U.S. Department of Labor

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

BRB No. 21-0125 BLA

WILMA JEAN HONEYCUTT (o/b/o RONALD D. HONEYCUTT)	)	
Claimant-Respondent	)	
v.	)	
HONDO COAL COMPANY, c/o HONEYCUTT ENTERPRISES INCORPORATED	)	DATE ISSUED: 6/22/2022
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Michael A. Pusateri (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

ROLFE and GRESH, Administrative Appeals Judges:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Larry A. Temin's Decision and Order Awarding Benefits (2019-BLA-05278) rendered on a claim filed on June 27, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ found Employer is the correctly named responsible operator. He further determined Claimant[2] established the Miner had 7.71 years of coal mine employment[3] and therefore could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2018). In addition, he found Claimant failed to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018). Considering whether Claimant established entitlement to benefits under 20 C.F.R. Part 718, the ALJ found Claimant

[1] The Miner filed a prior claim on November 4, 2008, but withdrew it on May 5, 2009; therefore, it is considered not to have been filed. 20 C.F.R. §725.306; Director's Exhibit 49.

[2] The Miner died on December 28, 2018. Claimant's Exhibit 3. Claimant, his widow, is pursuing this claim on his behalf. Claimant's Exhibit 4.

[3] The Miner also worked as a federal coal mine inspector for the Mine Safety and Health Administration from 1978 to 2007. Director's Exhibit 48 at 11-12. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, has held a federal mine inspector is not a "miner" for purposes of the Act and employment as a federal mine inspector cannot be counted as qualifying coal mine employment. *Navistar, Inc. v. Forester*, 767 F.3d 638, 647 (6th Cir. 2014).

[4] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

established the Miner was totally disabled due to clinical and legal pneumoconiosis,[5] and awarded benefits. 20 C.F.R. §§718.201, 718.204.

On appeal, Employer argues the ALJ lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution.[6] It also argues removal provisions applicable to ALJs violate the separation of powers doctrine and render his appointment unconstitutional. Furthermore, it challenges its designation as the responsible operator. On the merits, Employer argues the ALJ erred in finding the Miner had clinical and legal pneumoconiosis, and that his totally disabling respiratory impairment was due to pneumoconiosis.[7] Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation (the Director), has filed a response, urging rejection of Employer's constitutional challenges to the ALJ's appointment and removal protections. The Director

[5] "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). "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).

[6] Article II, Section 2, Clause 2, sets forth the appointing powers:

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

U.S. Const. art. II, § 2, cl. 2.

[7] We affirm, as unchallenged on appeal, the ALJ's finding that the Miner was totally disabled from a respiratory impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 28.

also urges the Benefits Review Board to affirm the ALJ's determination that Employer is liable for benefits. Employer has filed separate reply briefs, reiterating its arguments.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[8] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer urges the Board to vacate the ALJ's Decision and Order and remand the case to be heard by a constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[9] Employer's Brief at 10-11 (unpaginated); Employer's Reply to Director at 1-5. It acknowledges the Secretary of Labor (the Secretary) ratified the prior appointment of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[10] but

[8] This case arises within the jurisdiction of the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 15.

[9] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to the Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018), (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[10] The Secretary of Labor (the Secretary) issued a letter to ALJ Temin on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended 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. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Temin. ALJ Temin issued no orders in this case until his June 22, 2019 notice of assignment, notice of hearing, and prehearing order. As the ALJ took no significant action prior to the ratification of his appointment, his

maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 11-13 (unpaginated).

The Director responds that the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Response at 4-6. He also maintains Employer failed to demonstrate the Secretary's actions ratifying the appointment were improper. *Id.* at 5-6. We agree with the Director.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Response at 5 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with "the burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress has authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter but rather specifically identified ALJ Golden and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Golden. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of ALJ Golden "as an Administrative Law Judge." *Id.*

Employer does not assert the Secretary had no "knowledge of all material facts," but instead generally speculates he did not provide "genuine consideration" of the ALJ's

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subsequent actions are not tainted by an Appointments Clause violation and the parties are not entitled to a new hearing before a new constitutionally appointed ALJ. *See Noble v. B & W Res., Inc.*, 25 BLR 1-267, 1-271-72 (2020).

qualifications when he ratified the ALJ's appointment. Employer's Brief at 13 (unpaginated). Employer therefore has not overcome the presumption of regularity.[11] *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the ALJ's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" all its earlier actions was proper).[12] Consequently, we reject Employer's argument that this case should again be remanded for a new hearing before a different ALJ.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 13-18 (unpaginated); Employer's Reply to Director at 6-8. Employer generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 15-17 (unpaginated). It also relies on the Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), and the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). *See* Employer's Brief at 14-15, 17 (unpaginated).

[11] While Employer notes the Secretary's ratification letter was signed by a "robo-pen," Employer's Reply to Director at 3, this does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act").

[12] While Employer correctly states Executive Order 13843, which removes ALJs from the competitive civil service, applied only to future appointments, Employer's Brief at 17-18 (unpaginated), the Executive Order does not state that the Secretary's 2017 ratification of the ALJ's appointment was impermissible or invalid. Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Golden's appointment, which we hold constituted a valid exercise of his authority, bringing the ALJ's appointment into compliance with the Appointments Clause.

Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-1138 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Moreover, in *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as [ALJs]" who, "unlike members of the [PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id.* at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch, where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[13] 140 S. Ct. at 2201. It did not address ALJs.

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. at 1988. The Court explained "the *unreviewable authority* wielded by Administrative Patent Judges during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id.* at 1985 (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison,* 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized "'[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Edward J. DeBartolo*

[13] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 575 (1988) (*quoting Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional either facially or as applied. *Pehringer*, 8 F.4th at 1137-1138.[14]

[14] While our concurring colleague is correct that Employer did not comply with the mandatory claims-processing regulations in pursuing its appeal of the ALJ's appointment and removal issues, no party has raised its noncompliance at any time during this litigation -- in contrast to the Appointments Clause cases our colleague cites in which the Director *did raise* to the Board the failure to preserve the issue. Finding these issues precluded on our own accord thus would improperly treat compliance with mandatory claims-processing rules as a jurisdictional requirement. *See, e.g.*, *Fort Bend Cnty v. Davis*, 139 S. Ct. 1843, 1846 (2019) (claims processing-rules are not jurisdictional, so they "must be timely raised to come into play."); *George v. Youngstown State Univ.*, 966 F.3d 446, 469 (6th Cir. 2020) (collecting cases and noting that circuit precedent "prohibits sua sponte enforcement of [administrative exhaustion requirements]" in the face of defendants' "forfeiture for failure to raise the defense.") (citations omitted); *see also Fleming v. U. S. Dept. of Agric.*, 987 F.3d 1093, 1097 (D.C. Cir. 2021) (noting the difference between mandatory claims-processing rules and jurisdictional rules; enforcement of the claims-processing rules at issue were dependent on the government's timely raising noncompliance).

Citing several lower court cases that "predate [the Supreme Court's] effort to 'bring some discipline' to the use of the term 'jurisdictional,'" *Boechler, P.C. v. Comm'r*, 142 S. Ct. 1493, 1500 (2022) (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)), our colleague argues efficiency justifies excusing the parties' failure to raise the defense. "But a prescription does not become jurisdictional whenever it promotes important congressional objectives" and "recognizing that the charge-filing requirement is non-jurisdictional gives [parties] scant incentive to skirt the instruction." *Davis*, 139 S. Ct. at 1851. Thus, for the Board to consider these constitutional arguments, we would have to find the requisite "truly exceptional circumstances" exist to overlook the ordinary rules of forfeiture and the Director's conscious litigation decision not to raise the defense. *Freytag v. Comm'r*, 501 U.S. 868, 894 (1991) (Scalia, J., concurring) ("no basis for the assertion that the structural nature of a constitutional claim in and of itself constitutes such [an exceptional] circumstance"); *see also 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.) ("While we retain the discretion in exceptional cases to consider nonjurisdictional constitutional claims

Responsible Operator

The responsible operator is the potentially liable operator[15] that most recently employed the miner. 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or another potentially liable operator that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c)(2).

On January 4, 2017, the district director identified Hondo Coal Company (Hondo Coal) as a potentially liable operator. Director's Exhibit 33. Hondo Coal timely responded, generally contesting its designation as the responsible operator. Director's Exhibits 36-37. The district director subsequently issued the Schedule for the Submission of Additional Evidence (SSAE) on October 10, 2017, designating Hondo Coal as the responsible operator and giving it until December 8, 2017 to submit evidence that another potentially liable

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that were not timely raised, *Freytag*, [501 U.S. at 879], employer has not attempted to establish that this case so qualifies."). Moreover, to do so, while simultaneously insisting Employer must "touch every base" in the administrative process, would result in an inequitable application of the black lung regulations that the Sixth Circuit has recently (and repeatedly) warned against. *Joseph Forrester Trucking v. Dir., Off. of Workers' Comp. Programs* [*Davis*], 987 F.3d 581, 589 (6th Cir. 2021) ("And even when duly enacted, the Department may not apply its regulations in an unreasonable or arbitrary manner, for example, by selectively enforcing the regulations"); *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 747 (6th Cir. 2019) ("And the agency must not misinterpret the regulation or apply it in an arbitrary manner (by, for example, enforcing it against some parties but not others).").

[15] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

operator should have been designated the responsible operator.[16] Director's Exhibit 44. On November 3, 2017, Employer requested an extension of time to obtain the Miner's deposition testimony; it also argued in separate correspondence dated December 11, 2017, that the Miner's subsequent employer, Regal Coal, should be responsible as a successor operator to Hondo Coal. Director's Exhibits 40, 45. The district director denied Employer's request for an extension of time until February 4, 2018 as excessive in light of the fact that Employer initially responded to the Notice of Claim on January 27, 2017. Director's Exhibit 46. On March 13, 2018, the district director issued a Proposed Decision and Order denying benefits and identifying Hondo Coal and Old Republic as the responsible operator and carrier, respectively. Director's Exhibit 49. Claimant requested a hearing, and the case was referred to the Office of Administrative Law Judges. Director's Exhibits 56, 62.

On appeal, the ALJ rejected Employer's argument that it did not employ Claimant for at least one year, finding Employer was precluded from arguing it does not meet the requirements of a potentially liable responsible operator as it failed to present any argument or evidence in support of its position before the district director. Decision and Order 7. The ALJ further found Employer failed to establish a successor operator relationship with Regal Coal or that Regal Coal is financially capable of assuming liability for the payment of benefits. *Id.* at 8. Therefore, he found Hondo Coal is the properly designated responsible operator. *Id*.

Employer argues the ALJ erred in finding it waived its argument that it does not meet the requirements of a potentially liable responsible operator.[17] Employer's Brief at 18-20 (unpaginated). The Director agrees Employer timely controverted its status as responsible operator, but contends the ALJ's error does not require remand because the evidence can only demonstrate that Hondo Coal was properly designated a potentially liable operator. Director's Response at 10-11. We agree with the Director.

[16] The district director found the Miner's subsequent employer, Regal Coal Company, was not the responsible operator as it did not employ the Miner for at least one year and was uninsured while it employed him. Director's Exhibit 44.

[17] Employer also contends the ALJ erred in observing the submission of the Miner's deposition transcript was untimely. Employer's Brief at 20 (unpaginated). However, Employer fails to explain how this makes any difference in the case as the deposition was admitted into evidence as Director's Exhibit 48 and the ALJ considered it. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference."); Hearing Transcript at 8.

Employer timely contested its designation as the responsible operator before the district director. Director's Exhibit 36. Thus, its argument that Hondo Coal is not the responsible operator, because the Miner's work for "Hondo in 1977 and 1978 was for less than 125 days," was properly before the ALJ. Employer's Post-Hearing Brief at 14. On appeal, Employer maintains it cannot be held liable because the Miner's deposition and his Social Security Administration (SSA) earnings record establish Hondo Coal employed him for less than one year. Employer's Brief at 20 (unpaginated); *see also* Employer's Post-Hearing Brief at 14.[18] However, aside from generally stating this evidence "proves" its argument, it fails to provide any analysis or explanation for its position.

Moreover, contrary to Employer's implication, the Miner's deposition testimony does not directly address his length of employment with Hondo Coal. Director's Exhibit 48 at 18-20. Rather, the Miner testified that he worked, in total, for five to seven years for a series of companies including Honeycutt, Honeycutt and Vance, Hondo Coal, and Regal Coal. Director's Exhibit 48 at 18. He was never asked specifically about his time working at Hondo Coal.

As the Director notes, a miner need only be employed for 125 days with an operator to establish one year of coal mine employment, regardless of the actual duration of the miner's employment in any one calendar year. Director's Response at 11 (citing *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-02 (6th Cir. 2019)). The Miner's SSA earnings record reflects income from Hondo Coal during the last three quarters of 1977, totaling $8,276.91, and a total income of $783.13 from Hondo Coal in 1978. Director's Exhibit 7. The Director submits that the calculation provided for in 20 C.F.R. §725.101(a)(32)(iii), when applied to the Miner's SSA earnings record for his employment with Hondo Coal, results in 124.87 days of coal mine employment.[19] Director's Response at 11-12 n. 9. As he also indicates, a "working day" means "any day *or part of a day* for which a miner received pay for work as a miner. 20 C.F.R. § 725.101(a)(32) (emphasis added); *see also Griffith v. Director, OWCP*, 868 F.2d 847, 849 (6th Cir. 1989). Thus, the Miner's SSA earnings

[18] While Employer argued the Miner did not work for Hondo Coal for at least 125 days in its Post-Hearing Brief to the ALJ, it did not explain how it came to this conclusion. Employer's Post-Hearing Brief at 14.

[19] The Director also states the method provided for in *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984), holding that a miner may be credited for a full quarter of coal mine employment for each quarter in which he earned at least $50.00 from coal mine operators, would also lead to a finding of greater than 125 days. Director's Response at 11; *see Shepherd*, 915 F.3d at 401-02.

record indicates he had 125 working days with Hondo Coal and thus supports a finding of one year of employment pursuant to *Shepherd*, 915 F.3d at 401-02.[20]

Employer points to no evidence that demonstrates the Miner did not work for Hondo Coal for at least 125 days. Nor does it identify any other reasonable means that the ALJ could have calculated the Miner's coal mine employment with Hondo Coal to find less than 125 days. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference."); *Cox v. Director, OWCP*, 791 F.2d 445, 446-47 (6th Cir. 1986) (party challenging an ALJ's decision must do more than recite evidence, but must demonstrate "with some degree of specificity" how substantial evidence supports its position); *Fish v. Director, OWCP*, 6 BLR 1-107, 109 (1983). Consequently, any error in the ALJ's failure to determine if Hondo Coal employed the Miner for at least one year is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Because Employer raises no other arguments that Hondo Coal did not meet the criteria of a potentially liable operator, we affirm the ALJ's finding that Hondo Coal is a potentially liable operator. 20 C.F.R. §725.494(a)-(e); Decision and Order at 9.

Next, Employer argues the Miner's testimony is sufficient to find the companies owned by his uncle were related and thus either Hondo Coal's predecessor, Honeycutt Enterprises, Inc. (Honeycutt Enterprises), or Hondo Coal's successor, Regal Coal, is the correct responsible operator.[21] Employer's Brief at 20-21 (unpaginated). Employer submits that the ALJ's analysis of the evidence is contradictory, as he indicated the Miner's testimony demonstrated a relationship between the companies yet found it insufficient to support a finding of a successor operator relationship. *Id.*

As addressed above, Hondo Coal meets the requirements of a potentially liable responsible operator. Thus, there is no need to aggregate the Miner's employment with his prior employer, Honeycutt Enterprises. 20 C.F.R. §725.495(a)(1). Even assuming Regal Coal was a successor operator to Hondo Coal, the record contains prima facie evidence

[20] Dividing the Miner's wage for Hondo Coal by the average daily earnings that the Bureau of Labor Statistics (BLS) reports in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual* results in 115.12 days in 1977 ($8,276.91/$71.90 = 115.12) and 9.75 days for 1978 ($783.13/$80.31 = 9.75), totaling 124.78 days.

[21] The Miner testified he worked for five to seven years for a series of companies owned first by his uncle and then by his uncle and other partners. Director's Exhibit 48 at 17. He testified that some of the companies worked "on their own" and sometimes "as contractors," but used the same people and equipment. *Id.* at 17-20.

consisting of the statement from the district director, as 20 C.F.R. §725.495(d) requires, that Regal Coal is incapable of assuming liability for the payment of benefits as it was uninsured at the time of the Miner's employment.[22] Director's Exhibit 32; *Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 322-23 (6th Cir. 2014). If the successor operator is financially incapable of assuming liability for benefits, liability falls to its predecessor if the predecessor meets the definition of a potentially liable operator – namely, that it employed the miner for at least one year and is financially capable of paying benefits. 20 C.F.R. §§725.492(d), 725.494(c), (e), 725.495(a)(3). As the ALJ found, Employer presented no evidence to satisfy its burden of proving that Regal Coal is financially capable of assuming liability for benefits. Decision and Order at 8; 20 C.F.R. §725.495(c)(2). Therefore, we affirm the ALJ's determination that Hondo Coal was properly named as the responsible operator. 20 C.F.R. §725.495(a)(1); Decision and Order at 9.

Entitlement under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

After considering the x-ray and medical opinion evidence, the ALJ determined this evidence demonstrated the Miner "likely" had asbestosis, which arose out of the Miner's coal mine employment and thus constituted clinical pneumoconiosis. Decision and Order at 22. In analyzing the medical opinion evidence, the ALJ noted Dr. Green did not specifically offer an opinion regarding the presence of asbestosis, but credited his opinion that the Miner had legal pneumoconiosis in the form of chronic obstructive pulmonary

[22] If the operator finally designated as responsible is not the operator that most recently employed the miner, the regulations require the district director to explain the reason for such designation. 20 C.F.R. §725.495(d). If the reasons include the more recent operator's inability to pay for benefits, the district director must provide a statement that he has no record of insurance coverage or authorization to self-insure for that employer as of Claimant's last day of employment. *Id.* Such a statement in the record constitutes prima facie evidence that the subsequent employer is not financially capable of paying benefits. *Id.* If the record lacks such a statement, however, the subsequent employer is presumed to be financially capable of paying benefits. *Id.*

disease (COPD) due to smoking and coal mine dust exposure. Decision and Order at 21, 24.

Employer argues the ALJ erred in finding the Miner had clinical pneumoconiosis arising out of coal mine employment because he failed to require Claimant to prove he was exposed to asbestos during his 7.71 years of coal mine employment rather than during his much longer career as a federal mine inspector. Employer's Brief at 21-25 (unpaginated). We need not address this argument, however, because the ALJ permissibly found the Miner also had legal pneumoconiosis based on Dr. Green's opinion, which considered only the Miner's actual coal mine employment. Decision and Order at 24; Director's Exhibits 16, 28.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must establish the Miner suffered from a chronic lung disease or impairment "significantly related to, or substantially aggravated by, coal dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). The United States Court of Appeals for the Sixth Circuit has held that a miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The ALJ considered the opinions of Drs. Green, Fino, and Rosenberg. Dr. Green opined the Miner had legal pneumoconiosis in the form of COPD due to coal mine dust exposure and cigarette smoking. Director's Exhibits 16, 28. Dr. Green based his opinion initially on his understanding that the Miner had thirty-four years of coal mine employment. Director's Exhibit 16. After being advised that the Miner's work as a federal mine inspector could not be considered, Dr. Green continued to opine the Miner's coal mine dust exposure contributed to his COPD, relying on only three years of coal mine employment. Director's Exhibit 28. Dr. Rosenberg opined the Miner did not have legal pneumoconiosis because he did not have an obstructive impairment. Employer's Exhibit 5 at 4. Both Drs. Fino and Rosenberg opined the Miner had an oxygen exchange impairment and restrictive lung disease due to asbestosis. Employer's Exhibits 4, 5, 11, 12.

The ALJ found Dr. Green's opinion well-documented and well-reasoned and gave it probative weight. Decision and Order at 24. Conversely, he found the opinions of Drs. Fino and Rosenberg were neither well-reasoned nor well-documented and were based upon

premises contrary to the regulations. *Id*. at 25. Employer argues the ALJ erred in his evaluation of the medical opinions. Employer's Brief at 25-27 (unpaginated). We disagree.

Employer contends the ALJ erred in relying on the principle in the preamble to the 2001 amended regulations that cigarette smoke and coal mine dust are additive to discredit Drs. Rosenberg's and Fino's opinions, although neither attributed the Miner's condition to smoking. Employer's Brief at 25-26 (unpaginated). Employer's argument is misplaced. The ALJ did not discredit Drs. Rosenberg's and Fino's opinions as contrary to the preamble; rather, he credited Dr. Green's opinion for being consistent with it. Decision and Order at 23-25. Specifically, the ALJ permissibly credited Dr. Green's explanation that the Miner's cigarette smoking and coal mine dust exposure contributed to his COPD as consistent with the preamble to the amended regulations.[23] Decision and Order at 29; 65 Fed. Reg 79920, 79,941 (Dec. 20, 2000); *Groves,* 761 F.3d at 601.

Nor is there any merit to Employer's argument that the ALJ erred in crediting Dr. Green's diagnosis of legal pneumoconiosis when he did not diagnose asbestosis, "upon which the ALJ's legal pneumoconiosis finding rested." Employer's Brief at 27 (unpaginated). Contrary to Employer's argument, the ALJ found Dr. Green's opinion established legal pneumoconiosis in the form of COPD arising out of coal mine employment. Decision and Order at 25. His opinion did not depend on the presence of asbestosis.

Employer does not contest Dr. Green's diagnosis of COPD or identify any other error in the ALJ's crediting of his opinion to find the Miner's COPD constitutes legal pneumoconiosis. Thus, the ALJ's finding that Dr. Green's opinion supports a finding of legal pneumoconiosis in the form of COPD is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 Decision and Order at 24; 20 C.F.R. §718.201(a)(2), (b).

As the ALJ correctly noted, Dr. Fino did not address whether the Miner had legal pneumoconiosis. Decision and Order at 24; Employer's Exhibits 4, 12. Thus, he provided no contradictory opinion to Dr. Green's. While Dr. Rosenberg opined the Miner did not have legal pneumoconiosis because he found no obstruction, Employer does not argue that

[23] Employer's contention that the ALJ cannot rely on the preamble in making credibility determinations is also without merit. Employer's Brief at 26 (unpaginated). An ALJ may permissibly evaluate expert opinions in conjunction with the Department of Labor's discussion of the prevailing medical science set forth in the preamble. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801 (6th Cir. 2012).

Dr. Rosenberg's determination that the Miner did not have an obstruction outweighs Dr. Green's diagnosis of COPD. Thus, the ALJ permissibly found Dr. Green's opinion that the Miner had legal pneumoconiosis in the form of COPD was the most persuasive. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002) (it is within the purview of the ALJ to evaluate conflicting evidence, draw appropriate inferences, and assess probative value); *Tenn. Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order 25.

Because it is supported by substantial evidence, we affirm the ALJ's finding that the medical opinion evidence establishes the Miner had legal pneumoconiosis.[24] 20 C.F.R. §718.202(a); Decision and Order at 25.

Disability Causation

To establish disability causation, Claimant must prove that the Miner's pneumoconiosis was a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it had "a material adverse effect on the miner's respiratory or pulmonary condition" or "[m]aterially worsen[ed] a totally disabling respiratory or pulmonary impairment which [was] caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

The ALJ considered the opinions of Drs. Green, Fino, and Rosenberg. Dr. Green opined the Miner was totally disabled due to clinical and legal pneumoconiosis. Director's Exhibit 28. Drs. Fino and Rosenberg opined the Miner was totally disabled due to asbestosis, and opined his clinical pneumoconiosis was too minimal to have contributed to his impairment. Employer's Exhibits 4, 5, 11, 12. The ALJ credited Dr. Green's opinion as sufficient to establish the Miner's pneumoconiosis was a substantially contributing cause of his respiratory impairment. Decision and Order at 29. Conversely, he found the opinions of Drs. Fino and Rosenberg were not sufficiently explained. *Id*.

Employer argues the ALJ's crediting of Dr. Green's opinion to find the Miner was totally disabled due to legal pneumoconiosis is internally inconsistent and falls short of the

[24] As we have affirmed the ALJ's finding that the medical opinion evidence establishes legal pneumoconiosis, we need not address Employer's arguments that the ALJ erred in finding the Miner also had clinical pneumoconiosis that arose out of his coal mine employment. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 21-25 (unpaginated); Decision and Order at 25.

explanatory requirements of the APA.[25] Employer's Brief at 27 (unpaginated). Employer contends the ALJ found asbestosis "responsible" for the Miner's condition, but then credited the only physician who failed to diagnose it. *Id.* We disagree.

Employer's argument implies the ALJ found the changes demonstrated on x-ray, which he indicated were "likely asbestosis," represented the sole cause of the Miner's impairment. Employer's Brief at 27 (unpaginated). However, it ignores the ALJ's crediting of Dr. Green's opinion that the Miner also had legal pneumoconiosis in the form of COPD, which he opined contributed to the Miner's totally disabling respiratory impairment. Decision and Order at 24-25, 29. As noted above, the ALJ permissibly credited Dr. Green's opinion that the Miner had legal pneumoconiosis in the form of a COPD due to cigarette smoking and coal mine dust exposure. Decision and Order at 29; Director's Exhibits 16, 28.

Employer does not argue the ALJ erred in finding Dr. Green's opinion supported a finding that the Miner's legal pneumoconiosis substantially contributed to his disabling impairment; thus, it is affirmed. *Skrack*, 6 BLR at 1-711; *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999) (if we understand what the ALJ did and why he did it, the APA is satisfied). Nor does Employer specifically challenge the ALJ's finding that Drs. Fino and Rosenberg did not adequately explain why the Miner's disabling impairment was not caused by pneumoconiosis. Decision and Order at 29. Accordingly, these credibility findings are affirmed as unchallenged on appeal. *Skrack*, 6 BLR at 1-711; *see also Peabody Coal Co. v. Smith*, 127 F.3d 504, 507 (6th Cir. 1997); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995) (an ALJ who has found the disease and disability elements established may not credit an opinion denying causation without providing "specific and persuasive" reasons for concluding it does not rest upon a disagreement with those elements). Thus, we affirm the ALJ's finding that the Miner established disability causation based on the medical opinion evidence. 20 C.F.R. §718.204(c).

[25] The Administrative Procedure Act, 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring:

I concur in my colleagues' decision to affirm the ALJ's award of benefits. I write separately to express my view that Employer has forfeited its challenges to the ALJ's authority.

Employer argues for the first time on appeal that the ALJ lacked authority to decide this claim because he was not properly appointed and removal protections for ALJs are unconstitutional. Employer's Brief at 10-13 (unpaginated). Employer, however, failed to raise these arguments while this case was before the ALJ in contravention of Black Lung issue exhaustion regulations and Board precedent.[26] 20 C.F.R. §§725.451 (after district director issues decision, a party may request ALJ hearing "on any contested issue of fact or law"), 725.463 (ALJ hearing "shall be confined" to issues raised before the district director or new issues "not reasonably ascertainable" before the district director), 802.301 (Board cannot engage in *de novo* proceeding; it may only "review the findings of fact and conclusions of law on which the decision or order appealed from was based"); *Joseph Forrester Trucking v. Dir., Off. of Workers' Comp. Programs* [*Davis*], 987 F.3d 581, 587 (6th Cir. 2021) ("Black lung benefits adjudication regulations require that litigants raise issues before the ALJ as a prerequisite to review by the Benefits Review Board."); *see also Fleming v. USDA*, 987 F.3d 1093, 1097 (D.C. Cir. 2021) (constitutional arguments

[26] Employer first raised this issue to the ALJ only after it appealed his Decision and Order to the Board. In a footnote in its December 21, 2020 response to a fee petition from Claimant's counsel, it argued the ALJ did not have the authority to adjudicate the fee petition. However, the fee petition is not subject to this appeal.

concerning §7521 removal provisions are subject to Department of Agriculture statutory issue exhaustion requirements).

"For decades, the Board has routinely cited, with near black-letter authority, the principle that issues not raised before the ALJ are forfeited." *Davis*, 987 F.3d at 588. The Board thus consistently declines to consider challenges to ALJs' adjudicatory authority when raised for the first time on appeal. *See Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019) (litigant forfeited Board review of its Appointments Clause argument by failing to raise it to the ALJ); *Kiyuna v. Matson Terminals Inc*., 53 BRBS 9, 11 (2019) (litigants must timely raise Appointments Clause arguments to the ALJ to preserve their right to review by the Board; litigant forfeited the issue by raising it for the first time in a motion for reconsideration to the ALJ); *Luckern v. Richard Brady & Associates*, 52 BRBS 65 (2018) (litigant forfeited Appointments Clause argument by failing to raise it in its initial brief to the Board).

As the Sixth Circuit observed in *Davis*, it is a "settled rule in seemingly every forum for dispute resolution," including Black Lung claims, "that a judge's authority should be challenged at the 'earliest practicable moment' to 'prevent[ ] litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware.'"[27] *Davis*, 987 F.3d at 592, *quoting Glidden Co. v. Zdanok*, 370

[27] I therefore disagree with the majority's assessment that rejecting Employer's argument as forfeited is inconsistent with law or would lead to inequitable results in other Black Lung claims. Further, the United States Courts of Appeals for the Tenth, Sixth, Fourth, and Third Circuits – in full awareness of the Supreme Court's distinction between jurisdictional rules and mandatory claim-processing rules – have held that courts may *sua sponte* enforce mandatory claim-processing rules when a petitioner's violation of the rule implicates judicial interests and resources beyond those of the responding party who may benefit from its application. *See United States v. Mitchell*, 518 F.3d 740 (10th Cir. 2008); *United States v. Gaytan-Garza*, 652 F.3d 680 (6th Cir. 2011); *United States v. Oliver*, 878 F.3d 120 (4th Cir. 2017); *Long v. Atl. City Police Dep't*, 670 F.3d 436 (3d Cir. 2012); *see also Zhong v. U.S. Dep't of Just.*, 480 F.3d 104, *en banc rehearing denied*, 489 F.3d 126 (2d Cir. 2007)(whether to "excuse issue exhaustion," even where the government waives it as an affirmative defense, is a matter of "discretion"). Few issues implicate judicial interests and resources more than the requirement to timely raise Appointments Clause arguments, especially in the drawn-out process of Black Lung litigation. *Davis*, 987 F.3d at 591, 593 ("[I]ssue preservation rules exist to ensure that contested issues receive the adversarial vetting necessary for meaningful appellate review[;]" they "preserv[e] judicial resources" and "enhance the dispute resolution process for all involved[.]").

U.S. 530, 535 (1962) (cautioning against considering forfeited arguments due to the risk of sandbagging). This is particularly important in appeals before the Board given the "attenuated" and "prolonged" nature of Black Lung litigation. *Id.* at 590 (It is "easy to understand why the Board's regulatory scheme disfavors allowing an operator to undo years of proceedings based upon arguments at its disposal from the start."). After all, the remedy Employer seeks is to upend years of litigation by vacating the ALJ's decision and remanding the claim for a completely new hearing before a different ALJ. *See Lucia*, 138 S. Ct. at 2055.

Thus, while the majority is correct that the merits of Employer's Appointments Clause and removal arguments can be easily rejected, the Board need not consider the issues Employer raises because it has not identified any basis for excusing its forfeiture.[28]

While the Supreme Court's decisions in *Fort Bend County v. Davis*, 139 S. Ct. 1843 (2019) and its predecessors were concerned with courts outright declining jurisdiction based on rules that were mandatory but not jurisdictional, the Court at no time said adjudicators are powerless to enforce those rules absent a party requesting it. *See, e.g.*, *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13, 17 (2017) (mandatory claim-processing rules "must" be enforced if properly raised, but "may" be forfeited). Its rationale in *Davis* for *not enforcing* the Civil Rights Act's mandatory charge-filing requirements when first raised as an affirmative defense "years into litigation" helps explain why the Board *should enforce* the requirement that parties exhaust Appointments Clause arguments before the ALJ – allowing a party to upend years of litigation by raising arguments available at the outset "occasion[s] wasted court resources[,]" most notably those of the Office of Administrative Law Judges. *Davis*, 139 S. Ct. at 1849; *see Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (party who "timely" raises a meritorious Appointments Clause challenge is entitled to a new hearing before a different ALJ).

[28] In *Freytag v. Comm'r*, 501 U.S. 868 (1991), the Supreme Court considered a forfeited Appointments Clause argument because extraordinary circumstances warranted the Court's consideration of the issue. Following *Freytag*, the Board has also considered whether to *excuse* forfeiture of Appointments Clause arguments based on extraordinary circumstances but has never found such circumstances exist. *See, e.g., Powell*, 53 BRBS at 15; *but see Davis*, 987 F.3d at 591 (holding the employer failed to identify any exception that would allow the court to "excuse [its] noncompliance" with black lung issue exhaustion regulations); *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 747 (6th Cir. 2019) (distinguishing the Black Lung Act and regulations from *Freytag's* "prudential" exception and the Mine Act's specific allowance for "extraordinary circumstances"). In concluding the Board *must consider* the merits of Employer's untimely Appointments Clause argument unless "extraordinary circumstances" exist to hold it forfeited, my colleagues turn this precedent on its head.

Davis, 987 F.3d at 588; *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018); *Powell*, 53 BRBS at 15.

I therefore concur in the majority decision to affirm the ALJ's award of benefits.

GREG J. BUZZARD
Administrative Appeals Judge