U.S. Department of Labor

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

BRB No. 18-0341 BLA

LOWELL BARTON DAUGHERTY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 07/19/2019
	)	
Employer-Respondent	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Lowell Barton Daugherty, Jacksboro, Tennessee.

Cody F. Fox (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

GILLIGAN, Administrative Appeals Judge:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2015-BLA-05715) of Administrative Law Judge Daniel F. Solomon, rendered on a miner's subsequent claim filed on June 6, 2014,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found claimant had twelve years of coal mine employment. Because claimant established fewer than fifteen years of coal mine employment, he was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] Considering claimant's entitlement under 20 C.F.R. Part 718, the administrative law judge found the new evidence did not establish the existence of pneumoconiosis, and thus found claimant did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Accordingly, he denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of his claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief in this appeal.

In an appeal filed by a claimant who is not represented by counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial

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[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but is not representing claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant filed a prior claim for benefits on June 7, 2010, which the administrative law judge denied on January 30, 2013, for failure to establish the existence of pneumoconiosis. Director's Exhibit 1. The Director, Office of Workers' Compensation Programs (the Director) filed an appeal with the Board, but later requested to withdraw it. *Id*. The Board granted the Director's request and dismissed the appeal on April 10, 2013. *Daugherty v. Consolidation Coal Co.*, BRB No. 13-241 BLA (unpub. Order) (Apr. 10, 2013); Director's Exhibit 1.

[3] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Length of Coal Mine Employment

The administrative law judge determined claimant could not invoke the rebuttable presumption that he is totally disabled due to pneumoconiosis because he did not establish at least fifteen years of qualifying coal mine employment. Claimant bears the burden of proof to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (en banc).

On his current application claimant alleged ten to fifteen years of coal mine employment, from 1973 to May 1995. Director's Exhibits 3, 4. The administrative law judge noted that "employer stipulated to, at most, twelve years of coal mine employment, although [employer] also calculated 8.16 years of coal mine employment based on the [Social Security Administration (SSA)] earnings report." Decision and Order at 5. He summarily concluded that claimant established twelve years of coal mine employment.[5] *Id*.

Although the administrative law judge indicated he relied on the SSA record, he did not identify which quarterly or yearly wages were for coal mine employment. He also did not explain his finding in relation to the other evidence in the record, which includes claimant's coal mine employment history forms, deposition testimony and hearing testimony. Director's Exhibit 4; Employer's Exhibit 7; Hearing Transcript at 9-13.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the claimant's coal mine employment was in Tennessee and Kentucky. *Shupe v. Director,* OWCP, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 4.

[5] The administrative law judge previously determined, without explanation, that claimant established eleven years and one month of coal mine employment. 2013 Decision and Order at 3.

Because we are unable to discern the administrative law judge's method for calculating the length of claimant's coal mine employment, his Decision and Order does not satisfy the Administrative Procedure Act (APA).[6] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Therefore, we must vacate the administrative law judge's finding of twelve years of coal mine employment and remand this case for the administrative law judge to explain fully his findings as to the length of claimant's coal mine employment. *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 407 (6th Cir. 2019); *Aberry Coal, Inc. v. Fleming*, 843 F.3d 219, 224 (6th Cir. 2016), *amended on reh'g*, 847 F.3d 310, 315-16 (6th Cir. 2017).

Part 718 Entitlement – Pneumoconiosis

When a miner files a claim for benefits more than one year after the final denial of his previous claim, the subsequent claim must also be denied unless the administrative law judge finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based."[7] 20 C.F.R. §725.309(c)(3). As claimant's prior claim was denied because he did not establish pneumoconiosis, he was required to submit new evidence establishing he has pneumoconiosis in order to obtain review of his claim on the merits. 20 C.F.R. §725.309(c)(3); *see Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 758-59 (6th Cir. 2013); Director's Exhibit 1.

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[6] The Administrative Procedure Act (APA), 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[7] To be entitled to benefits under the Act, claimant must establish that he has pneumoconiosis, the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and the totally disabling impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

In considering whether claimant established clinical pneumoconiosis,[8] the administrative law judge considered nine readings of five x-rays. Decision and Order at 5. He noted that all of the readings were by physicians who are dually qualified as Board-certified radiologists and B readers, and there is only one positive interpretation by Dr. Alexander, who read the February 20, 2013 x-ray as positive for simple pneumoconiosis. Decision and Order at 16; Director's Exhibit 12. The administrative law judge gave little weight to the positive reading as Dr. Adcock read the same film as negative and Dr. Alexander read two subsequent x-rays, obtained on August 6, 2014 and August 20, 2015, as negative for simple pneumoconiosis. Decision and Order at 16; Employer's Exhibit 4; Claimant's Exhibits 2, 4. Finding a preponderance of the x-ray evidence negative for simple clinical pneumoconiosis, the administrative law judge found that claimant did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 16. We affirm the administrative law judge's determination as it is rational and supported by substantial evidence.[9] *See Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994); *Staton v. Norfolk & W. Ry. Co.*, 65 F.3d 55, 58-60 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993).

In considering whether claimant has legal pneumoconiosis,[10] the administrative law judge considered four medical opinions.[11] Drs. Ajjarapu and Isber diagnosed claimant with

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[8] Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[9] The record contains no biopsy or autopsy evidence for consideration at 20 C.F.R. §718.202(a)(2). Claimant is unable to establish pneumoconiosis at 20 C.F.R. §718.202(a)(3) by invoking the irrebuttable presumption of total disability due to pneumoconiosis, as the record contains no evidence of complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

[10] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[11] None of the physicians opined that claimant has clinical pneumoconiosis.

legal pneumoconiosis, while Drs. Dahhan and McSharry opined that he does not have the disease. Director's Exhibit 11; Claimant's Exhibits 7, 10; Employer's Exhibits 2, 3, 16, 18. The administrative law judge found Dr. Ajjarapu's and Dr. Isber's opinions insufficiently reasoned to satisfy claimant's burden of proof. Decision and Order at 16, 18. He also discredited Dr. Dahhan's and Dr. McSharry's opinions because they expressed views in conflict with the preamble to the 2001 regulatory revisions.[12] *Id*. at 17-18.

We see no error in the administrative law judge's finding that Dr. Ajjarapu's opinion is not sufficiently reasoned. Dr. Ajjarapu performed the Department of Labor's pulmonary examination of claimant and diagnosed chronic bronchitis due to a combination of coal mine dust exposure and smoking. Director's Exhibit 11. She explained the inhalation of coal dust and tobacco smoke causes airway inflammation, leading to bronchospasm, excessive airway secretions and bronchitis symptoms. *Id.* She reported claimant's smoking history as a half a pack of cigarettes a day for twenty-five years, while the administrative law judge found claimant smoked up to one pack a day for twenty-five years. Decision and Order at 16. The administrative law judge permissibly rejected Dr. Ajjarapu's opinion because she did not have an accurate understanding of the daily amount of cigarettes claimant smoked. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1994); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988) (The effect of an inaccurate smoking history on the credibility of a medical opinion is a determination to be made by the administrative law judge); Decision and Order at 16.

The administrative law judge did not adequately explain, however, his discrediting of Dr. Isber's opinion. In a July 8, 2013 report, Dr. Isber indicated that claimant was seen for a "follow-up" and to be evaluated for black lung. Claimant's Exhibit 7. He noted that claimant worked twelve years in underground coal mine employment, and one year on the surface, and had a smoking history of up to one pack a day for twenty-five to thirty years. Id. Dr. Isber further noted a chest x-ray showed small non-calcified nodules in both lungs, consistent with coal workers' pneumoconiosis, and a pulmonary function study showed severe airway chronic obstructive pulmonary disease (COPD), which he attributed to a combination of coal mine dust exposure and smoking. *Id*. In a March 22, 2017 treatment

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[12] Drs. Dahhan and McSharry diagnosed claimant with bronchial asthma/chronic obstructive pulmonary disease caused entirely by smoking. Employer's Exhibits 2, 3. The administrative law judge found that their rationales for excluding a diagnosis of legal pneumoconiosis did not account for the Department of Labor's recognition that the effects of smoking and coal dust exposure are additive or that asthma "may fall under the regulatory definition of pneumoconiosis if it is related to coal dust exposure." Decision and Order at 17; *see* 65 Fed. Reg. 79,939, 79,940 (Dec. 20, 2000).

note, Dr. Isber indicated that a recent chest x-ray showed "hyperinflated lung consistent with COPD" but no suspicious nodules or infiltrates. Claimant's Exhibit 11. He stated, "I don't see any evidence of [p]neumoconiosis but [claimant] is definitely at risk since it might take many years for it to show up." *Id*.

The administrative law judge considered Dr. Isber's July 8, 2013 report and the March 22, 2017 treatment note to be "contradictory" and his opinion therefore not sufficiently reasoned to establish that the claimant has legal pneumoconiosis. Decision and Order at 18. Contrary to the administrative law judge's characterization, however, while Dr. Isber revised his opinion regarding whether claimant had radiological evidence for clinical pneumoconiosis, Dr. Isber specifically noted in both his report and treatment note that claimant has COPD, which he attributed to both smoking and coal mine dust exposure. Claimant's Exhibits 7, 11. Because Dr. Isber's findings with respect to the presence of COPD are not contradictory, we are unable to affirm the administrative law judge's rationale for discrediting his opinion. *See Wojtowicz*, 12 BLR at 1-165. We therefore vacate the administrative law judge's finding claimant did not establish legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 18. Because we vacate the administrative law judge's finding on legal pneumoconiosis, we further his determination claimant did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and we vacate the denial of benefits. *Id*.

On remand, the administrative law judge must determine the length of claimant's coal mine employment and explain with specificity the method by which he calculates it. If claimant establishes at least fifteen years of underground or comparable surface coal mine employment, the administrative law judge must also determine whether claimant is totally disabled and can thereby invoke the Section 411(c)(4) presumption.[13] If claimant does not establish at least fifteen years of qualifying coal mine employment, the administrative law judge must reconsider whether Dr. Isber's opinion is sufficient to establish legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). If so, the administrative law judge must determine if claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), and, as necessary, whether legal pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c). If claimant does not establish legal pneumoconiosis, the administrative law judge must reinstate the denial of benefits. In rendering all of his findings on remand, the

[13] Based on the administrative law judge's discrediting of employer's physicians as not reasoned, employer is unable to rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i), (ii).

administrative law judge must explain his rationale and conclusions in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Lucia Does Not Mandate a General Remand

Our dissenting colleague argues that in light of *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018), which held that administrative law judges must be appointed in a manner consistent with Appointments Clause of the Constitution, we should, *sua sponte*, order the Director to brief "whether the administrative law judge was appointed by the Head of an Agency and the role, if any, of the Secretary of Labor in selecting him for his position at the Department of Labor."[14] *Infra* at 18. Presumably assuming the administrative law judge would be found improperly appointed, our colleague further argues we should then treat claimant's failure to object to his authority during extensive briefing on the matter below -- or to raise the issue here -- as excusable forfeiture. Despite no indication claimant desires such relief, and no input from the other parties, our colleague would then remand the case on his own accord "for a new hearing on all issues." *Id*. Substantial legal and ethical questions, however, prevent that approach even if we reached the issue.

In prior cases where an administrative law judge has taken significant action prior to the Secretary of Labor's ratification of DOL administrative law judges and a party has raised the Appointments Clause argument for the first time in an opening brief before the Board, we have agreed with the Director, found exceptional circumstances exist to excuse forfeiture, and remanded for a new hearing in front of a new administrative law judge. *See, e.g., Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA (Oct. 22, 2018) (en banc). We have not so held, however, in cases in which the issue has been litigated below. *Kiyuna v. Matson Terminals, Inc.*, … BRBS , BRB No. 19-0103 (June 25, 2019) (affirming forfeiture where administrative law judge rejected Appointments Clause argument raised for first time after briefing closed). In addition, as Appointments Clause challenges are not jurisdictional, we have required litigants to at least properly raise the argument before addressing it for the first time on appeal. Those two factors fundamentally distinguish the case at bar.

[14] We decline to do so. No party raises the issue in this appeal, determining the answer would involve extensive fact-finding that we are not empowered to do, and the agency's stance on the matter below and in other cases eliminates any need for clarification of its position on the issue. *See, e.g., Stiltner v. Superior Mining and Minerals*, BRB Nos. 18-0313 BLA, 18-0314 BLA, 18-0353 BLA, and 18-0431 BLA (Apr. 30, 2019) (unpub.) (Buzzard, J., dissenting).

First, the "effect of failing to preserve an argument will depend upon whether the argument has been forfeited or waived." *Barna v. Board of School Directors of Panther Valley School District*, 877 F.3d 136, 146 (3d Cir. 2017); *Hamer v. Neighborhood Serv. of Chicago*, 138 S. Ct. 13, 17 n.1 (2017) ("The terms waiver and forfeiture -- though often used interchangeably by jurists and litigants -- are not synonymous."). Forfeiture is the failure, often inadvertent, to make the timely assertion of a right; waiver, in contrast "is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (citation omitted); *MCEP, LLC v. Atrium Health System*, 922 F.3d 713, 729 n.10 (6th Cir. 2019).

The distinction carries "great significance." *Barna*, 877 F.3d at 146. Although the narrow exceptional circumstances rule applies to forfeited issues, "waived claims may not be resurrected on appeal." *Id.* at 146, n.7; *see also Wood v. Milyard*, 566 U.S. 463, 471 n.5 (2012) (distinguishing waivers and forfeitures and observing that "a federal court has the authority to resurrect only forfeited defenses"); *United States v. Jimenez*, 512 F.3d 1, 7 (1st Cir. 2007) ("A waiver is unlike forfeiture, for the consequence of a waiver is that the objection is unreviewable.").

The parties litigated the Appointments Clause issue before the administrative law judge. Employer filed a motion to hold the case in abeyance pending *Lucia*, noting if a stay was denied, it "object[ed] to the authority of the [administrative law judge] to decide this case" and that it further preserved the "issue [of the administrative law judge's authority] for appeal." Emp. Mot. for Abey. at 4, n.1. In response, the Director argued that the Secretary's ratification "should" cure actions going forward, but any "actions taken by the [administrative law judge] pre-ratification" may "face continuing challenges." Mot. to Reconsider at 2.

Claimant, represented by Stone Mountain below, did not object to the administrative law judge's authority, either pre or post-ratification, in response to the briefing.[15] Indeed,

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[15] Stone Mountain explains its representation on its website:

> We are well-known and respected across the country for the strength of our benefits counseling. Our counselors assist miners through the entire process, including explaining the claims process, deciding whether and when to file a claim, and completing application documents. . . . In addition, because we offer a unique Layperson Legal Representation program, we extend the basic Benefits Counseling process to include helping patients through the rest of the claims process, up to and including serving as their representative at

the administrative law judge reported that claimant had been specifically "noticed" of employer's Appointment's Clause contentions and did not seek "relief on the same basis." Order Denying Mot. for Abey. at 3. Given that the very purpose of the Black Lung program is to provide timely and certain relief to disabled workers, and that one of claimants' biggest obstacles is delay in the processing of their claims, that position is unsurprising. *See, e.g.*, Brief for National Black Lung Association as Amicus Curiae Supporting Affirmance at 4, *Lucia v. SEC*, 585 U.S. , 138 S.C.t. 2044, 2055 (2018) (No. 17-130), 2018 WL 1733141 *4 (urging the court to enforce strict waiver rules to Appointment Clause arguments because "[d]elays in the federal black lung benefits program are one of the most prominent problems facing coal miners with black lung and their widows.").

Claimant's decision to consent to the administrative law judge's authority and go forward with his claim when confronted with the Appointments Clause issue constitutes waiver, not forfeiture. *See Wood*, 566 U.S. at 465 (deeming an argument waived when a party "twice informed the U.S. District Court that it '[would] not challenge, but [is] not conceding, the timeliness of [the action].'"). The distinction prevents us from raising the argument on appeal, *see, e.g.*, *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 678 (6th Cir. 2018) (appointments clause challenges are "not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture"), and it distinguishes this case from prior cases in which we have previously excused untimely raised Appointments Clause arguments. *See, e.g.*, *Miller*, BLR , BRB No. 18-0323 BLA, slip op. at 4.[16]

> hearings with the Administrative Law Judge and Benefits Review Board, if the decision is appealed.

Available at: www.stonemountainhealthservices.org/black-lung-program-services.html.

[16] The dissent's statement that claimant's conduct can "also be construed as an agreement that the appointment was unconstitutional" is puzzling. *Infra* at 17-18. Claimant had the opportunity to respond to several rounds of briefing on the issue but chose not object to the administrative law judge's authority. And when specifically noticed of employer's request for transfer to a new adjudicator, informed the administrative law judge that he "did not seek relief on the same basis." Order Denying Mot. for Abey. at 3. While it is true that claimant and his lay representative might not understand the legal arguments regarding the Appointment's Clause (the same can be said of many attorneys), that does not mean that they could not make an informed choice regarding the basic decision to either go ahead with their case or suffer the delay and uncertainty reassignment creates. Equally puzzling is the dissent's claim that raising the Appointment's Clause issue here after claimant's specific consent to the administrative law judge's authority below would not constitute sandbagging. *See, e.g.*, *Freytag v. Comm'r*, 501 U.S. 868, 895 (Scalia, J.,

Second, we have required litigants to at least raise the Appointments Clause issue in an opening brief before addressing it. *See Motton v. Huntington Ingalls Indus., Inc.*, 52 BRBS 69 (2018) (Appointments Clause argument forfeited when raised in motion to vacate filed after initial petition for review and brief); *Luckern v. Richard Brady & Assocs.*, 52 BRBS 65 (2018) (Appointments Clause issue raised in reply brief will not be addressed); *see also Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir 2018) (refusing to excuse forfeiture of a *Lucia* argument because the "obligation to identify the issues on appeal in the opening brief applies to arguments premised on the loftiest charter of government as well as the most down to earth ordinance.").

In addition to consenting to the administrative law judge's authority below, and in contrast to other cases in which Stone Mountain clients have asked us for a remand on Appointments Clause grounds, *see, e.g.*, *Tackett v. Premier Elkhorn Coal Co.*, BRB No. 18-0481 BLA (appeal pending), claimant has not mentioned the issue here. To raise it *sua sponte* thus either creates different substantive rights for pro se claimants, or it means treating the Appointments Clause issue as jurisdictional, requiring us to remand every case in which an administrative law judge has taken significant pre-ratification action. Neither option is advisable or permissible.

Moreover, while it is true that we do not require pro se claimants to formally identify issues in an opening brief, that does not mean that we can, or should, make strategic litigation decisions on their behalf. Claimants and coal companies are not similarly-situated when it comes to delay in black lung litigation. *See, e.g.*, *Amax Coal Co. v. Franklin*, 957 F.2d 355, 356 (7th Cir. 1992) ("As so often in black lung cases, the processing of the claim has been protracted scandalously . . . delay in processing these claims is especially regrettable" because most black lung claimants "are middle-aged or elderly and in poor health and therefore quite likely die before receiving benefits if their cases are spun out for years"); *Lango v. Director, OWCP*, 104 F.3d 573, 575-76 (3d Cir. 1997) ("many cases languish while waiting for an [administrative law judge] or the [Benefits Review Board] to hear them" such that "the magnitude of the delays is likely to affect the legal representation available to claimants") (citation omitted); *see also* Brief for National Black Lung Association as Amicus Curiae Supporting Affirmance at 16, *Lucia v. SEC*, 585 U.S. , 138 S.C.t. 2044, 2055 (2018) (No. 17-130), 2018 WL 1733141 *16 (arguing for minimal application of *Lucia* given that coal miners must endure years of

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concurring) (Sandbagging is suggesting or permitting "the trial court pursue a certain course, and later -- if the outcome is unfavorable -- claiming that the course followed was reversible error.").

litigation to receive modest benefits and that the backlog before the Office of Administrative Law Judges is the biggest cause of delay).

A general remand delays the processing of this case and it contributes to the delay of other cases. As Judge Robert Bacharach of the United States Court of Appeals for the Tenth Circuit has recognized, in making tactical decisions on the part of pro se litigants, courts need to be mindful that they do not harm the people they attempt to benefit:

> I strongly agree with our dissenting colleague that pro se litigants should be treated fairly. But a key ingredient of fairness is equality in treatment. Once we start imagining grounds for reversal that the parties have not raised, we can easily cross the line into advocacy. Crossing that line can serve not only to compromise our neutrality but also to create unintended consequences, disadvantaging the very parties that we are trying to help. *See* Robert Bacharach & Lyn Entzeroth, *Judicial Advocacy in Pro Se Litigation: A Return to Neutrality*, 42 Ind. L. Rev. 19, 32-41 (2009) (giving examples where judges have inadvertently disadvantaged pro se litigants by devising arguments in an effort to be helpful).

Hill v. Corizon Health, Inc., 712 F. App'x. 811, 814 (10th Cir. 2017) (unpub.).

Our colleague states that the primary difference between our two approaches is that we affirm "the administrative law judge's discrediting Dr. Ajjarapu's diagnosis of legal pneumoconiosis, a finding that is adverse to claimant" while "a *Lucia* remand would weigh all physicians' opinions in the first instance, along with the other issues identified by the majority." *Infra* at 18 n.2. True. But put another way, our remand entitles claimant to benefits if he establishes disability and fifteen years of coal mine employment under *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019), while our colleague's would completely reset the process in front of the Office of Administrative Law Judges, putting claimant in the same position he was three years ago with nothing to show for it. Heeding the advice of Judge Bacharach, we refuse to do so.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

RYAN GILLIGAN
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting

I agree with the majority that the administrative law judge committed several errors that require remand. Most notably, he determined that claimant is not entitled to the Section 411(c)(4) presumption based on an unexplained finding of less than fifteen years of coal mine employment. Before the Board considers the merits of the claim, however, it must address whether the administrative law judge accurately found that his appointment is consistent with the Appointments Clause of the U.S. Constitution, Art. II § 2, cl. 2.[17] If

[17] Article II, Section 2, Clause 2, sets forth the appointing powers of the President and Congress:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment

not, the parties are entitled to a new hearing before a different, constitutionally appointed adjudicator. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018).

The constitutionality of the administrative law judge's appointment raises a substantial question of law and is therefore well within the Board's scope of review. 33 U.S.C. §921(b)(3); *see Energy W. Mining Co. v. Lyle*, F.3d , No. 18-9537 (10th Cir. July 12, 2019) (Board has authority to remedy Appointments Clause violation); *Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc) (vacating pro se claimant's award based on employer's Appointments Clause argument); *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 676 (6th Cir. 2018) (Appointments Clause argument to be first considered by the administrative agency); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1118 (6th Cir. 1984) (Board vested with "same judicial power to rule on substantive legal questions as was possessed by the district courts.") (citation omitted).

Moreover, the Board cannot overlook the issue on the basis that it was not raised on appeal. Claimant, appearing without the assistance of counsel, is not required to identify any issues to be considered by the Board, nor should he be expected to raise an argument on a complex constitutional question. *See* 20 C.F.R. §§802.211(e), 802.220 (Board may waive formal compliance with procedural rules including identification of issues to be appealed). Instead, the Board must conduct its own review of the decision below to ensure that it is supported by substantial evidence and consistent with law. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989).

That Appointments Clause arguments are "nonjurisdictional" does not deprive the Board of authority to consider them. While jurisdictional questions cannot be waived or forfeited and therefore must be considered on appeal even if not raised at trial, *see, e.g.*, *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 (2017), nonjurisdictional Appointments Clause challenges may be waived or forfeited but are nevertheless "in the category of . . . constitutional objections that [can] be considered on

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> of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Art. II, § 2, cl. 2.

appeal whether or not they were ruled upon below." *Freytag v. Comm'r*, 501 U.S. 868, 878–79 (1991).

The Board has routinely cited *Freytag* for the proposition that it "retains the discretion in exceptional cases to consider nonjurisdictional constitutional claims that were not timely raised." *Sizemore v. Shamrock Coal Corp.*, BRB Nos. 17-0518 BLA and 17-0519 BLA, slip op. at 3-4 n.9 (Aug. 10, 2018) (unpub.); *see, e.g*., *Hawkins v. Eighty Four Mining Co.*, BRB No. 17-0514 BLA (July 11, 2018) (unpub); *Ray v. Island Creek Coal Co.*, BRB No. 17-0318 BLA (Mar. 28, 2018) (unpub.); *Williams v. Whitaker Coal Co.*, BRB No. 17-0228 BLA (Feb. 28, 2018) (unpub.). Moreover, the Board has consistently exercised such discretion to overturn awards, and remand claims for new hearings, based on Appointments Clause objections that were not raised at trial by parties with experienced legal counsel. And, it has done so without any explanation as to why the cases are "exceptional." *See, e.g., Miller*, BRB No. 18-0323 BLA, slip op. at 4 (award vacated based on Appointments Clause argument first raised to the Board); *Stiltner v. Superior Mining & Minerals*, BRB Nos. 18-0313 BLA, 18-0314 BLA, 18-0353 BLA, and 18-0431 BLA, slip. op. at 6 n.10 (Apr. 30, 2019) (unpub.) (Buzzard, J., dissenting) (award vacated with explanation that "Board exercised its discretion to consider employer's [untimely] challenge"); *Culbertson v. TDL Coal Co., Inc.*, BRB Nos. 18-0312 BLA and 18-0381 BLA (Mar. 14, 2019) (unpub.) (award vacated over claimant's objection that employer waived/forfeited its Appointments Clause challenge by failing to raise it to the administrative law judge); *Gamblin v. Island Creek Ky. Mining*, BRB Nos. 18-0299 BLA and 18-0300 BLA (Feb. 28, 2019) (unpub.) (employer's failure to raise Appointments Clause argument to the administrative law judge does not constitute waiver or forfeiture); *Shepherd v. Incoal, Inc.*, BRB No. 18-0370 BLA (February 25, 2019) (unpub.) (same); *Younce v. P & J Coal Co., Inc.*, BRB No. 18-0288 BLA (Jan. 30, 2019) (unpub.) (same); *Lawson v. Mingo Logan Coal Co.*, BRB No. 18-0182 BLA (Nov. 29, 2018) (unpub.) (award vacated without addressing claimant's argument that employer waived/forfeited its Appointments Clause challenge by failing to raise it to the administrative law judge until after the hearing); *Robinette v. Bevins Energy, Inc.*, BRB Nos. 17-0626 BLA and 17-0626 BLA-A (Mar. 13, 2018) (Order) (unpub.) (award vacated over claimant's objection that

employer waived/forfeited its Appointments Clause challenge by failing to raise it to the administrative law judge).[18]

The majority's attempt to distinguish this case as one of unreviewable waiver versus reviewable forfeiture is unavailing.[19] First, it is questionable to infer that a lay representative's inability to craft a legal response on a complex constitutional question is an "intentional relinquishment or abandonment of a known right." *Brewer v. Williams*, 430 U.S. 387, 412 (1977) ("It is settled law that an inferred waiver of a constitutional right is disfavored."), *citing Estelle v. Williams*, 425 U.S. 501, 515, (1976) (Powell, J., concurring) (Court "generally disfavor[s] inferred waivers of constitutional rights"); *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) ("[A] waiver of constitutional rights in any context must, at the very least, be clear."). Second, even if waiver can be inferred, the Board retains its discretion to consider the issue because, in the context of an Appointments Clause challenge, waiver is not, as the majority suggests, an outright bar to appellate review. *See Freytag*, 501 U.S. at 878-79 (exercising discretion to hear Appointments Clause challenge despite petitioner waiving the argument by expressly consenting to the

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[18] Cases in which the Board has declined to exercise its discretion to consider untimely Appointments Clause arguments have been largely limited to circumstances in which a litigant has failed to properly raise the issue to the Board. *See, e.g.*, *Motton v. Huntington Ingalls Industries, Inc.*, 52 BRBS 69 (2018) (Appointments Clause argument 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 argument raised in reply brief is forfeited); *Messer v. Andalex Res., Inc.*, BRB No. 18-0272 BLA (May 17, 2019) (Gilligan, J., concurring) (unpub.) (Appointments Clause argument first raised in second appeal to the Board is forfeited); *Young v. Island Creek Coal Co.*, BRB No. 18-0064 BLA (Dec. 17, 2018) (unpub.) (Appointments Clause argument first raised seven months after opening brief is forfeited); *Kupke v. Serv. Emp. Int'l, Inc.*, BRB No. 17-0359 (Sept. 6, 2018) (unpub.) (Appointments Clause argument first raised in motion for reconsideration is forfeited); *Zumwalt v. Nat'l Steel & Shipbuilding Co.*, BRB Nos. 17-0048 and 17-0048A (Sept. 6, 2018) (en banc) (unpub.) (same).

[19] Waiver is the "intentional relinquishment or abandonment of a known right," while forfeiture is "the failure to make the timely assertion of a right." *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 n.1 (2017) (citations omitted). Waived errors are typically treated as unreviewable on appeal, while forfeited errors can be reviewed under a "plain error" standard. *United States v. Arviso-Mata*, 442 F.3d 382, 384 (5th Cir. 2006).

trial judge's assignment to the case); *see also Jones Bros.*, 898 F.3d at 677-78 (describing *Freytag* as excusing waiver).

To the extent the Board has routinely exercised its discretion to entertain untimely Appointments Clause challenges by experienced counsel, there is no basis for declining to do so in this case. *See Multicultural Media, Telecom & Internet Council v. FCC*, 873 F.3d 932, 937 (D.C. Cir. 2017) (an agency cannot exercise its discretion arbitrarily). At the time employer filed its motion challenging the administrative law judge's authority, the Supreme Court had just granted certiorari in *Lucia* to resolve conflicting decisions from the U.S. Courts of Appeals for the Tenth Circuit and the D.C. Circuit. *See Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016); *Lucia v. SEC*, 868 F.3d 1021 (D.C. Cir. 2017). The Director, in turn, argued that the Secretary's ratification of the administrative law judge's appointment three months prior, in December 2017, cured any defect for purposes of issuing a decision in this case, a position which the Director subsequently conceded is inconsistent with *Lucia*. *See Miller*, BRB No. 18-0323 BLA, slip op. at 4 (agreeing with the Director that because the administrative law judge "took significant actions" prior to ratification, the challenging party is "entitled to the remedy specified in *Lucia*"). The administrative law judge opted for a third approach, rejecting employer's and the Director's arguments by finding that his appointment, unlike other Department of Labor administrative law judges, was in fact constitutional even before the Secretary's purported ratification.

That claimant's non-attorney lay representative did not develop a response to these constitutional issues is not a sufficient basis from which to infer an intentional relinquishment of the right to raise an Appointments Clause challenge. *See United States v. Zubia-Torres*, 550 F.3d 1202, 1206-07 (10th Cir. 2008) (counsel's statement that the defendant had "no objections" to the sentencing calculation is not evidence of a "conscious or intentional" waiver of his right to challenge that calculation on appeal);[20] *United States v. Arviso-Mata*, 442 F.3d 382, 384 (5th Cir. 2006) (same). While the majority interprets the lay representative's silence as a waiver of the right to challenge the administrative law judge's authority, it does not convincingly explain why failing to object to employer's motion cannot also be construed as an agreement that the appointment was

[20] The United States Court of Appeals for the Tenth Circuit explained that waiver is typically found "in cases where a party has invited the error that it now seeks to challenge, or where a party attempts to reassert an argument that it previously raised and abandoned below." *United States v. Zubia-Torres*, 550 F.3d 1202, 1205 (10th Cir. 2008). Claimant neither invited the potential error in this case nor raised and abandoned an Appointments Clause argument below.

unconstitutional. That more than one inference can be drawn from the lay representative's lack of response undermines a finding that he clearly intended to waive claimant's rights.

Nor is the lay representative's omission more objectionable than the numerous cases in which the Board has excused forfeiture by experienced counsel who should have been aware of Appointments Clause arguments but failed to raise them at trial.[21] "Sandbagging" is of even less concern in this case, where employer itself raised the Appointments Clause argument at trial and the administrative law judge issued a ruling on the issue. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981) ("Because the District Court reached and adjudicated the merits . . . no interests in fair and effective trial administration . . . would be served if [this Court] refused now to reach the merits . . ."); *Freytag*, 501 U.S. at 895 (Scalia, J., concurring in part and concurring in judgment) (sandbagging implies that the issue raised on appeal has not been "considered in the tribunal of first instance"). None of the parties can claim to be surprised by the Board's review of a finding rendered by the administrative law judge.

At this juncture, the Board has insufficient information from which to determine whether the administrative law judge was constitutionally appointed. For the reasons set forth in my dissenting opinion in *Stiltner*, BRB Nos. 18-0313 BLA, 18-0314 BLA, 18-0353 BLA, and 18-0431 BLA, I would instruct the Director to provide briefing to the Board on the question of whether the administrative law judge was appointed by the Head of an Agency and the role, if any, of the Secretary of Labor in selecting him for his position at the Department of Labor. The answer to these questions is determinative of whether the

[21] The Board's recent decision in *Kiyuna v. Matson Terminals, Inc.*, BRBS , BRB No. 19-0103 (June 25, 2019), does not command a different result. There, the Board held that the claimant, who was represented by counsel, forfeited his Appointments Clause challenge "by fail[ing] to timely raise [it to the administrative law judge] even after *Lucia* was issued[.]" *Kiyuna*, BRB No. 19-0103, slip op. at 4 n.4. The Board, however, specifically declined to address "whether claimant's failure to raise the issue at an earlier date constitutes forfeiture." *Id*. Because the time period in which claimant's lay representative allegedly waived his Appointments Clause challenge occurred long before the Supreme Court's decision in *Lucia*, at a time when the Tenth Circuit and the D.C. Circuit had issued conflicting opinions on the issue, the present appeal is not controlled by *Kiyuna*.

Board remands this claim for a new hearing on all issues pursuant to *Lucia* or, consistent with the majority's approach, remands it for reconsideration of some issues but not others.[22]

Thus, while I agree with much of the majority's analysis of the merits of the claim, I must dissent on its disposition of the appeal.

GREG J. BUZZARD
Administrative Appeals Judge

[22] Judge Solomon is retired. Therefore, regardless of the resolution of the Appointments Clause issue, this claim will be remanded to a new administrative law judge. The most notable difference between a remand pursuant to *Lucia* and the majority's approach is that the majority affirms the administrative law judge's discrediting of Dr. Ajjarapu's diagnosis of legal pneumoconiosis, a finding that is adverse to claimant. A *Lucia* remand would require that the new administrative law judge weigh all physicians' opinions in the first instance, along with the other issues identified by the majority.