PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1623

EDD POTTER COAL COMPANY, INCORPORATED; OLD REPUBLIC INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; AUSTINE SALMONS,

Respondents.

On Petition for Review of an Order of the Benefits Review Board. (17-0657-BLA)

Argued: May 4, 2022 Decided: June 30, 2022

Before WILKINSON, RICHARDSON, and RUSHING, Circuit Judges.

Petition for review denied by published opinion. Judge Wilkinson wrote the opinion, in which Judge Rushing joined. Judge Richardson wrote an opinion concurring in the judgment.

ARGUED: Mark Elliott Solomons, GREENBERG TRAURIG LLP, Washington, D.C., for Petitioners. Jeffrey Steven Goldberg, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C.; Brad Anthony Austin, WOLFE, WILLIAMS & REYNOLDS, Norton, Virginia, for Respondents. **ON BRIEF:** Michael A. Pusateri, GREENBERG TRAURIG LLP, Washington, D.C., for Petitioners. Seema Nanda, Solicitor of Labor, Barry H. Joyner, Associate Solicitor, Jennifer L. Feldman, Deputy

Associate Solicitor, Gary K. Stearman, Counsel for Appellate Litigation, Office of the Solicitor, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Federal Respondent.

WILKINSON, Circuit Judge:

After Austine Salmons filed a benefits claim in this black lung case, an administrative law judge (ALJ) and the Benefits Review Board both determined that Edd Potter Coal Company would be responsible in the event that Salmons was entitled to benefits. Once the Board remanded the case to determine if benefits were in fact appropriate, Edd Potter decided to raise an Appointments Clause challenge for the first time. Both the ALJ and the Board concluded that Edd Potter had forfeited this issue by failing to timely raise it. We agree, as the Department of Labor's regulations require issue exhaustion both before the ALJ and before the Board. Given Edd Potter's double forfeiture, we deny the petition for review.

I.

In August 2011, former coal miner Austine Salmons filed a claim for benefits under the Black Lung Benefits Act. *See* 30 U.S.C. § 901 *et seq.* That Act provides benefits to "coal miners who are totally disabled by pneumoconiosis," also known as black lung disease, and to their surviving dependents. *Id.* § 901(a). And it sets up a system both to determine eligibility for benefits and to decide who is responsible for paying those benefits (often a coal mine operator). *See* 30 U.S.C. § 932.

Salmons' case first went to a Department of Labor district director, who notified Edd Potter that it was potentially responsible for the claim. After the district director proposed denying the claim, Salmons requested a de novo hearing in front of an ALJ. Before the ALJ, Edd Potter contested Salmons' entitlement to benefits and its own liability as the responsible operator. Yet it made no mention of any Appointments Clause

challenge. In August 2017, the ALJ ruled that Edd Potter was the responsible operator and that Salmons was entitled to benefits.

Edd Potter appealed to the Benefits Review Board, once more disputing both its own responsibility and Salmons' entitlement to benefits. Again, though, it failed to raise an Appointments Clause challenge. On November 30, 2018, the Board first affirmed the ALJ's finding that Edd Potter was the responsible operator. It then vacated the ALJ's finding that Salmons was totally disabled and therefore remanded the case "for further proceedings consistent with this opinion." P.A. 92. The Board instructed that, on remand, the ALJ "must reconsider" the evidence of total disability and "may" reinstate certain findings already made. P.A. 91.[1]

On January 9, 2019, with the case on remand before the ALJ, Edd Potter first raised its Appointments Clause challenge. It asked for Salmons' case to be reassigned to a properly appointed ALJ in light of *Lucia v. SEC*, 138 S. Ct. 2044 (2018), which the Supreme Court had decided five months before the Board's initial ruling. In *Lucia*, the Supreme Court held that ALJs at the Securities and Exchange Commission were "Officers of the United States" subject to the Appointments Clause. *Id.* at 2049. As a result, those ALJs needed to be appointed by the President, a department head, or a court of law. *Id.* at 2051; *see* U.S. Const. art II, § 2, cl. 2. Because they hadn't been, one who made "a *timely* challenge to the constitutional validity of the appointment of an officer

[1] "P.A." refers to the Petitioners' Appendix, as the parties did not file a Joint Appendix in this case.

who adjudicates his case" was entitled to a new hearing before a different (and properly appointed) ALJ. *Lucia*, 138 S. Ct. at 2055 (emphasis added) (quoting *Ryder v. United States*, 515 U.S. 177, 182 (1995)). So had Edd Potter's request been granted, this case would have gone to a different ALJ, and Edd Potter would have had yet another chance to contest its status as the responsible party.

The ALJ denied Edd Potter's *Lucia*-based request, finding that Edd Potter "offer[ed] no support for a conclusion that its raising of the Appointments Clause is timely." P.A. 98. Because Edd Potter did not challenge the ALJ's authority to hear the case initially or on appeal, the ALJ determined that Edd Potter had forfeited its Appointments Clause challenge. Subsequently, the ALJ awarded benefits to Salmons.

Edd Potter again appealed to the Board. Reasoning that the Appointments Clause issue was "'non-jurisdictional' and subject to the doctrines of waiver and forfeiture," the Board found that Edd Potter had forfeited the issue by waiting until after the Board had remanded the case. P.A. 147. And the Board saw no basis to excuse Edd Potter's forfeiture because the agency could effectively address the Appointments Clause claim and because decades-old precedent already said "everything necessary to decide" *Lucia*. P.A. 148 (quoting 138 S. Ct. at 2053). The Board then affirmed the ALJ's award of benefits.

Edd Potter timely petitioned this court for review. We review the legal conclusions of the ALJ and of the Board de novo. *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252 (4th Cir. 2016).

II.

It is firmly established that, before an agency, parties must raise all issues they seek to maintain on appeal "at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952); *South Carolina v. U.S. Dep't of Labor*, 795 F.2d 375, 378 (4th Cir. 1986); *see also Sims v. Apfel*, 530 U.S. 103, 107–10 (2000). This requirement, typically known as issue exhaustion, "obliges a party to challenge an issue it disputes during an initial proceeding." *Joseph Forrester Trucking v. Dir., Off. of Workers' Comp. Programs*, 987 F.3d 581, 586 (6th Cir. 2021). Derived from more general issue-preservation principles, issue-exhaustion requirements foster fairness to administrators and litigants by putting them on notice of disputed issues. *See L.A. Tucker Truck Lines*, 344 U.S. at 37. They promote efficiency as well by avoiding piecemeal litigation. *See McCarthy v. Madigan*, 503 U.S. 140, 145 (1992).

Forfeiture results when a party fails to raise an issue at the appropriate time. Indeed, "[n]o procedural principle is more familiar . . . than that a constitutional right may be forfeited" when a party fails "to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444 (1944). And forfeiture is "essential to the orderly administration of justice," not "a mere technicality." *Freytag v. Comm'r*, 501 U.S. 868, 894–95 (1991) (Scalia, J., concurring in part and in the judgment) (quoting 9 C. Wright & A. Miller, Federal Practice and Procedure § 2472 (1971)). Arguments made in initial administrative proceedings should not be treated as a rough draft, to be expanded whenever a new idea pops into a party's

head. Instead, the "very word 'review' presupposes that a litigant's arguments have been raised and considered in the tribunal of first instance." *Id.* at 895.

These principles undoubtedly apply to Edd Potter's Appointments Clause challenge. After all, Appointments Clause challenges are not jurisdictional. *See Jones Brothers, Inc. v. Sec'y of Labor*, 898 F.3d 669, 678 (6th Cir. 2018); *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 794–95 (8th Cir. 2013); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 756 (D.C. Cir. 2009). As a result, they are "subject to ordinary principles of waiver and forfeiture." *Joseph Forrester Trucking*, 987 F.3d at 587 (quoting *Jones Brothers*, 898 F.3d at 678); *see also David Stanley Consultants v. Dir., Off. of Workers' Comp. Programs*, 800 F. App'x 123, 127–28 (3d Cir. 2020) (finding forfeiture of Appointments Clause challenge in black lung context); *Energy West Mining Co. v. Lyle*, 929 F.3d 1202, 1206 (10th Cir. 2019) (same).

To determine whether Edd Potter forfeited its Appointments Clause challenge, we think it best to employ the same three-step framework as the Sixth Circuit. *See Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 746 (6th Cir. 2019) (introducing framework); *Joseph Forrester Trucking*, 987 F.3d at 587–92 (applying framework). We first ask whether issue exhaustion is required before the ALJ and before the Board. Concluding that it is, we next ask whether Edd Potter exhausted its Appointments Clause challenge. Concluding that it did not, we finally ask whether Edd Potter's forfeiture should be excused. Finding no basis to do so, we deny Edd Potter's petition for review.

A.

Normally, "issue-exhaustion rules are creatures of statute or regulation." *Carr v. Saul*, 141 S. Ct. 1352, 1358 (2021); *see also Sims*, 530 U.S. at 107–08. Here, the Director concedes that nothing in the Black Lung Benefits Act explicitly requires issue exhaustion. The Director instead relies upon the Department of Labor's regulations, concluding that they require issue exhaustion both at the ALJ level and at the Board level.

Our review of the relevant regulations leads us to the same place. The Department's regulations lay out in extensive detail the procedures for black lung disputes. The essence of these painstaking regulations is that a party must raise issues at one level to have them considered at the next. That is meat-and-potatoes procedure in a hierarchical system, and that is all we have here. We therefore hold that the Department of Labor's regulations require issue exhaustion both before the ALJ and before the Board.[2]

1.

We start with the question of issue exhaustion before the ALJ. A black lung case begins when a miner files a benefits claim with a Department of Labor district director. 20 C.F.R. § 725.401. After receiving evidence from each party, the district director issues a proposed decision which becomes final after 30 days if no party objects. *Id.* § 725.419. When a party does object, a formal hearing in front of an ALJ follows. *Id.* § 725.421.

[2] Because the regulations are clear, we need not consider whether to judicially impose issue exhaustion. *Cf. Carr*, 141 S. Ct. at 1362 (declining to impose exhaustion requirement as matter of judicial prudence); *Sims*, 530 U.S. at 112 (same).

Such a hearing takes place in accordance with the Administrative Procedure Act, *see* 33 U.S.C. § 919(d), and it typically involves the consideration of briefs, the admission of evidence, and the examination of witnesses, *see* 20 C.F.R. § 725.455–457.

Several regulations stipulate how to raise issues for ALJ consideration. First, in advance of a hearing, an objecting party "shall specify the findings and conclusions" of the district director that the party disagrees with, *id.* § 725.419(b), thereby "teeing up those issues for an ALJ," *Joseph Forrester Trucking*, 987 F.3d at 586. And the district director transmits, among other things, a statement "of contested and uncontested issues in the claim" to the Office of Administrative Law Judges. 20 C.F.R. § 725.421(b)(7). Relatedly, a party may specify in writing "any contested issue of fact or law" on which a hearing should be held. *Id.* § 725.451. Basically, then, the dispute-resolution process works like a funnel, narrowing the issues as the case progresses.

Before the ALJ, issue exhaustion is plainly one of the rules of the game. The very purpose of an ALJ hearing "shall be to resolve contested issues of fact or law." *Id.* § 725.455(a). And that hearing is specifically "confined to those contested issues which have been identified by the district director or any other issue raised in writing before the district director." *Id.* § 725.463(a). The "only" scenario in which an ALJ may consider "a new issue" is "if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director." *Id.* § 725.463(b). A party can raise that new issue "at any time" prior to the ALJ's decision; the ALJ meanwhile retains discretion to remand to the district director, resolve the new issue, or refuse to consider it. *Id.* What is

clear, though, is that the new issue must be raised. Playing by this basic rule cannot be too much to ask.

The Board's review on appeal reinforces the requirement of issue exhaustion in front of an ALJ. If a party timely appeals an ALJ's decision, the Board cannot simply start from scratch. To wit, it "is not empowered to engage in a de novo proceeding or unrestricted review of a case brought before it." *Id.* § 802.301(a). Instead, the Board is only "authorized to review" the "conclusions of law on which the decision or order appealed from was based." *Id.* And it can only set aside a conclusion of law if it is not "in accordance with law." *Id.* The clear implication, then, is that parties may not raise new issues of law willy-nilly before the Board. That its review is limited to "the record developed at the hearing" before the ALJ further reinforces this point. *Id.* § 802.301(b); *see id.* ("Parties shall not submit new evidence to the Board.").

On the whole, these regulations "require that legal questions be raised before the ALJ to be reviewable by the Board." *Joseph Forrester Trucking*, 987 F.3d at 588. Add the Board's limited scope of review and the requirement that parties raise new issues before the ALJ renders a decision, and the sum is that Department regulations require issue exhaustion before the ALJ.

2.

We next consider issue exhaustion before the Board. Here the obligation is straightforward: a regulation requires any petition for review to "list[] the specific issues to be considered on appeal." 20 C.F.R. § 802.211(a); *see also id.* § 802.11(b) (accompanying brief must "[s]pecifically state[] the issues to be considered by the

Board"). The Supreme Court has cited this very regulation as an example of issue exhaustion. *Sims*, 530 U.S. at 108. No wonder, then, that other circuits have mentioned the same regulation in holding that issue exhaustion is required before the Board. *Bryan*, 937 F.3d at 749–50; *Zumwalt v. Nat'l Steel & Shipbuilding Co*., 796 F. App'x 930, 931 (9th Cir. 2019); *see also David Stanley Consultants*, 800 F. App'x at 127. No surprise, either, that our own court has refused to consider issues that parties failed to raise before the Board. *See, e.g.*, *Armco, Inc. v. Martin*, 277 F.3d 468, 476 (4th Cir. 2002) (waiver where party "did not present these issues to the Board"); *Consolidation Coal Co. v. Necessary*, 272 F. App'x 273, 279 (4th Cir. 2008) ("[W]e will not consider the argument that Consol chose not to make before the BRB."). At this point, we need not spill more ink. Issue exhaustion is required before the Board.

3.

Finally, we examine whether a remand by the Board to an ALJ changes anything. Edd Potter claims that none of the regulations governing issue exhaustion apply on remand. So as Edd Potter would have it, a remand turns back the clock and allows a party to raise whatever new issues it would like, effectively absolving it of any earlier forfeiture.

That cannot be. Not only would this throw a monkey wrench into a finely tuned system; it would also ignore a statute, two regulations, and decades of Board practice making clear that a remand does not lead to a procedural free-for-all. We hold that the happenstance of a remand does not by itself excuse an earlier failure to exhaust an issue before the ALJ and the Board.

Start with the relevant statute and corresponding regulations, which circumscribe what happens on remand. The Black Lung Benefits Act incorporates procedures that allow remand by the Board "to the [ALJ] for further appropriate action." *See* 30 U.S.C. § 932(a) (incorporating 33 U.S.C. § 921(b)(4)). Two Department regulations elaborate. The first states that the Board may "remand the case for action or proceedings consistent with the decision of the Board." 20 C.F.R. § 802.404(a). The second mandates that on remand "such additional proceedings shall be initiated and such other action shall be taken as is directed by the Board." *Id.* § 802.405(a). These provisions, taken together, limit the scope of a remand. They instruct the ALJ to follow orders rather than to go rogue, and they direct the parties to go and do likewise. It is difficult to imagine how introducing new issues at this stage—especially out of left field, never once mentioned before—could be consistent with or follow the directions of the Board.

Board practice confirms that conclusion. First, the Board naturally refuses to consider issues raised in an appeal when they could have been raised earlier. *See Stahla v. Northland Servs.*, 2017 WL 1279641, at *4 (Ben. Rev. Bd. Mar. 24, 2017) ("It is well-established that a party generally may not raise a new issue on appeal to the Board. This doctrine also bars a party from challenging an adverse finding of an [ALJ] in a second appeal where the party had the opportunity to raise the issue before and failed to do so.") (citation omitted); *Verderane v. Jacksonville Shipyards, Inc.*, 14 Ben. Rev. Bd. Serv. 220.15, 226 (1981); *Burbank v. K.G.S., Inc.*, 13 Ben. Rev. Bd. Serv. 467, 468 (1981). If the Board refuses to consider issues that could have been raised earlier, that is strong evidence that they should have been raised earlier, before the remand took place.

Second, the Board consistently applies the mandate rule, whereby an ALJ must comply with the Board's directions on remand. *See, e.g.*, *Kunselman v. Canterra Coal Co.*, 2000 WL 35927535, at *3 (Ben. Rev. Bd. Feb. 28, 2000) ("[T]he [ALJ] erred in failing to follow the Board's remand instructions [because an] inferior court has no power or authority to deviate from the mandate issued by an appellate court."); *Dobson v. Todd Pac. Shipyards Corp.*, 1995 WL 17960189, at *7 (Ben. Rev. Bd. Apr. 11, 1995) ("It is error for an [ALJ] to fail to follow the Board's instructions on remand."). Applying the mandate rule is well within the Board's rights. 18B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4478.3 (3d ed. 1998).

Both the governing regulations and the Board's practice comport with this court's application of the mandate rule in black lung cases. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 267 (4th Cir. 2002) (reprimanding ALJ for failing to comply with mandate from the court of appeals). The mandate rule requires that, on remand, the lower body must "implement both the letter and spirit" of the mandate. *Id.* (quoting *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993)). A remand therefore does not throw open the floodgates. For instance, "any issue conclusively decided . . . on the first appeal is not remanded." *Doe v. Chao*, 511 F.3d 461, 465 (4th Cir. 2007) (quoting *United States v. Husband*, 312 F.3d 247, 251 (7th Cir. 2002)). Likewise, any issue "impliedly decided" on appeal is "foreclose[d]." *Bell*, 5 F.3d at 66.

Most relevant here, the mandate rule means that "any issue that could have been but was not raised on appeal is waived and thus not remanded." *Doe*, 511 F.3d at 465 (quoting *Husband*, 312 F.3d at 250); *see also S. Atl. Ltd. P'ship of Tenn. v. Riese*, 356

F.3d 576, 584 (4th Cir. 2004) ("Under the mandate rule, a district court cannot reconsider issues the parties failed to raise on appeal."). So when a party fails to present an issue, it is not allowed to "use the accident of a remand to raise . . . an issue that [it] could just as well have raised in the first appeal." *United States v. Pileggi*, 703 F.3d 675, 680 (4th Cir. 2013) (quoting *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996)).

By its operation, the mandate rule serves the "key interests" of "hierarchy and finality." *Doe*, 511 F.3d at 465. It protects "the very value and essential nature of an appeal" while preventing "[r]epetitive hearings" that "waste judicial resources." *Id.* (quoting *United States v. O'Dell*, 320 F.3d 674, 679 (6th Cir. 2003)). At bottom, it is an outgrowth of common sense, and it ensures the orderly resolution of disputes rather than allowing litigation to proceed in dribbles.

The Department's regulations, the Board's consistent practice, and the mandate rule's application all point in the same direction as logic. On remand, parties may not raise whatever new issues they would like if they have previously failed to bring those issues to the attention of the ALJ and the Board. The mere fact of a remand does not wipe the whole slate clean.

B.

Having found that issue exhaustion is required before the ALJ and before the Board, we next ask whether Edd Potter exhausted its Appointments Clause claim. Answering that question is easy: no, it did not. In fact, it forfeited the issue twice over. Edd Potter made no mention of an Appointments Clause challenge when this case was initially before the ALJ, and it stayed mum on its first appeal to the Board. Instead of

timely raising its claim, Edd Potter waited until the Board rejected its attempt to entirely extricate itself from the case. Only then did it ask for a do-over.

C.

Because Edd Potter did not exhaust its Appointments Clause challenge, we finally ask whether its forfeiture should be excused. While the Supreme Court has previously declined to add unwritten exceptions to exhaustion requirements, *see Ross v. Blake*, 578 U.S. 632, 641–42 (2016), it has also indicated that some exhaustion provisions "might be best read to give judges the leeway to create exceptions" or to themselves "incorporate standard administrative-law exceptions," *id.* at 642 n.2. Edd Potter tenders two bases for excusing its double forfeiture, but we find neither persuasive.

Edd Potter first suggests that the "futility exception to exhaustion requirements" applies, maintaining that the ALJ and the Board "are powerless to grant the relief requested." *Carr*, 141 S. Ct. at 1361. While it is true that bringing facial constitutional challenges "outside the limited scope of an ALJ's adjudicative authority might well be futile," *Joseph Forrester Trucking*, 987 F.3d at 591, this is not such a challenge. Edd Potter does not think the Black Lung Benefits Act facially unconstitutional; it instead contests "how the Department of Labor *applied* its statutory appointments power." *Bryan*, 937 F.3d at 753.

Both ALJs and the Board can hear such as-applied challenges. *Joseph Forrester Trucking*, 987 F.3d at 591 (ALJ); *Bryan*, 937 F.3d at 753 (Board). Both ALJs and the Board can grant the requested relief of reassignment to a different ALJ. *Joseph Forrester Trucking*, 987 F.3d at 591 (ALJ); *Bryan*, 937 F.3d at 753 (Board). And both ALJs and the

Board did in fact grant that relief in "legions" of other black lung cases when the Appointments Clause challenge was "properly raised." *Joseph Forrester Trucking*, 987 F.3d at 591–92; *see, e.g.*, *Miller v. Pine Branch Coal Sales, Inc.*, 2018 WL 8269864, at *2–3 (Ben. Rev. Bd. Oct. 22, 2018) (Board granting relief); *McNary v. Black Beauty Coal Co.*, 2014-BLA-5373, Order Granting Employer's Motion to Reassign (OALJ Aug. 22, 2018) (ALJ granting relief); *Patrick v. Virgil Raleigh Coal Co.*, 2013-BLA-6129, Order Granting Motion for Reconsideration and Reassignment (OALJ Sept. 28, 2018) (ALJ granting relief). Even if no constitutionally appointed ALJs existed at the time of the ALJ's decision in this case, that does not excuse Edd Potter's failure to exhaust the issue before the Board, which could have assigned the matter to a constitutionally appointed ALJ on remand. In these circumstances, allegations of futility ring hollow.

Next, Edd Potter claims that *Lucia* was an intervening change in the law. It says that we should only ask it for "conscientiousness, not clairvoyance" and thus implies that raising its Appointments Clause challenge earlier would have required a crystal ball. Appellant's Br. at 16 (quoting *Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 92 (2d Cir. 2009)). We disagree. The intervening-law exception only applies when an issue "was not previously available," that is, when "there was strong precedent" that makes the failure to raise "not unreasonable." *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605–06 (4th Cir. 1999) (citation omitted). The exception exists to "protect those who, despite due diligence, fail to prophesy a reversal of established adverse precedent." *United States v. Chittenden*, 896 F.3d 633, 639 (4th Cir. 2018) (quoting *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 374 (6th Cir. 2007)).

That exception does not apply here. Appointments Clause challenges were available before *Lucia*. Besides, there was no adverse precedent preventing Edd Potter from bringing that challenge. To the contrary: *Lucia* plainly stated that *Freytag*—a case decided in 1991—"says everything necessary to decide this case." 138 S. Ct. at 2053. And in the years leading up to *Lucia*, the issue of ALJ appointments was alive and kicking. Numerous litigants had, before *Lucia*, made the argument that ALJs in various agencies were officers of the United States. *See, e.g.*, *Burgess v. FDIC*, 871 F.3d 297, 299 (5th Cir. 2017); *Bennett v. SEC*, 844 F.3d 174, 177–78 (4th Cir. 2016). The Tenth Circuit had held as much. *Bandimere v. SEC*, 844 F.3d 1168, 1188 (10th Cir. 2016). So too plenty of black lung litigants pressed the point before *Lucia* was decided. *See, e.g.*, *Miller*, 2018 WL 8269864, at *1 (challenge raised in 2017). This issue was very much present before *Lucia*. Raising it did not require clairvoyance. It only required awareness, and this is what Edd Potter lacked. We thus decline to accept its arguments for excusing its forfeiture in this case.

D.

Had Edd Potter raised and thereby preserved the Appointments Clause issue in a timely fashion, it would have had everything that it seeks. It would have gotten a new hearing before a different ALJ. And it would have been able to there contest the determination that it was the responsible operator. Instead, Edd Potter waited. It waited until the ALJ and the Board reached an unfavorable decision and refused to remove it altogether from the case. It waited until it knew for sure that it would be held responsible if Salmons was found to be totally disabled.

We do not know why Edd Potter waited, and we in no way wish to impugn its motives. Yet we cannot close our eyes to the fact that allowing parties to raise issues for the first time on remand does nothing to discourage sandbagging. *Freytag*, 501 U.S. at 895 (Scalia, J., concurring in part and in the judgment). Indeed, what Edd Potter proposes encourages parties to take a second bite of the apple when the first is not to their liking. Allowing this could not help but disrupt the ordinary processes of black-lung decision-making.

Procedure is often about encouraging a certain degree of expedition, and issue exhaustion is no different. Without it, "a party could wait until an ALJ [or the Board] renders an adverse decision before raising an Appointments Clause challenge, with the potential to receive a new hearing before a new (and perhaps more sympathetic) ALJ." *Joseph Forrester Trucking*, 987 F.3d at 592. This undoubtedly gums up the works and induces delay in already lengthy proceedings.

It is not as though expedition in black-lung cases is in danger of sacrificing deliberation. Salmons filed his claim in 2011, and it is not abnormal for these cases to take several years. On average, it takes 21 months for a black lung case to go from docketing to disposition before an ALJ. Office of Administrative Law Judges, Quarterly Report on Case Inventory for 1st Quarter FY 2022, at 21. Yet that timespan does not even account for prior proceedings before the district director, subsequent proceedings before the Board, or later remands. Also, who qualifies as a responsible operator, and whether that operator should pay benefits, requires delving into a miner's work history and

conducting thorough medical examinations. No one expects these decisions to be resolved in a day.

Still, we must be cognizant of the costs of undue delay. Austine Salmons filed his benefits claim 3,915 days before argument in this case. Over the course of almost eleven years, the system set up to adjudicate his claim did so. As the Director notes, the claimants in these cases are often elderly persons whose lungs have lost their flexibility and who struggle even to breathe. *See* Federal Resp't Br. at 22–23. Returning to square one at least for this miner would deal a very heavy blow. If the law required it, that would be one thing. But it did not. Edd Potter forfeited its Appointments Clause claim not once but twice. Its two wrongs, or at least omissions, do not make for a right.

III.

For the foregoing reasons, the petition for review is denied.

DENIED

RICHARDSON, Circuit Judge, concurring in the judgment:

I agree that Edd Potter loses. A *plausible* argument exists that neither agency regulations nor any mandate rule prevented Edd Potter from raising the Appointments Clause issue before the ALJ *after remand* from the Board. But Edd Potter forfeited that argument by failing to raise it. And without that argument, I would deny Edd Potter's petition.

As the majority explains, the agency certainly has some exhaustion requirements. But it seems plausible that none applied before the ALJ after remand here.

First, the ALJ may consider an issue not raised before the district director "only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director." 20 C.F.R. § 725.463(b). But one may reasonably argue that is the circumstance here: A challenge to an ALJ's appointment may not have been reasonably ascertainable before the district director given that an ALJ had yet to be assigned. If so, then Edd Potter was not required to raise his challenge to the district director, which is the first step in the process.

And there is also an issue-exhaustion requirement at the Board level (the last step in the agency's process). 20 C.F.R. §§ 725.481, 802.301(a). But that requirement limits the ability of the Board to consider issues not first raised to the ALJ. So Edd Potter could not have raised the Appointments Clause challenge before the Board if it failed to do so before the ALJ. *See Joseph Forrester Trucking v. Dir., Off. of Workers' Comp. Programs*, 987 F.3d 581, 588 (6th Cir. 2021); *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 749–50 (6th Cir. 2019). But here, Edd Potter raised the Appointments Clause

challenge for the first time before an ALJ on remand. So one might well argue that the Board-level exhaustion requirement does not apply here.

The Government argues we should limit parties' ability to raise a new issue after remand to the ALJ. But is unclear how the agency regulations create that requirement. And even if we analogize to the mandate rule in traditional courts, it remains unclear how the Government's argument works. When a case is remanded to a district court, parties can generally raise a new issue unless (1) the issue was addressed by the lower court and not raised on appeal, or (2) raising the issue would contradict express or implicit rulings made by the appellate court. *See S. Atl. Ltd. P'ship of Tenn. v. Riese*, 356 F.3d 576, 584 (4th Cir. 2004). The initial proceedings before the ALJ and the Board addressed no Appointments Clause issue. It is thus unclear why raising this issue on remand would be *inconsistent* with the Board's decision or how the issue had been decided by the ALJ so as to require raising it before the Board the first time. Thus, any mandate rule might not apply here.

So a plausible argument exists that no exhaustion rule barred Edd Potter from raising the Appointments Clause challenge before the ALJ on remand. But I would not reach the ultimate merit of this path. I would instead reject it because Edd Potter failed to map out this pathway in their brief. Edd Potter had to do more than just claim that the Board erred. They had to explain how the Board erred—or at least be close enough put

the reviewing court on the right track. *See Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 153 n.6 (4th Cir. 2012). This they failed to do.*

Even so, we may consider arguments not raised with specificity by the parties. But there is no reason to do so in this public-benefits case that has already dragged on for over a decade.

* Rather than argue that it could raise the Appointment Clause challenge on remand to the ALJ under the agency's regulations, Ed Potter argues instead that it was not required to raise the constitutional issue before the agency. *See, e.g.*, Pet'rs' Br. 2 ("The question presented is whether a litigant must raise Appointments Clause challenges to agencies lacking authority to decide those challenges before obtaining judicial review . . . .").