *Young v. Island Creek Coal Co.*, 2018 WL 7046801, BRB No. 18-0064 BLA (Dec. 17, 2018) (post-briefing motion), *appeal docketed*, No. 19-3113 (6th Cir.); *Eversole v. Shamrock Coal Co.*, 2018 WL 7046745, BRB No. 17-0629 BLA (Dec. 12, 2018) (post-briefing motion); *Beams v. Cain & Son, Inc.*, 2018 WL 7046795, BRB No. 18-0051 BLA (Nov. 26, 2018) (post-briefing motion); *McIntyre v. IGC Knott County*, 2018 WL 70466700, BRB No. 17-0583 BLA (Nov. 26, 2018) (post-briefing motion); *Elkhorne Eagle Mining Co. v. Higgins*, 2018 WL 3727423, BRB No. 17-0475 (July 30, 2018) (post-briefing motion), *appeal docketed*, No. 18-3926 (6th Cir.), *Elkins v. Dickenson-Russell Coal Co.*, 2018 WL 3727420, BRB No. 17-0461 BLA (July 5, 2018) (post-briefing motion); *Napier v. Star Fire Coals, Inc.,* BRB No. 17-0149 BLA (July 5, 2018) (motion for reconsideration), *appeal docketed*, No. 18-3838 (6th Cir.), SA 142-145.

DSC makes two arguments against the Board's longstanding rule that it will not consider a petitioner's new issue after the opening brief is filed. First, DSC argues that "this is but one requirement annumerated [sic] among many" set forth in the Board's rule, 20 C.F.R. § 802.211(b). OB 25. But the fact that Section 802.211(b) encompasses additional requirements does not make this particular requirement any less mandatory. DSC's contention is simply a non sequitur. In any event, Section 802.211(b)'s requirement that the opening brief "[s]pecifically state[] the issues to be considered by the Board" is entirely consistent with Fed. R. App. P. 28(a)(5), which likewise provides a basis for invoking waiver. *Kost v. Kozakiewicz,* 1 F.3d 176, 182 (3d Cir.1993) ("Under Federal Rule of Appellate Procedure 28(a)(3) and (5) and Third Circuit Local Appellate Rule 28.1(a), appellants are required to set forth the issues raised on appeal and to present an argument in support of those issues in their opening brief.").

DSC also complains that Section 802.211(d) merely affords a *discretionary* remedy for a petitioner's failure to timely raise an issue. The Board clearly understood this in declining to address DSC's untimely raised issue here. SA 130 (observing that it generally will not consider untimely-raised new issues). Regardless, the Board procedure of declining to hear an issue not raised in an opening brief is certainly inoffensive as it closely parallels the courts of appeals' rule on the subject. *Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942,

955 (6th Cir. 1999) (recognizing similarity between Board and appellate rule that issues not raised in opening briefs are generally considered abandoned); *Caldwell*, 4 Black Lung Rep. at 1-138-39 (explaining that rule in courts of appeals is basis for Board practice); *see also Helen Mining Co. v. Elliott*, 859 F.3d 226, 232 n.7 (3d Cir. 2017) (coal company waived issue on appeal by failing to raise it in its opening brief, despite raising issue to the Board); *Kost*, 1 F.3d at 182 (failure to identify or argue an issue in appellant's opening brief constitutes waiver of the argument on appeal and the court need not address it); *Forestal Guarani, S.A. v. Daros Intl'l Inc.*, 613 F.3d 395, 403 (3d Cir. 2010) ("we usually refrain from addressing an argument or issue not properly raised and discussed in the appellate briefing").

Nor was the Board's refusal to afford special treatment to Appointments Clause challenges out of line. For example, the Sixth Circuit in *Island Creek Coal Co. v. Wilkerson [Wilkerson]* confirmed that Appointments Clause challenges "are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture." *Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) (quoting *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 678 (6th Cir. 2018). The *Wilkerson* panel declined to consider the petitioner's Appointments Clause challenge because it was not raised before the Court until the petitioner's reply brief: "Time, time, and time again, we have reminded litigants that we will treat an argument as forfeited when

it was not raised in the opening brief." 910 F.3d at 256 (internal quotation marks omitted). *See Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009) (holding that petitioner "forfeited its [Appointments Clause] argument by failing to raise it in its opening brief"); *In re DBC*, 545 F.3d 1373, 1377, 1380 & n.4 (Fed. Cir. 2008) (refusing to entertain an untimely Appointments Clause challenge to the appointment of a Patent Office administrative judge); *see also Kabani & Co. v. SEC*, 733 F. App'x 918 (9th Cir. 2018) (citing *Lucia* and holding that petitioners "forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency"), *cert. denied*, __ S.Ct. __, 2019 WL 936267 (May 13, 2019).

This Court will only overturn the Board's procedural rulings for an abuse of discretion. *Kephart*, 701 F.2d at 26. The Board's straightforward application here of its longstanding rule against petitioners raising new issues after filing an opening brief falls far short of that standard. Consequently, DSC failed to preserve its Appointments Clause challenge before the agency.[8]

[8] Although the Board did not address DSC's failure to raise its Appointments Clause challenge in its original appeal to the Board, the Board will not consider a new issue raised for the first time in an appeal from a remand decision when that issue could have been raised in the original appeal. *Stahla v. Northland Servs., Inc.*, BRB No. 16-0398, 2017 WL 1279641 *4 (Mar. 24, 2017); *Verderane v. Jacksonville Shipyards, Inc.*, 14 Ben. Rev. Bd. Serv. 220, 226 (Ben. Rev. Bd. 1981), *aff'd on other grounds*, 772 F.2d 775 (11th Cir. 1985); *Burbank v. K.G.S., Inc.*, 13 Ben. Rev. Bd. Serv. 467, 468 (1981). This Board practice, like its rule to not consider a petitioner's new issue after the opening brief, is consistent with the

2. By failing to timely raise the issue before the agency, DSC forfeited its Appointments Clause challenge before this Court.

DSC's failure to preserve its Appointments Clause claim results in its forfeiture before this Court. Under longstanding principles governing judicial review of administrative decisions, this Court should not reach a claim that could and should have been preserved before the agency, but was not. And, contrary to DSC's argument, OB 36-37, Appointments Clause challenges can be forfeited.

The Appointments Clause provides that inferior officers are to be appointed by "the President," the "Courts of Law," or the "Heads of Departments." U.S. Const. Art. II, sec. 2, cl. 2. In *Lucia*, the Supreme Court held that SEC ALJs are inferior officers who must be appointed consistent with the Constitution's Appointments Clause. In so holding, the Supreme Court explained that it "has held that one who makes a *timely* challenge to the constitutional validity of the

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practice of the courts of appeals. *See AngioDynamics, Inc. v. Biolitec AG*, 823 F.3d 1, 4 (1st Cir. 2016) ("'We need not and do not consider a new contention that could have been but was not raised on the prior appeal.'") quoting *In re Cellular 101, Inc.*, 539 F.3d 1150, 1155 (9th Cir. 2008); *Macheca Transport Co. v. Philadelphia Indem. Ins. Co.*, 737 F.3d 1188, 1194 (8th Cir. 2013) ("For over one hundred years, our court has repeatedly barred parties from litigating issues in a second appeal following remand that could have been presented in the first appeal."); *Northwestern Indiana Telephone Co., Inc. v. F.C.C.*, 872 F.2d 465, 470 (D.C.Cir. 1989) ("It is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand."); 18B Wright & Miller, Fed. Prac. & Proc. Juris. § 4478.6 (2d ed.).

appointment of an officer who adjudicates his case is entitled to relief," and that Lucia was entitled to relief because he "made just such a *timely* challenge" by raising the issue "before the Commission." 138 S.Ct. at 2055 (emphasis added, internal quotation omitted).

To support that conclusion, the Court cited *Ryder v. United States*, 515 U.S. 177 (1995), which held that the petitioner was entitled to relief on his Appointments Clause claim because he – unlike other litigants – had "raised his objection to the judges' titles before those very judges and prior to their action on his case." *Ryder*, 515 U.S. at 181-83. And forfeiture and preservations concerns had been raised in *Lucia*'s merits briefing: as amicus, the National Black Lung Association urged the Supreme Court to "make clear that where the losing party failed to properly and timely object, the challenge to an ALJ's appointment cannot succeed." Amici Br. 15, *Lucia v. SEC*, No. 17-130, 2018 WL 1733141 (U.S. Apr. 2, 2018).[9]

[9] Even if *Lucia*'s repeated references to timeliness could be considered *dicta*, "such *dicta* are highly persuasive. Indeed, with regard to statements made by the Supreme Court in *dicta,* this Court "[does] not view [them] lightly.'. . . To ignore what we perceive as persuasive statements by the Supreme Court is to place our rulings, and the analysis that underlays them, in peril." *Galli v. New Jersey Meadowlands Comm'n*, 490 F.3d 265, 274 (3d Cir. 2007) (quoting *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery,* 330 F.3d 548, 561 (3d Cir. 2003)); *see In re McDonald*, 205 F.3d 606, 612 (3d Cir. 2000) ("[W]e should not idly ignore considered statements the Supreme Court makes in dicta."); *see also Kabani & Co.,* 733 F. App'x at 919 (citing *Lucia* in holding that "petitioners forfeited their Appointments Clause claim by failing to raise it in their briefs or

Unlike the challenger in *Lucia*, DSC failed to timely raise and preserve its Appointments Clause challenge before the agency. It waited for nearly five years (from September 2013 to July 2018), and until after briefing had closed before the Board, to first raise the issue. As the Board properly concluded, by then it was too late. *See supra* at 12.

Under longstanding principles of administrative law, a party may not raise before the court an issue it failed to preserve before the agency. In *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 35 (1952), a litigant argued for the first time in court that the agency's hearing examiner had not been properly appointed under the Administrative Procedure Act. The Supreme Court held that the litigant forfeited this claim by failing to raise it before the agency, and explained that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made" during the agency's proceedings "while it has opportunity for correction[.]" *Id.* at 36-37. Although the Court recognized that a timely challenge would have rendered the agency's decision "a nullity," *id.* at 38, it refused to entertain the forfeited claim based on the "general rule that courts should not topple over administrative decisions unless the

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before the agency").

administrative body not only has erred but has erred against objection made at the time appropriate under its practice," *id.* at 37.[10]

This Court has consistently applied these normal principles of forfeiture, and explained that "[i]t is axiomatic that arguments asserted for the first time on appeal are deemed to be waived and consequently are not susceptible to review in this Court absent exceptional circumstances." *Birdman v. Office of the Governor*, 677 F.3d 167, 173 (3d Cir. 2012) (internal quotation omitted). And in cases under the BLBA, the Court will not consider issues that were not raised and preserved before the Benefits Review Board. *See Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 1143-44 (3d Cir. 1980) (dismissing appeal because sole argument before the Court was not raised before the Board). *See also Brandywine Explosives & Supply v. Director, OWCP*, 790 F.3d 657, 663 (6th Cir. 2015) (declining to consider issue not properly raised before the Board); *McConnell v. Director, OWCP,* 993 F.2d 1454, 1460 n.8 (10th Cir. 1993) (same); *Arch Mineral Corp. v. Director, OWCP*, 798 F.2d 215, 220 (7th Cir. 1986) (same).

[10] As previously discussed, DSC's initial raising of its Appointments Clause challenge in a post-briefing motion for remand before the Board was not an "objection made at the time appropriate under its practice." *L.A. Tucker*, 344 U.S. at 37. DSC thus failed to exhaust its administrative remedies. *See Spectrum Health-Kent Community Campus v. N.L.R.B.*, 647 F.3d 341, 349 (D.C. Cir. 2011) ("[T]o preserve objections for appeal a party must raise them in the time and manner that the [NLRB]'s regulations require.").

These principles apply with full force to Appointments Clause challenges. As explained earlier, those challenges are not jurisdictional and receive no special entitlement to review. *See supra* at 16-17; *see also GGNSC Springfield LLC v. NLRB,* 721 F.3d 403, 406 (6th Cir. 2013) ("Errors regarding the appointment of officers under Article II are 'nonjurisdictional.'") (quoting *Freytag v. C.I.R.*, 501 U.S. 868, 878-79 (1991)); *Turner Bros. Inc. v. Conley*, 757 F. App'x 697, 700 (10th Cir. 2018) ("Appointments Clause challenges are nonjurisdictional and may be waived or forfeited."). *Lucia* did not change this. The Sixth, Ninth, and Tenth Circuits have all held post-*Lucia* that Appointments Clause claims were forfeited when a petitioner failed to preserve them before the agency. *Jones Bros.*, 898 F.3d at 677 (finding Appointments Clause challenge forfeited when litigant failed to press issue before agency, but excusing the forfeiture in light of the unique circumstances of the case); *Kabani & Co.*, 733 F. App'x at 919 ("[P]etitioners forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency."); *Turner Bros.*, 757 F. App'x at 699 (agreeing that "Turner Brothers' failure to raise the [Appointments Clause] issue to the agency is fatal").

Likewise, the Eighth and Federal Circuits reached the same result before *Lucia*. *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 798 (8th Cir. 2013) (holding party waived Appointments Clause challenge by failing to raise the issue before the agency); *In re DBC*, 545 F.3d at 1377-81 (finding litigant forfeited

Appointments Clause challenge by failing to raise it before agency). Similarly, the Sixth, Ninth and D.C. Circuits have found Appointments Clause challenges forfeited when the petitioner failed to raise it in its opening brief before the court. *Wilkerson*, 910 F.3d at 256; *Kabani & Co.*, *supra*; *Intercollegiate Broad. Sys.*, 574 F.3d at 755-56.

The Federal Circuit has explained that a timeliness requirement for Appointments Clause challenges serves the same basic purposes as those underlying administrative exhaustion: "First, it gives [the] agency an opportunity to correct its own mistakes . . . before it is haled into federal court, and [thus] discourages disregard of [the agency's] procedures." *In re DBC*, 545 F.3d at 1378 (internal quotations omitted). Second, "it promotes judicial efficiency, as [c]laims generally can be resolved much more quickly and economically in proceedings before [the] agency than in litigation in federal court." *Id.* at 1379 (quoting *Woodford v. Ngo*, 548 U.S. 81, 89 (2006)). Both of those reasons apply here. If DSC had raised the Appointments Clause challenge during the administrative proceedings, the Secretary of Labor or the Board could well have provided an appropriate remedy.

In fact, both the Secretary of Labor and the Board have taken appropriate remedial actions: the Secretary ratified the prior appointments of all then-incumbent agency ALJs "to address any claim that administrative proceedings

pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution." *Sec'y of Labor's Decision Ratifying the Appointments of Incumbent U.S. Department of Labor Administrative Law Judges* (Dec. 20, 2017).[11] And the Board has held that where an ALJ was not properly appointed and the issue is timely raised, the "parties are entitled to a new hearing before a new, constitutionally appointed administrative law judge." *Miller v. Pine Branch Coal Sales, Inc.*, __ Black Lung Rep. (MB) __, 2018 WL 8269864 (Ben. Rev. Bd. 2018) (en banc) (vacating improperly appointed ALJ's award and remanding the case for reassignment to a different ALJ); *Billiter v. J&S Collieries*, BRB No. 18-0256 (Aug. 9, 2018) (same), SA 146-148; *Noble v. Cumberland River Coal Co.*, BRB No. 18-0419 BLA (Feb. 27, 2019) (same), SA 149-152. Had DSC timely raised the issue, it could have obtained appropriate relief. But it did not do so.

DSC's failure to timely present its Appointments Clause objection to the agency is quintessential forfeiture.

3. There are no grounds to excuse DSC's forfeiture.

DSC points to no excuse sufficient to justify its failure to timely raise the Appointments Clause challenge before DOL. It seeks a ruling that the ALJ was

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

not constitutionally appointed, that his decision must therefore be vacated, and that a new ALJ decision must be rendered by a different, properly-appointed ALJ. The Board has issued many such orders already, *supra* at 23-24, which would have spurred the Secretary of Labor (whose delegatee, the Director, is a party to this suit) to ensure the availability of properly-appointed ALJs, if he had not already done so, *id.*[12] If DSC had timely acted before the agency, it could have obtained effective relief.

DSC attempts to justify its administrative inaction by reliance on the Sixth Circuit's decision in *Jones Brothers*. OB 24. That decision, however, provides no excuse. Indeed, the decision confirms that DSC's forfeiture of its Appointments Clause challenge here should not be excused, as this case lacks the special distinguishing features that led the court to excuse the forfeiture in that case.

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[12] More generally, the Board has broadly interpreted its authority to decide substantive questions of law, including certain other constitutional issues. *See Duck v. Fluid Crane and Constr. Co.*, 2002 WL 32069335, at *2 n.4 (Ben. Rev. Bd. 2002) (stating that the Board "possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its jurisdiction"); *Shaw v. Bath Iron Works*, 22 Ben. Rev. Bd. Serv. 73 (1989) (addressing the constitutionality of the 1984 amendments to the Longshore Act); *Herrington v. Savannah Mach. & Shipyard*, 17 Ben. Rev. Bd. Serv. 196 (1985) (addressing constitutional validity of statutes and regulations within its jurisdiction); *Smith v. Aerojet Gen. Shipyards,* 16 Ben. Rev. Bd. Serv. 49 (1983) (addressing an issue involving due process); *see generally* 4 Admin L. & Prac. § 11.11 (3d ed.) ("Agencies have an obligation to address constitutional challenges to their own actions in the first instance.").

There, the court held that a petitioner had forfeited its Appointments Clause claim by failing to argue it before the Federal Mine Safety and Health Review Commission, but that this forfeiture was excusable for two reasons.

First, it was not clear whether the Commission could have entertained an Appointments Clause challenge, given the statutory limits on the Commission's review authority. *Jones Bros.*, 898 F.3d at 673-77, 678 ("We understand why *that* question may have confused Jones Brothers[.]"). Second, Jones Brothers' timely identification in its opening pleading of the Appointments Clause issue for the Commission's consideration was reasonable in light of the uncertainty surrounding the Commission's authority to address the issue. *Id.* at 677-78 (explaining that merely identifying the issue was a "reasonable" course for a "petitioner who wishes to alert the Commission of a constitutional issue but is unsure (quite understandably) just what the Commission can do about it."). Given these circumstances, the court exercised its discretion to excuse petitioner's forfeiture, but explained that this was an exceptional outcome: "[W]e generally expect parties like Jones Brothers to raise their as-applied or constitutional-avoidance challenges before the Commission and courts to hold them responsible for failing to do so." *Id.* at 677.

No similar exceptional circumstances exist here. Unlike Jones Brothers, which identified the issue in its initial appellate filing, DSC did not timely identify

the Appointments Clause issue to the Board. Moreover, DSC could not have reasonably believed that the Board would have refused to entertain such a challenge. The Board has repeatedly provided remedies for Appointments Clause violations, *see supra* at 24, and has broadly interpreted its authority to decide substantive questions of law, including certain other constitutional issues. *See supra* at 25 (citing instances where Board addressed constitutional issues). *Jones Brothers* is simply inapposite.

Moreover, DSC cannot plausibly claim to be surprised by *Lucia*. The Sixth Circuit considered and rejected that possibility in *Wilkerson*, explaining that "[n]o precedent prevented the company from bringing the constitutional claim before [*Lucia,*]" and that "*Lucia* itself noted that existing case law 'says everything necessary to decide this case.'" *Wilkerson*, 910 F.3d at 257 (quoting *Lucia*, 138 S. Ct. at 2053). The panel also noted that the Tenth Circuit's decision in *Bandimere v. SEC*, 844 F.3d 1168, 1188 (2016), which reached the same conclusion as the Supreme Court in *Lucia*, was decided in December 2016, giving the *Wilkerson* petitioner enough time to properly raise the issue. Here, DSC also had enough time to raise the issue – *Bandimere* was decided before the ALJ's decision awarding the claim in June 2017, and before DSC filed its brief with the Board.

Any suggestion that DSC's forfeiture should be excused because *Lucia* was not foreseeable should be rejected.[13]

Finally, if the Court were to excuse DSC's forfeiture, there would be real world consequences. To the best of our knowledge, there are nearly six hundred cases from around the country – arising under the BLBA, the Longshore Act, and its extensions – currently pending before the Board. But in the great majority of these cases, no Appointments Clause claim has been raised. Should this Court excuse DSC's forfeiture here – where DSC failed to timely raise the claim to the agency – it would be inviting every losing party at the Board to seek a re-do of years' worth of administrative proceedings. For the Black Lung program, whose very purpose is to provide timely and certain relief to disabled workers, that is

[13] By the time DSC filed its opening Board brief in August 2017, there had been twelve different reported court opinions that discussed Appointments Clause challenges to ALJs. *Helman v. Dep't of Veterans Affairs*, 856 F.3d 920 (Fed. Cir. May 9, 2017); *Bandimere v. SEC*, 844 F.3d 1168, 1170 (10th Dec. 27, 2016); *Bennett v. SEC*, 844 F.3d 174, 177-78 (4th Cir. Dec. 16, 2016); *Lucia v. SEC*, 832 F.3d 277, 283 (D.C. Cir. Aug. 9, 2016), *affirmed by an equally divided en banc court*, 868 F.3d 1021 (D.C. Cir. June 26, 2017); *Hill v. SEC*, 825 F.3d 1236, 1240 (11th Cir. June 17, 2016); *Tilton v. SEC*, 824 F.3d 276, 279-80 (2d Cir. June 1, 2016); *Bennett v. SEC*, 151 F. Supp. 3d 632, 633 (D. Md. Dec. 17, 2015); *Ironridge Global IV, Ltd. v. SEC*, 146 F. Supp. 3d 1294, 1312 (N.D. Ga. Nov. 17, 2015); *Duka v. SEC*, 124 F. Supp. 3d 287, 289 (S.D.N.Y. Aug. 12, 2015); *Gray Fin. Grp. v. SEC*, 166 F. Supp. 3d 1335, 1350 (N.D. Ga. Aug. 4, 2015); *Tilton v. SEC*, 2015 WL 4006165, at *1 (S.D.N.Y. June 30, 2015); *Hill v. SEC*, 114 F. Supp. 3d 1297, 1316 (N.D. Ga. June 8, 2015). In some of these cases, the courts did not reach the merits of the Appointments Clause claim because the litigants had not completed their administrative proceedings, and the courts lacked jurisdiction until those proceedings were completed. *See, e.g.*, *Hill*, 825 F.3d at 1252.

precisely the kind of disruption that forfeiture seeks to avoid. *See L.A. Tucker*, 344 U.S. at 37 (cautioning against overturning administrative decisions where objections are untimely under agency practice).

In sum, the basic tenets of administrative law required DSC to timely raise its Appointments Clause challenge before the agency. DSC's attempt to justify its failure to do so is unavailing. The Court should therefore find that DSC forfeited its right to challenge the ALJ's authority under the Appointments Clause.

C. The ALJ did not abuse his discretion in denying DSC's request to order Peters to undergo post-hearing pulmonary evaluations.

1. Statutory and Regulatory Background

Federal black lung adjudications must comply with the due process requirements of the Fifth Amendment and the APA. *North American Coal Co. v. Miller*, 870 F.2d 948, 950-51 (3d Cir. 1989).[14] "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation omitted). The APA guarantees a party's right "to present his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d). This guarantee, however, does not undermine an ALJ's

[14] *See also* 33 U.S.C. § 919(d), as incorporated by 30 U.S.C. § 932(a); 20 C.F.R. § 725.455(b).

"discretion to guide the course of the hearing . . . includ[ing] the power to make reasonable, nonarbitrary decisions regarding the admission or exclusion of evidence for procedural reasons." *Thomas J. Smith, Inc. v. Director, OWCP*, 482 F. App'x 683, 685 (3d Cir. 2012) (internal quotation omitted). DSC bears the burden "to make a strong showing that the ALJ has abused his discretion" in denying its request to order Peters to undergo post-hearing physical examinations. *Id.* (internal quotation omitted).

DOL's regulations place limits on the amount of medical evidence a party may submit in claims under the BLBA. 20 C.F.R. § 725.414; *see Elm Grove Coal Co. v. Director, OWCP*, 480 F.3d 278, 283-85 (4th Cir. 2007) (upholding the evidence-limiting rules). In relevant part, the evidence-limiting rules permit both the claimant and the employer to submit as affirmative-case evidence two chest x-ray readings, two pulmonary function tests, two arterial blood gas studies, and two medical reports. 20 C.F.R. § 725.414(a)(2)(i), (3)(i).

Each party may also submit, in rebuttal, one physician's interpretation of the testing submitted by the opposing party as part of its affirmative case. 20 C.F.R. § 725.414(a)(2)(ii), (3)(ii). Where rebuttal evidence has been submitted, the party who originally proffered the evidence that has been the subject of rebuttal may submit one additional statement to rehabilitate its evidence. *Id*. In addition, "where the rebuttal evidence tends to undermine the conclusion of a physician who

prepared a medical report," an additional statement from the physician explaining his or her conclusion in light of the rebuttal evidence may be submitted as rehabilitative evidence. *Id*.

Finally, the parties must exchange medical evidence at least twenty days before an ALJ hearing. *See* 20 C.F.R. § 725.456(b)(2) (stating that "documentary material, including medical reports, which was not submitted to the district director, may be received into evidence ... if such evidence is sent to all other parties at least twenty days before a hearing is held in connection with the claim"). The twenty-day rule may be waived and evidence may be admitted at a hearing "upon a showing of good cause why such evidence was not exchanged" at least twenty days prior to the hearing or the ALJ may "exclude the late evidence from the record." 20 C.F.R. § 725.456(b)(3).

2. The ALJ properly denied DSC's request to order Peters to undergo post-hearing pulmonary evaluations.

DSC cannot dispute that it was given notice of and participated in the hearing before the ALJ. It challenges only the ALJ's denial of its request to order Peters to undergo pulmonary evaluations by its experts after the hearing was over. OB 27-30, 43-49. In challenging an evidentiary ruling of this kind under the APA, DSC "bears the burden 'to make a strong showing that the ALJ has abused his discretion.'" *Smith*, 482 F. App'x at 685. And the ALJ's decision should be upheld unless DSC shows "that the adjudication was infected by 'some prejudicial,

fundamentally unfair element.'" *Id.* (quoting *Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (quoting *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 501 (4th Cir. 1999))). DSC has failed to meet its burden.

DSC argues that the ALJ "essentially prevented [it] from obtaining two initial pulmonary function tests and arterial blood gases to which it [was] entitled to under 726.414(a)(3)(i)," which it claims "were essential in allowing [it] a fair opportunity to respond to evidence filed by [Peters]." OB 49.[15] The facts tell another story. Nearly two years passed between the time the district director forwarded the claim to the ALJ and when the ALJ held a hearing. DSC was given six months notice of the hearing date. And although it did not know the contents of Dr. Cohen's report, it knew fifty-six days before the hearing that Peters would be submitting it and was not obligated to share it until twenty days before the hearing under 20 C.F.R. § 725.456(b), which Peters did. As the ALJ critically observed, DSC "ha[d] a right to have [Peters] go to two examinations" before the hearing and "there's nothing here that indicates that you all couldn't have exercised your right [to conduct pulmonary evaluations] before the hearing." SA 44. Given the

[15] In his initial decision and in his decision on remand, the ALJ determined that these tests did not establish total respiratory disability under 20 C.F.R. § 718.204(b)(2)(i), (ii). SA 131 n.5 (Board 2018 decision). Arguably, DSC's requested additional testing would have been redundant, or supported Peters' case.

chronology of events, DSC's claim that the ALJ promoted a "trial by ambush" (OB 49) is exaggerated.

DSC attempts to locate a right to a post-hearing pulmonary evaluation in 20 C.F.R. § 725.414(a)(3)(i), arguing that "[i]f any part of the evidence … filed by [Peters] would support entitlement, [DSC] is entitled to obtain its own evaluations and studies…." OB 45. But that regulation stands for nothing of the sort. As discussed above, Section 725.414(a)(3)(i) merely allows an employer to submit two complete pulmonary evaluations in support of its affirmative case, and, per 20 C.F.R. § 725.456(b)(2), that evidence must be submitted within twenty days of the hearing. Neither provision conditions the development of an employer's affirmative case on the claimant's affirmative case. Again, the ALJ was entirely correct in stating, "[t]he ability to send [Peters] to examinations isn't contingent on [Peters] coming up with evidence that helps his case and then you get to exercise your right." SA 43.

Likewise, the ALJ was correct in limiting DSC to the submission of post-hearing evidence *rebutting* Dr. Cohen's report. 20 C.F.R. § 725.414(a)(3)(ii). That rebuttal evidence consisted of Drs. Rosenberg's and Broudy's interpretation of the testing conducted by Dr. Cohen, in particular, the pulmonary function study, and statements from the doctors addressing Dr. Cohen's findings. EX 13, 14. Nothing more was required. 20 C.F.R. § 725.414(a)(3)(ii).

The ALJ's ruling here comports with the case law. In *Thomas J. Smith, Inc.*, this Court considered whether a coal company had a right to a post-hearing physical examination in response to claimant's medical evidence submitted shortly before the twenty-day deadline. The Court squarely rejected the notion. 482 F. App'x at 686. The Court found due process satisfied because the company had been given "ample opportunity" to present rebuttal evidence (by cross-examining claimant's doctor or submitting additional medical reports reviewing the evidence of record). *Id*. Regarding the pulmonary evaluation, the Court unequivocally held "[n]either the APA, relevant regulations, nor our precedent dictates that [Smith] had the additional right to conduct a post-hearing physical examination." *Id.* *Accord Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143 (4th Cir. 1991) (upholding an ALJ's refusal to allow a post-hearing pulmonary evaluation where the coal company had ample opportunity before the hearing to have the claimant examined by a doctor of its choosing).

Furthermore, the ALJ's action here is consistent with this Court's decision in *North American Coal Co.*, 870 F.2d 948, which involved a medical report that claimant mailed to employer on the twentieth day before the formal hearing. Citing the 20-day rule, the ALJ did not allow the company to submit a report critiquing claimant's submission or to cross-examine claimant's doctor. The Court held that the ALJ's refusal was error: "because the ALJ provided *no* opportunity

for North American to respond to the medical evidence the ALJ relied upon in awarding benefits, North American's due process rights were violated." 870 F.2d at 849 (emphasis in original). Here, by contrast, the ALJ complied with *North America Coal Co.* He admitted DSC's post-hearing rebuttal evidence, namely, Drs. Rosenberg's and Broudy's critiques of Dr. Cohen's report. (DSC did not ask to depose Dr. Cohen.) Indeed, as this Court later correctly observed, *North American Coal Co.* "did not specifically state that the employer had the right to have the claimant re-examined." *Thomas J. Smith*, 482 F. App'x at 686.

In sum, due process requires a meaningful opportunity to be heard. *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 807-08 (4th Cir. 1998); *see generally Mathews*, 424 U.S. at 333. DSC was given that. *Before* the hearing, it submitted as part of its affirmative case the medical opinions of Drs. Rosenberg and Broudy. All told, DSC submitted pre-hearing *six exhibits* from the doctors, including initial and supplemental reports and deposition testimony. *See* DX 14, EX 1-5. *After* the hearing, it submitted two more reports from the doctors. EX 13, 14. That DSC elected to have its experts *review* the medical evidence of record, rather than conduct their own examination and testing, was simply its litigation choice. Due process, the black lung regulations, and case precedent do not entitle DSC to a second chance simply because that strategy may have failed.

CONCLUSION

The Court should reject DSC's Appointment Clause challenge and affirm the Board's decision that the ALJ did not violate DSC's due process rights by rejecting its request to conduct post-hearing pulmonary evaluations of Peters.

Respectfully submitted,

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COMBINED CERTIFICATIONS

I hereby certify that:

1) This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 9001 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

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