U.S. Department of Labor

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

BRB No. 17-0430 BLA
Case No. 2015-BLA-05447

DALLAS BLANTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
REX COAL COMPANY, INCORPORATED	)	DATE ISSUED: 07/03/2019
	)	
and	)	
	)	
CHARTIS CASUALTY COMPANY/AIG	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	ORDER on MOTION for
Party-in-Interest	)	RECONSIDERATION

Employer/carrier (employer) has filed a timely motion for reconsideration of the Board's decision in *Blanton v. Rex Coal Co., Inc.*, BRB No. 17-0430 BLA (June 8, 2018) (unpub.), affirming the award of benefits in this miner's claim. 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond in opposition to employer's motion. Employer has filed a reply brief.

Employer argues for the first time on reconsideration that, pursuant to *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. ___, 138 S. Ct. 2044 (2018), the manner in which Department of Labor administrative law judges are appointed violates the Appointments Clause of the

United States Constitution, Art. II § 2, cl. 2. Employer thus requests that the Board vacate the award of benefits and remand the case for a new hearing before a constitutionally appointed administrative law judge. The Director and claimant respond that employer forfeited this argument by failing to raise it in its opening brief.

We agree that the issue is forfeited. Contrary to employer's contention, the Appointments Clause issue is "non-jurisdictional," and thus is subject to the doctrines of waiver and forfeiture. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009). Because employer first raised its Appointments Clause argument fourteen months after it filed its appeal, one year after it filed its opening brief, and after the Board issued its decision on the merits, employer forfeited the issue. *See Lucia*, 138 S. Ct. at 2055 (one who makes "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case" is entitled to relief); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254 (6th Cir. 2018) (Appointments Clause challenge forfeited because it was not raised in opening brief); *Motton v. Huntington Ingalls Industries, Inc.*, 52 BRBS 69 (2018) (Board holds Appointments Clause issue forfeited when raised in motion to vacate filed after initial petition for review and brief); *Luckern v. Richard Brady & Associates*, 52 BRBS 65 (2018) (Appointments Clause issue raised in reply brief will not be addressed); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal).

In asserting its challenge is timely, employer contends the Board lacks the authority to address issues of constitutionality and thus it was unnecessary to raise the issue prior to the decision in *Lucia*. Emp. Reply Br. at 2. However, employer overlooks that judicial precedent and Board practice confirm that Congress vested the Board with the statutory power to decide substantive questions of law. 33 U.S.C. §921(b)(3); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116-17 (6th Cir. 1984) (because the Board performs the identical appellate function previously performed by the district courts, Congress intended to vest it with the same judicial power to rule on substantive legal questions). Indeed, the Board has long addressed constitutional issues generally. *See Shaw v. Bath Iron Works Corp.*, 22 BRBS 73 (1989) (addressing the constitutionality of the 1984 amendments to the Longshore Act); *Herrington v. Savannah Machine & Shipyard*, 17 BRBS 196 (1985) (addressing constitutional validity of statutes and regulations within its jurisdiction); *Smith v. Aerojet General Shipyards*, 16 BRBS 49 (1983) (addressing due process issue); *cf. Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018) (Federal Mine Safety and Health Review Commission has authority to entertain and remedy as-applied Appointments Clause challenges, but may not have such authority with respect to facial constitutional challenges). If employer had timely presented the issue, the Board would have addressed it and could have provided a remedy. *Miller v. Pine Branch Coal Sales,*

Inc., __ BLR ___, BRB No. 18-0323 BLA (Oct. 22, 2018) (en banc) (vacating award by improperly appointed administrative law judge and remanding for reassignment).

We thus decline to excuse employer's forfeiture. *Wilkerson,* 910 F.3d at 257 ("No precedent prevented the company from bringing the constitutional claim before [the Supreme Court's decision in *Lucia*]."); *In re DBC*, 545 F.3d 1373 (Fed. Cir. 2008) (declining to excuse waived Appointments Clause challenge); *see Freytag v. Comm'r*, 501 U.S. 868, 879 (1991) ("rare" case where discretion was exercised to address untimely Appointments Clause challenge). Unlike *Jones Bros.*, employer here did not preserve the constitutional issue by raising it before the Board in its Petition for Review and brief.[1] *See Turner Bros., Inc. v. Conley*, 757 F. App'x 697, 699-700 (10th Cir. 2018) (unpublished) (distinguishing *Jones Bros.* and declining to excuse forfeiture on the basis that the issue was first mentioned in a motion to the court after the briefing was complete).

Accordingly, we deny employer's motion for reconsideration. 20 C.F.R. §§801.301(c); 802.409.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge[2]

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[1] In *Jones Bros.*, the petitioner raised the Appointments Clause issue before the Federal Mine Safety and Health Review Commission, but did not "press" it.

[2] Due to the retirement of Chief Administrative Appeals Judge Betty Jean Hall, Administrative Appeals Judge Greg J. Buzzard is substituted on this panel. 20 C.F.R. §802.407(a).