U.S. Department of Labor

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

BRB No. 17-0625 BLA
Case No. 2014-BLA-05509

MARLIN D. RICE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KARST ROBBINS COAL COMPANY	)	
	)	
and	)	
	)	
BITUMINOUS CASUALTY CORPORATION	)	DATE ISSUED: 07/09/2019
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	ORDER ON RECONSIDERATION EN BANC[1]
Party-in-Interest	)	

As no member of the Board has voted to vacate or modify the decision herein, the motion for reconsideration[2] en banc filed by carrier is DENIED. 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301(b), 802.407(a), 802.409.

[1] Administrative Appeals Judge Ryan Gilligan recused himself from this matter.

[2] Carrier argues for the first time on reconsideration that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different administrative law judge, based on the Supreme Court's holding in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018), that the manner in which certain administrative law judges are appointed violates the Appointments Clause of the Constitution, Art. II §2, cl. 2. Carrier's Motion for Reconsideration at 2-8. Because carrier first raised the Appointments

Clause issue only after the Board issued its decision on the merits, twenty-five months after it filed its initial petition for review and brief, carrier forfeited the issue. *See Lucia*, 138 S. Ct. at 2055 (relief required where party makes "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [the] case"); *see also Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) (any challenge to a district court or administrative decision must be raised in the opening brief); *Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (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); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982). Employer incorrectly argues that *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018) requires that its forfeiture be excused. In *Jones Bros.*, the court excused the petitioner's forfeiture before the Federal Mine Safety and Health Review Commission because it was unclear whether the agency could entertain the Appointments Clause argument. 898 F.3d at 677. Unlike *Jones Bros.*, it is clear 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). Carrier further has not set forth any explanation for its failure to raise the appointments clause issue prior to this time. We thus decline to excuse employer's forfeiture.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge