U.S. Department of Labor

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

BRB No. 17-0484 BLA
Case No. 2016-BLA-05472

MARVIN R. RADCLIFF Claimant-Respondent v. ENERGY WEST MINING COMPANY and PACIFICORP ELEC OPERATIONS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/19/2019 ORDER on MOTION for RECONSIDERATION EN BANC

Employer/carrier (employer) has filed a timely motion for reconsideration of the Board's decision in *Radcliff v. Energy West Mining Co*., BRB No. 17-0484 BLA (June 28, 2018) (unpub.), affirming the award of benefits in this miner's claim. Employer also moves for en banc reconsideration. The Director, Office of Workers' Compensation Programs (the Director), responds in opposition to employer's motion. Employer filed a brief in reply to the Director's opposition.

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. Emp. Mot. for Recon. at 4-6. 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 responds that employer forfeited this argument by failing to raise it in its opening brief. Director's Response at 2-4.

We agree with the Director. Because employer first raised its Appointments Clause argument thirteen 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[a party's] case" is entitled to relief); *Turner Bros., Inc. v. Conley*, 757 F. App'x 697 (10th Cir. 2018) (unpublished) (declining to address the Appointments Clause issue because it was not raised before the administrative law judge or Board); *Motton v. Huntington Ingalls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).

Relying on *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018), employer argues that "it is necessary to raise an Appointments Clause challenge before the agency **only if** . . . the agency had the ability to remedy the constitutional problem, and even there, failure to raise the issue can be excused if an absence of legal authority made it uncertain whether the agency had the ability to remedy the problem." Emp. Reply Br. at 5-6, citing *Jones Bros.*, 898 F.3d at 677 ("We thus could not fault a petitioner for failing to raise a facial constitutional challenge in front of an administrative body that could not entertain it.").

In asserting the Board "cannot remedy" the issue it now raises, thus relieving it of an obligation to raise its argument "before the agency," Emp. Reply Br. at 6, 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); *Turner Bros.*, 757 F. App'x at 700 ("[F]ailure to raise this argument with the Board constitutes failure to exhaust administrative remedies and deprives the Court of Appeals of jurisdiction to hear the matter.") (internal citation omitted); *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). 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 improperly appointed administrative law judge's award and remanding for reassignment).

We thus decline to excuse employer's forfeiture. *Island Creek Coal Co. v. Wilkerson,* 910 F.3d 254 (6th Cir. 2018) (declining to excuse forfeited Appointments Clause challenge not raised in opening brief)[1]; *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.[2] *See Turner Bros.*, 757 F. App'x at 699-700 (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).

[1] The Sixth Circuit noted that, "No precedent prevented the company from bringing the constitutional claim before [the Supreme Court's decision in *Lucia*]." *Island Creek Coal Co. v. Wilkerson,* 910 F.3d 254, 257 (6th Cir. 2018).

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

Accordingly, we deny employer's motion for reconsideration en banc. 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301(b), (c); 802.407(d); 802.409.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge