U.S. Department of Labor

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

BRB No. 20-0094 BLA

STEVY C. BAILEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL COMPANY	)	
	)	
	)	
and	)	DATE ISSUED: 10/25/2022
	)	
PEABODY ENERGY CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER EN BANC

Appeal of the Decision and Order Awarding Benefits in a Subsequent Claim of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

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

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD, ROLFE, GRESH, and JONES, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits in a Subsequent Claim (2018-BLA-06036) pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim[1] filed on March 9, 2016.

The ALJ found Employer is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier. She accepted the parties' stipulation that Claimant has twenty-six years of underground coal mine employment and found he established complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and establishing a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). She further found Claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203, and awarded benefits.

On appeal, Employer argues the district director, the Department of Labor (DOL) official who initially processes claims, is an inferior officer who was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[2] It

[1] This is Claimant's third claim for benefits. The district director denied his initial claim because he failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. The district director denied his second claim by reason of abandonment. Director's Exhibit 2. A denial by reason of abandonment is "deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

[2] 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

further contends the ALJ erred in finding Peabody Energy is the liable carrier.[3] Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's constitutional arguments and affirm the ALJ's determination that Peabody Energy is liable for benefits.[4]

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.[5] 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: District Director

Citing *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018), Employer contends the district director lacked the authority to identify the responsible operator and process this case because the district director is an "inferior officer" of the United States not properly appointed under the Appointments Clause. Employer's Brief at 37-44 (unpaginated).

> 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.

[3] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant has twenty-six years of underground coal mine employment, he has complicated pneumoconiosis and invoked the irrebuttable presumption at Section 411(c)(3), his complicated pneumoconiosis arose out of coal mine employment, and he established a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.203, 718.304, 725.309; Decision and Order at 7, 14-15.

[4] The Director filed his response brief accompanied by a Motion to Accept Response Brief Out of Time. No party has objected. The Board accepts the Director's response brief as part of the record. 20 C.F.R. §§802.212, 802.217.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Dir., OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

We conclude Employer forfeited its Appointments Clause challenge. Appointments Clause issues are "non-jurisdictional" and thus are subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Edd Potter Coal Co. v. Dir., OWCP* [*Salmons*], 39 F.4th 202, 207 (4th Cir. 2022) (because Appointments Clause challenges are not jurisdictional, "they are 'subject to ordinary principles of waiver and forfeiture'") (quoting *Joseph Forrester Trucking v. Dir., OWCP* [*Davis*], 987 F.3d 581, 587 (6th Cir. 2021)). Indeed, it is a "settled rule in seemingly every forum for dispute resolution," including black lung claims, "that [an adjudicator'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.'" *Davis*, 987 F.3d at 592 (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962)) (cautioning against excusing forfeited arguments because of the risk of sandbagging); *Fleming v. USDA*, 987 F.3d 1093, 1100 (D.C. Cir. 2021) (raising issues in an untimely fashion is not proper exhaustion and does not preserve those issues for review); *In re DBC*, 545 F.3d 1373, 1380 (Fed. Cir. 2008) (declining to excuse waived Appointments Clause challenge to discourage "sandbagging").

The regulations implementing the Act clearly set out the steps a party must take to preserve an issue before the district director, ALJ, and Board. After a claim is filed, the district director shall take such action as is necessary to develop, process, and make determinations with respect to the claim. 20 C.F.R. §725.401. As the district director processes a claim, the parties have opportunities to raise issues, make arguments, and submit evidence. *See, e.g.*, 20 C.F.R. §§725.408, 725.410, 725.412, 725.414. "After the evidentiary development of the claim is completed and all contested issues, if any, are joined," the district director must issue a proposed decision and order "which purports to resolve a claim on the basis of the evidence submitted to or obtained by the district director." 20 C.F.R. §725.418.

Upon receiving a proposed decision and order from the district director, a party, to seek further review, must object to that proposal by "'specify[ing] the findings and conclusions' of the district director" with which it disagrees. *Salmons*, 39 F.4th at 208 (quoting 20 C.F.R. §725.419(b)); *Davis*, 987 F.3d at 588. The party must then request a hearing before the Office of Administrative Law Judges (OALJ) and, in doing so, specifically highlight "'any contested issue of fact or law' on which a hearing should be held." *Salmons*, 39 F.4th at 208 (quoting 20 C.F.R. §725.451); *Davis*, 987 F.3d at 588. In any claim in which a hearing is requested "and with respect to which the district director has completed evidentiary development and adjudication without having resolved all contested issues," the district director must refer the claim to the OALJ for a hearing. 20 C.F.R. §725.421(a).

Failure to contest an issue at this stage has consequences. In any case referred to the OALJ for a hearing, the district director is required to provide a "statement . . . of contested and uncontested issues in the claim." 20 C.F.R. §725.421(b)(7). The "hearing *shall be confined* to those contested issues which have been identified by the district director . . . or any other issue raised in writing before the district director." 20 C.F.R. §725.463(a) (emphasis added). An ALJ may consider a new issue "only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director."[6] *Salmons*, 39 F.4th at 208 (quoting 20 C.F.R. §725.463(b)). Absent application of the exception for issues not reasonably ascertainable, failure to contest an issue before the claim is transferred to the OALJ constitutes forfeiture of the issue. *Johnson v. Royal Coal Co.*, 326 F.3d 421, 425 (4th Cir. 2003) (holding 20 C.F.R. §725.463(a) is among the "provisions [that] define the outer limit of the scope of the hearing, preventing its expansion"); *Kott v. Dir., OWCP*, 17 BLR 1-9 (1992); *Thornton v. Dir., OWCP*, 8 BLR 1-277 (1985).

The Board's review of legal questions, in turn, is limited to "conclusions of law on which the decision or order appealed from was based." 20 C.F.R. §802.301(a); *Salmons*, 39 F.4th at 208 ("The Board's [limited scope of] review on appeal reinforces the requirement of issue exhaustion in front of an ALJ."); *Davis*, 987 F.3d at 588; *see* 33 U.S.C. §921(b)(3).[7] Thus, the Board routinely declines to consider arguments not properly raised below, including untimely Appointments Clause challenges. *See, e.g.*, *Salmons*, 39 F.4th at 210 (affirming Board's holding that the employer forfeited its Appointments Clause challenge by waiting until after the Board had remanded the case to the ALJ to raise it); *Davis*, 987 F.3d at 588 (affirming Board's holdings that three employers forfeited Appointments Clause arguments as consistent with Board's decades-long, "near black-letter" application of "the principle that issues not raised before the ALJ are forfeited");

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[6] Where an issue is not reasonably ascertainable, a party may raise it "at any time after a claim has been transmitted by the district director to the [OALJ] and prior to decision." 20 C.F.R. §725.463(b). An ALJ then may "in his or her discretion, either remand the case to the district director with instructions for further proceedings, hear and resolve the new issue, or refuse to consider such new issue." *Id.*

[7] 33 U.S.C. §921(b)(3) states:

> The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record.

Powell v. Serv. Emps. Int'l, Inc., 53 BRBS 13, 15 (2019) (Appointments Clause argument not raised to the ALJ is forfeited); *Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 11 (2019) (Appointments Clause argument forfeited when first raised in a motion for reconsideration to the ALJ).

Employer asserted for the first time during the June 5, 2019 hearing that the district director was not properly appointed and thus lacked authority to adjudicate this claim, and it waited until filing its October 4, 2019 post-hearing brief to provide any substantive argument supporting its position. Hearing Transcript at 8-9; Employer's Post-Hearing Brief at 7-12. Employer failed, however, to raise these arguments during the preceding three years, either while this case was pending before the district director or in its request for a hearing to the OALJ, in contravention of the black lung issue exhaustion regulations. 20 C.F.R. §§725.419(b) (any response to a proposed decision and order must specify the findings and conclusion with which the responding party disagrees), 725.451 (after the district director issues a 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).

Employer does not argue it followed the regulatory requirements at 20 C.F.R. §§725.419(b), 725.451 or allege it identified the Appointments Clause argument as a contested issue to the district director or that the district director identified her authority to process claims as a contested issue to be addressed at the hearing before the OALJ. Moreover, it does not argue that the issue was not "reasonably ascertainable" under the terms of the regulation, the regulatory requirements are inapplicable to the issue, or its failure to meet them should be excused. *See* Employer's Brief at 37-44 (unpaginated). The record thus establishes Employer did not adequately preserve the issue for appellate review by complying with the applicable regulatory requirements.

After the district director issued a Proposed Decision and Order on April 3, 2018, Employer responded by rejecting the district director's findings, requesting a hearing before an ALJ, and contesting its designation as the responsible operator and Claimant's entitlement to benefits. Director's Exhibits 45, 51, 55. Employer did not, however, identify the district director's authority to process claims as a contested issue the ALJ must resolve. Director's Exhibits 45, 51, 55. Whereas Employer raised its concerns and provided argument regarding the ALJ's appointment the very next month after submitting its request for a hearing, weeks before the district director transferred the case to the OALJ, it waited more than three years after the claim had been initially filed with the district director, and nearly thirteen months after the claim was transferred to the ALJ, to raise its

arguments concerning the district director's appointment.[8] Director's Exhibits 4, 52, 55; Employer's June 21, 2018 Notice That it is Preserving as an Issue Whether the ALJ is Properly Appointed. Allowing Employer to upend three years of adjudication by sending the claim back to the district director to restart the process—all based on a belated argument Employer had at its disposal from the beginning—violates the regulations and improperly encourages sandbagging. *See Davis*, 987 F.3d at 590 (due to the attenuated nature of black lung benefits claims, "the Board's regulatory scheme disfavors allowing an operator to undo years of proceedings based on arguments at its disposal from the start").

In light of the above, we conclude Employer forfeited its right to challenge the district director's authority to identify the responsible operator and process this case. Because this issue was not listed as a contested issue in the transmission of the record from the district director to the OALJ, the ALJ was precluded from addressing it unless it was "not reasonably ascertainable." *Salmons*, 39 F.4th at 208; 20 C.F.R. §725.463(b). Employer did not argue before the ALJ and does not contest before us that it was not reasonably ascertainable.[9] *Davis*, 987 F.3d at 590 ("a party must touch each base of the preservation process during the administrative and court proceedings"); 20 C.F.R. §725.463(b); Director's Exhibit 55. Nor has it shown the regulation's terms are inapplicable or should be waived. Since it failed to comply with the issue exhaustion

[8] Even when Employer raised the issue of the district director's authority at the hearing, it did not press the issue but, rather, by its own admission raised the issue solely to preserve it for appeal with no acknowledgment of the rules governing issue preservation. Hearing Transcript at 8-9; *see Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018) (to merely "acknowledge an argument is not to make an argument" and assertions lacking developed argument are forfeited).

[9] Moreover, because Employer did not actually argue to the ALJ or request a ruling below that the issue was not reasonably ascertainable when the claim was before the district director, there is no legal determination for the Board to review on appeal. 33 U.S.C. §921(b)(3) (Board "authorized to hear and determine appeals raising a substantial question of law or fact . . . taken from decisions with respect to claims"); 20 C.F.R. §802.301(a) (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., OWCP* [*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."). Further, Employer has failed to lay the required factual predicates for action; nowhere in the record does the process for appointing district directors appear. Consequently, the Board does not have before it the requisite facts for review and analysis.

regulations, Employer forfeited its challenge and is not entitled to our consideration of the issue. We therefore decline to consider it.[10] *See Salmons* 39 F.4th at 210; *Davis*, 987 F.3d

[10] Our concurring colleagues assert the Board's issue exhaustion regulations are mandatory claims-processing rules and not statutorily created jurisdictional mandates. Thus, citing *Fort Bend Cnty. v. Davis*, they argue Claimant and the Director have forfeited their exhaustion defense to the Appointments Clause argument by not raising it. 587 U.S. , 139 S. Ct. 1843, 1846 (2019). We acknowledge the issue exhaustion regulations are mandatory claims-processing rules and not jurisdictional. *See Davis*, 987 F.3d at 587 (describing the "regulatory exhaustion requirement" in black lung claims as a "claims-processing rule"). Even so, 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. Oliver*, 878 F.3d 120 (4th Cir. 2017); *Long v. Atl. City Police Dep't*, 670 F.3d 436 (3d Cir. 2012); *United States v. Gaytan-Garza*, 652 F.3d 680 (6th Cir. 2011); *United States v. Mitchell*, 518 F.3d 740 (10th Cir. 2008); *see also Zhong v. U.S. Dep't of Just.*, 480 F.3d 104, *en banc reh'g 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").

Notably, the concurrence concedes that the Board has discretion to enforce issue exhaustion requirements absent it being raised as an affirmative defense, asserting only that such discretion should be invoked "rare[ly]" and concluding this case does not qualify. *Infra* p. 21. But the concurrence's analysis fails to adequately recognize the significant disruption and delay that untimely, underdeveloped Appointments Clause defenses can cause after years of litigation, both before the Board and below. Given the already attenuated nature of black lung proceedings, during which it is not uncommon for miners to die without ever seeing their claims resolved, the Board retains a separate interest in ensuring judicial efficiency and fairness, and proper adversarial vetting, by holding such defenses must be raised at the earliest possible opportunity, as the regulations plainly require. *See Edd Potter Coal Co. v. Dir., OWCP* [*Salmons*], 39 F.4th 202, 212 (4th Cir. 2022) ("[W]e cannot close our eyes to the fact that allowing parties to raise issues for the first time on remand does nothing to discourage sandbagging. . . . Allowing this could not help but disrupt the ordinary processes of black-lung decision-making."); *Davis*, 987 F.3d at 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[.]"); *see also Angle v. United Pocahontas Coal Co.*, 1 BLR 1-3, 1-4 (1976) (because the employer failed to timely challenge the authority of the hearing officer to conduct the hearing, the decision

at 588; *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 402-03 (6th Cir. 2020) (the employer forfeited its Appointments Clause argument by failing to follow the Board's issue-exhaustion requirements); *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 754 (6th Cir. 2019) (the employers forfeited their Appointments Clause arguments by failing to exhaust them with the Board); *Energy W. Mining Co. v. Lyle*, 929 F.3d 1202, 1206 (10th Cir. 2019) (the employer forfeited its Appointments Clause challenge by failing to raise it before the Board); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018)

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below was valid); *Fields v. A.K.P. Coal Co.*, 3 BRBS 269, 283-84 (1976), *modified on other grounds on recon.*, 4 BRBS 228 (1976) ("[W]here objection to the qualification of a hearing examiner is not made during proceedings before him, fairness to the parties requires that a reviewing court not permit that objection to be raised as an issue for the first time during the appellate process . . . .") (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952)).

Moreover, the concurrence does not dispute that Employer clearly forfeited its Appointments Clause argument by failing to raise it in accordance with the regulatory issue exhaustion requirements. In fact, it concedes that such forfeiture is routinely treated as "dispositive" in innumerable Board decisions declining to grant Appointments Clause relief. *Infra* p. 22. Yet, its primary rationale for treating this case differently—that the parties, as a litigation strategy, might "prefer" to have the Board address the merits of the Appointments Clause question—extends the "party presentation" principle beyond its limits. Aside from identifying the general principle that courts "rely on the parties to frame the issues for decision," *see Greenlaw v. United States*, 554 U.S. 237, 245 (2008), the concurrence provides no support for its assertion that the parties, by strategy or preference, can bind the Board, or any appellate tribunal for that matter, to consider an untimely, far-reaching constitutional question that aims to upend years of litigation. *See generally United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) ("the party presentation principle is supple, not ironclad").

To be clear, Employer asks the Board to remand this claim not just for a new ALJ hearing, *see Lucia*, 138 S. Ct. at 2055, it asks us to send the claim back to the district director to start the *entire* claims process anew. Our acknowledgment of Employer's obvious forfeiture and our consistent application of Board forfeiture jurisprudence falls well short of an impermissible violation of the party presentation principle. *See, e.g.*, *Sineneng-Smith*, 140 S. Ct. at 1579, 1581-82 (abuse of discretion for appellate court to "takeover" or "radically transform" an appeal); *Greenlaw*, 554 U.S. at 244 (error for appellate court to alter a lower court's judgment to benefit a nonappealing party).

(the employer forfeited its Appointments Clause argument by failing to raise it in its opening brief).

Responsible Insurance Carrier

Claimant last worked in coal mine employment for Eastern Associated Coal Company (Eastern) from 1969 to 1998. Director's Exhibits 7-8; Hearing Transcript at 17. By the end of Claimant's employment, Eastern was a subsidiary of, and self-insured for black lung liabilities through, Peabody Energy. Director's Response at 2; Employer's Brief at 49 (unpaginated); Hearing Transcript at 15.

Patriot Coal Corporation (Patriot) was initially Peabody Energy's subsidiary. In 2007, nine years after Claimant's coal mine employment ended, Peabody Energy sold Eastern to Patriot and Patriot became an independent company. Director's Exhibit 21 at 1, 4-57. On March 4, 2011, the DOL authorized Patriot to self-insure for black lung claim liabilities, "retro-active to July 1, 1973," including for claims filed before Patriot purchased the Peabody Energy subsidiaries. Director's Exhibit 22 at 5-6. This authorization determined the amount of potential liability to insure the obligation, acknowledged Patriot's deposit of U.S. Treasury funds with the Federal Reserve Bank on behalf of the DOL in satisfaction of the liability obligation, and released the letter of credit Patriot financed under Peabody Energy's self-insurance program. *Id.* at 5. In 2015, Patriot went bankrupt. Director's Exhibit 27.

Employer admits Eastern is the correct responsible operator and was self-insured by Peabody Energy on the last day it employed Claimant.[11] Employer's Brief at 3, 49 (unpaginated). But it asserts the liability issue is that of the responsible carrier, not of the responsible operator, and the Black Lung Disability Trust Fund (Trust Fund), not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy. *Id.* at 1-2, 49. It argues the ALJ erred in finding it liable for benefits because: (1) 20 C.F.R.

[11] Eastern Associated Coal Company (Eastern) qualifies as a potentially liable operator because it is undisputed that: (1) Claimant's disability arose at least in part out of employment with Eastern; (2) Eastern operated a mine after June 30, 1973; (3) Eastern employed Claimant as a miner for a cumulative period of at least one year; (4) Claimant's employment included at least one working day after December 31, 1969; and (5) Eastern is capable of assuming liability for the payment of benefits through Peabody Energy Corporation's (Peabody Energy's) self-insurance coverage. 20 C.F.R. §725.494(a)-(e). Because Eastern was the last potentially liable operator to employ Claimant, the ALJ designated Eastern as the responsible operator and Peabody Energy as the responsible carrier. Decision and Order at 17, 21-22.

§725.495(a)(4) precludes Peabody Energy's liability; (2) the DOL released Peabody Energy from liability; and (3) the Director is equitably estopped from imposing liability on Peabody Energy. *Id.* at 11-34. It maintains that a separation agreement—a private contract between Peabody Energy and Patriot—released Peabody Energy from liability and the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. *Id.* at 18. Further, it alleges the ALJ erred by excluding liability evidence attached as exhibits to the depositions it submitted to the ALJ. *Id.* at 2-5. Employer also asserts that allowing the district director to make an initial determination of the responsible carrier in instances involving potential Trust Fund liability violates its due process rights. *Id.* at 44-48.

The Director responds that Peabody Energy was never released from liability for claims under the Act. Director's Response at 23-28. Further, he asserts 20 C.F.R. §725.495(a)(4) does not preclude Employer's designation as the responsible operator. *Id.* at 28. In addition, he contends there is no basis for Employer's equitable estoppel argument. *Id.* at 32-35. The Director maintains Peabody Energy was properly designated as the responsible carrier because Claimant last worked for Eastern when it was self-insured through Peabody Energy, and there is no argument that it is incapable of paying benefits. *Id.* at 19-20. Finally, the Director urges the Board to reject Employer's due process arguments. *Id.* at 14-18.

Exclusion of Liability Evidence

To support its assertion that Patriot, and not Peabody Energy, is the liable carrier, Employer submitted: a 2007 Separation Agreement between Peabody Energy and Patriot; a March 4, 2011 letter from Steven Breeskin (the former head of the DOL Division of Coal Mine Workers' Compensation (DCMWC)) to Patriot; Patriot's authorization to self-insure; the depositions of Mr. Breeskin; and the depositions of David Benedict (a former DCMWC employee) with twenty-two attached exhibits.[12] Director's Exhibit 23; Employer's

[12] Attached to Mr. Benedict's deposition at Employer's Exhibit 1 are Exhibit 1, Decision Granting Authority to Act as a Self-Insurer; Exhibit 2, Patriot's Application to Self-Insure; Exhibit 3, a March 4, 2011 letter from Mr. Breeskin to Rob Mead; Exhibit 4, a January 28, 2011 letter from Mr. Mead to Mr. Benedict; Exhibit 5, a November 23, 2010 letter from Mr. Breeskin to Mr. Mead; Exhibit 6, a Self-Insurance Calculation Program printout; Exhibit 7, a Security Requirement Calculation worksheet for Patriot; Exhibit 8, a May 19, 2015 letter from Larry Boggess to Lawrence Botts; Exhibit 9, a Self-insurance Analysis for Patriot; Exhibit 10, a December 28, 2014 letter from Gary Steinberg to Jack Lushefski; Exhibit 11, Milliman Report; Exhibit 12, a December 31, 2013 claim listing for Patriot; Exhibit 13, April 16, 2014 Patriot DOL Audit Report Information; Exhibit 14, an April 7, 2014 letter from Michael Chance to Chris Clarke; Exhibit 15, a March 2014 document entitled "Department of Labor Meeting"; Exhibit 16, Table of Contents

Exhibits 1-4. The ALJ determined the exhibits attached to Mr. Benedict's deposition constituted documentary evidence pertaining to liability and, absent extraordinary circumstances, were required to be submitted to the district director. Order Granting in Part and Denying in Part Employer's Motion to Admit Deposition Transcripts and Accompanying Exhibits of Steven Breeskin and David Benedict (Order Granting and Denying) at 3-4 (unpaginated); *see* 20 C.F.R. §§725.414(d), 725.456(b)(1). Determining no extraordinary circumstances exist, she declined to admit into evidence the exhibits attached to the deposition. Order Granting and Denying at 3-4.

Employer initially argues the ALJ erred in excluding its exhibits because evidence pertaining to a carrier's liability is not subject to the limitations set forth at 20 C.F.R. §725.456(b)(1). Employer's Brief at 2-5 (unpaginated). We disagree.

A "carrier is required to discharge the statutory and regulatory duties imposed on the employer, thus stepping into its shoes." *Tazco, Inc. v. Dir., OWCP* [*Osborne*], 895 F.2d 949, 951 (4th Cir. 1990). The regulations thus specifically include the insurance carrier as a party that must be given adequate notice of the claim and an opportunity to defend on the question of its liability for the payment of benefits. 20 C.F.R. §§725.360(a)(4), 725.407(b); *see Osborne*, 895 F.2d at 952. Because the district director must identify the responsible operator or carrier before a case is referred to the OALJ, the regulations require that, absent extraordinary circumstances, liability evidence must be timely submitted to the district director. 20 C.F.R. §§725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000).

Employer also argues the ALJ erred in excluding its exhibits by requiring it to show extraordinary circumstances exist under 20 C.F.R. §725.456(b)(1). Employer's Brief at 4-5 (unpaginated). It asserts that because the Director is a party to the claim, and did not voluntarily share these exhibits with Employer, it need only show good cause for failing to timely exchange its evidence. *Id.* (citing 20 C.F.R. §725.456(b)(3)) (If a party does not demonstrate good cause for failing to exchange documentary evidence, including medical reports, twenty days prior to the hearing, the ALJ must either exclude the evidence or remand the case to the district director for consideration of that evidence.). Contrary to Employer's contention, the ALJ correctly found the good cause standard at 20 C.F.R. §725.456(b)(3) applies only to non-liability evidence, and the applicable regulation for

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document; Exhibit 17, December 31, 2013 report of Patriot's black lung liability cash flow for reported Federal claims; Exhibit 18, December 30, 2009 Valuation of Patriot's black lung liability; Exhibit 19, email chain; Exhibit 20, letter from Mr. Chance to Mark Schroeder; Exhibit 21, collection of various documents; Exhibit 22, December 15, 2014 email from Mr. Botts to James Linden.

admission of liability evidence is 20 C.F.R. §725.456(b)(1), which states: "[d]ocumentary evidence pertaining to the liability of a potential liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances." Order Granting and Denying at 3 (quoting 20 C.F.R. §725.456(b)(1)).

We likewise reject Employer's argument that its due process rights were violated because "discovery was cut off prematurely." Employer's Brief at 36 (unpaginated). As the Director correctly notes, Employer's argument is impermissibly vague as it does not identify who allegedly cut off discovery, the date on which discovery was ended, or what evidence it was prevented from obtaining. 20 C.F.R. §802.211(b) (arguments to the Board must include references to transcripts, pieces of evidence, and other parts of the record to which the petitioner wishes the Board to refer); *see Fish v. Dir., OWCP*, 6 BLR 1-107, 1-109 (1983); Director's Response at 23. We therefore affirm the ALJ's determination that the exhibits attached to Mr. Benedict's deposition constituted documentary liability evidence required to be submitted to the district director, and Employer has not established the requisite extraordinary circumstances to justify excusing its failure to do so. Order Granting and Denying at 3-4.

Letter of Credit

Employer maintains the March 4, 2011 letter from Mr. Breeskin to Patriot releasing a letter of credit financed under Peabody Energy's self-insurance program absolves Peabody Energy from potential liability under the Act. Employer's Brief at 11-18 (unpaginated) (citing 20 C.F.R. §§726.1, 726.101); Director's Exhibit 37. Further, Employer argues Mr. Benedict's deposition testimony establishes the DOL "explicitly consented to shifting the liability in this matter to Patriot."[13] Employer's Brief at 16

[13] Employer argues its position is supported by Mr. Benedict's testimony that, in his mind, Patriot maintained the letter of credit to secure Peabody Energy's legacy black lung claim liabilities. Employer's Brief at 13 (unpaginated) (citing Employer's Exhibit 1 at 282-83). Further, Employer contends Mr. Benedict's testimony that he had conversations with Peabody Energy about its desire to have securities released as it was shedding liabilities establishes that the return of the letter of credit was in exchange for Patriot's security. *Id.* at 13-14 (citing Employer's Exhibit 1 at 286). Employer also argues the DOL was aware of the legacy liabilities, based upon Mr. Benedict's testimony that he considered Peabody Energy's legacy claims in determining whether to authorize Patriot to self-insure. *Id.* at 14-15 (citing Employer's Exhibit 1 at 80-83). Finally, Employer points to Mr. Benedict's testimony that he understood Patriot's application to self-insure was for the purpose of covering all its liabilities, and that he accepted a $15 million security deposit, despite his

(unpaginated). Employer asserts the applicable regulations establish "that self-insured operators must meet a number of pre-requisites to qualify as a potential self-insurer," including the posting of security. *Id.* at 12. The "submission of that security by the operator," Employer argues, "establishes its liability." *Id.* Insofar as the DOL "releases said security," Employer contends "the self-insurer's obligations under the Act are terminated, as the security previously proffered by the self-insurer no longer exists." *Id.* Because the DOL informed Patriot that it was releasing the letter of credit that Employer claims "was the basis of Peabody Energy's self-insurance status," Employer argues the DOL released Peabody Energy from liability. *Id.* at 17.

The ALJ rejected this argument. She correctly found it "is the Act, and not any action taken by the [DOL], that creates an operator's liability." Decision and Order at 19. While the regulations require an operator to obtain the DOL's authorization before it may self-insure, that authorization is not what triggers liability. 30 U.S.C. §933(a), as implemented by 20 C.F.R. §726.110; Decision and Order at 19. In addition to obtaining "adequate security," a self-insurance applicant "shall [also] as a condition precedent to receiving such authorization, execute and file . . . an agreement . . . in which the applicant shall agree . . . [t]o pay when due, as required by the Act, all benefits payable on account of total disability or death of any of its employee-Miners." 20 C.F.R. §726.110(a)(1). Further, Employer's liability is created by statute, which requires that during any period after December 31, 1973, coal mine operators "shall be liable for and shall secure the payment of benefits."[14] 30 U.S.C. §932(a), (b). These provisions establish that an operator's liability, and thus Employer's liability, stems from its obligation to pay federal black lung benefits, rather than from its compliance with the requirements to provide security for the payment of benefits.[15] *See Osborne*, 895 F.2d at 951 (holding that "the

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initial desire to secure $25 million. *Id.* at 15-16 (citing Employer's Exhibit 1 at 132, 140-41, 148-50).

[14] For the same reasons, the DOL's authorization for Patriot to self-insure for claims retroactive to July 1, 1973 does not release Peabody Energy from liability. 30 U.S.C. §932(a), (b); 20 C.F.R. §726.110(a)(1).

[15] In addition, as the Director argues, Eastern "continued to self-insure and be responsible for its black lung obligations" after the DOL returned Peabody Energy's security deposit. Director's Response at 27. The Director notes that after Peabody Energy filed for bankruptcy, it conceded to the bankruptcy court that its subsidiaries "satisfy their statutory Black Lung Benefits Act obligations on a self-insured basis," including via a five-million-dollar surety bond. Director's Response at 27 (citing Motion of the Debtors, *In re Peabody Energy Corp.*, No. 16-42529 (Bankr. E.D. Mo. Apr. 13, 2016)) ¶¶ 16, 21, 25(e); *cf. Hatton v. Westmoreland Coal Co.*, BRB No. 13-0219 BLA, 2014 WL 993063, at *2 n.4

carrier is required to discharge the statutory and regulatory duties imposed on the employer, thus stepping into its shoes").

Thus we agree with the Director's argument that "the security deposit is an additional obligation separate from the responsibility to pay benefits."[16] Director's Response at 25. Eastern's liability is created by statute, 30 U.S.C. §932(b), and it secured against that liability through the agreement with Peabody Energy to provide self-insurance supported by the provision of the letter of credit. Director's Exhibit 28. The release of that letter of credit did not release Peabody Energy from its agreement to act as insurer of Eastern's obligations.[17] Based on the foregoing, we reject Employer's argument that the DOL's release of the letter of credit to Patriot absolves Peabody Energy of liability.

(Feb. 20, 2014) (unpub.) (Board taking official notice of document at the employer's request where the claimant did not dispute the employer's description of the document).

[16] Moreover, as the Director correctly argues, Employer concedes that its self-insurance authorization was established by both a letter of credit and an indemnity bond. Director's Response at 24-24. Employer specifically states "Peabody Energy was previously authorized to self-insure its obligations under the [Act], as confirmed by [E]mployer's submission of the Peabody Energy Indemnity Bond . . . and a letter of credit in the amount of $13,000,000.00." Employer's Brief at 12 (unpaginated). The regulations allow an operator to post security in the form of "a letter of credit issued by a financial institution," but clarify that "a letter of credit shall not be sufficient by itself to satisfy a self-insurer's obligations under this part." 20 C.F.R. §726.104(b)(3). There is no evidence the DOL also released the indemnity bond that Peabody Energy posted.

[17] Employer bases its arguments that DOL released it from liability on its assertions of what Messrs. Breeskin and Benedict believed about the release of its letter of credit. Employer's Brief at 13-18 (unpaginated). In making these arguments it quotes at length from Mr. Benedict's deposition regarding his beliefs at the time, noting that Mr. Benedict's understanding was that Patriot's application to self-insure was intended to cover all of Patriot's liabilities, including Peabody Energy's legacy liabilities, and that, in his mind, the intent of the letter of credit was to secure the legacy liabilities. *Id.* (quoting Employer's Exhibit 1 at 80-83, 282-83). The testimony Employer cites, however, does little to support its argument. None of the parties contest that Patriot was authorized to self-insure for black lung claims, including liabilities incurred while Peabody Energy owned Eastern. The more salient point is that Employer cites no evidence demonstrating that as part of that agreement, Peabody Energy was also released from its black lung claim liabilities in the event Patriot's self-insurance failed.

Equitable Estoppel

Employer argues it should be relieved of liability under the doctrine of equitable estoppel. Employer's Brief at 23-34 (unpaginated). To invoke equitable estoppel, Employer must show the DOL engaged in affirmative misconduct and Employer reasonably relied on the DOL's action to its detriment. *Dawkins v. Witt*, 318 F.3d 606, 612 n.6 (4th Cir. 2003); *Lewis v. Washington*, 300 F.3d 829, 834 (7th Cir. 2002). Affirmative misconduct is more than "unprofessional and misleading conduct" or providing misinformation; it is "lying" or a "malicious" act rather than negligent conduct. *Dawkins*, 318 F.3d at 612; *see Keener v. E. Assoc. Coal Corp.*, 954 F.2d 209, 214 n.6 (4th Cir. 1992); *see also United States v. Mich. Express, Inc.*, 374 F.3d 424, 427 (6th Cir. 2004); *Reich v. Youghiogheny & Ohio Coal Co.*, 66 F.3d 111, 116 (6th Cir. 1995). Employer has not met its burden.

Employer alleges the Director's release of Peabody Energy from liability without securing proper funding from Patriot constitutes affirmative misconduct. Employer's Brief at 25-30 (unpaginated). However, as the ALJ found, there is no evidence establishing the DOL released Peabody Energy from liability, and Employer failed to establish affirmative misconduct.[18] Decision and Order at 19-20; *see United States v. Vanhorn*, 20 F.3d 104, 113 n.19 (4th Cir. 1994) (the government is not bound by the negligent acts of its agents). We therefore affirm the ALJ's rejection of Employer's equitable estoppel argument because it failed to establish the necessary elements. Decision and Order at 19-20; *see Dawkins*, 318 F.3d at 612; *Keener*, 954 F.2d at 214 n.6; *see also Graham v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022).

Liability Under 20 C.F.R. §725.495(a)(4)

Citing 20 C.F.R. §725.495(a)(4),[19] Employer contends the Director's failure to secure proper funding from Patriot absolves Peabody Energy of liability. Employer's Brief at 18-23 (unpaginated). Thus, it argues liability must transfer to the Trust Fund. *Id.* at 23.

[18] As we note above, in asserting the DOL released Peabody Energy from liability, Employer relies on its assertions of what Messrs. Breeskin and Benedict believed. Employer's Brief at 13-18 (unpaginated). However, it cites to no evidence demonstrating the DOL relieved Peabody Energy of liability. Thus, the ALJ rightly concluded there is no evidence the DOL released Peabody Energy from liability.

[19] The regulation states:

> If the miner's most recent employment by an operator ended while the operator was authorized to self-insure its liability under part 726 of this title,

Employer's argument is foreclosed by *Graham*, which rejected the argument that 20 C.F.R. §725.495(a)(4) absolved Peabody Energy of liability under the same facts. *Graham*, BLR , BRB No. 20-0221, slip op. at 9 ("As Patriot never employed Claimant . . . Section 725.495(a)(4) cannot apply by its unambiguous language."). As the ALJ correctly found, Patriot never employed Claimant; he retired nine years before Patriot was created. Decision and Order at 21. Thus, 20 C.F.R. §725.495(a)(4) cannot apply by its unambiguous language. *Id.* Rather, she found Employer stipulated it met the requirements for liability under the Act. *Id.* 18. Employer identifies no error in this finding. *Sarf v. Dir., OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b). The ALJ also correctly found Employer did not present any evidence that Peabody Energy is unable to assume liability in the event Claimant is found to be eligible for benefits. 20 C.F.R. §§725.494(e), 725.495(a)(3); Decision and Order at 18.

Employer's argument that the ALJ was required to find the DOL exhausted Patriot's bond in paying awards of benefits before Peabody Energy could be held liable is also without merit. Employer's Brief at 5-11 (unpaginated). The ALJ permissibly determined Employer's contention is misplaced as the issue before her involved the identification of the potentially liable operator, capable of assuming liability for the payment of benefits, to last employ Claimant. 20 C.F.R. §§725.494(e), 725.495(a)(1); Decision and Order at 18. As previously indicated, the ALJ permissibly found Eastern satisfies those criteria.[20] Decision and Order at 15. We therefore affirm the ALJ's finding Employer liable for benefits.[21]

> and that operator no longer possesses sufficient assets to secure the payment of benefits, the provisions of paragraph [20 C.F.R. §725.495](a)(3) shall be inapplicable with respect to any operator that employed the miner only before he was employed by such self-insured operator. If no operator that employed the miner after his employment with the self-insured operator meets the conditions of [a potentially liable operator], the claim of the miner or his survivor shall be the responsibility of the Black Lung Disability Trust Fund.

20 C.F.R. §725.495(a)(4).

[20] As we have affirmed the ALJ's determination that the expenditure of Patriot's bond is not relevant to this claim, we need not address Employer's argument that the Director violated its due process rights by failing to proffer an accounting of these funds. Employer's Brief at 10 (unpaginated).

[21] Employer states it intends to preserve the issue of whether the DOL's Black Lung Benefits Act Bulletin No. 16-01 violates the Administrative Procedure Act, but it does not

Due Process Challenge

Employer next alleges the regulatory scheme whereby the district director must determine the liability of a responsible operator and its carrier, while also administering the Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing. Employer's Brief at 44-48 (unpaginated). We disagree.

As the Director notes, Congress explicitly intended "individual coal mine operators rather than the [Trust Fund] bear the liability for claims arising out of such operators' mines to the maximum extent feasible." Director's Response at 14-15 (quoting S. Rep. No. 209, 95th Cong., 1st Sess. 9 (1977), *reprinted in* House Comm. on Educ. and Labor, 96th Cong., Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977, 612 (Comm. Print 1979)). Thus, as the Director avers, when identifying an employer that meets the responsible operator criteria, the DOL is acting in a manner consistent with congressional intent. Director's Response at 15. Furthermore, Employer incorrectly maintains that a district director makes the final determination as to which operator is the responsible operator. Employer's Brief at 47 (unpaginated). Although the regulations require all relevant documentary evidence to be submitted to the district director and require the district director to identify the responsible operator, they also allow the putative responsible operator to challenge its designation by requesting a de novo hearing before an ALJ. 20 C.F.R. §725.419; *see Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 497 (D.C. Cir. 2018); *Rockwood Cas. Ins. Co. v. Dir., OWCP* [*Kourianos*], 917 F.3d 1198, 1215 (10th Cir. 2019) (district director's designation of a responsible operator is not binding on the ALJ). The operator can then seek review of the ALJ's finding[22] before the Board and a United States Court of Appeals.[23] 20 C.F.R. §§725.481, 725.482; *see Acosta*, 888 F.3d at 497.

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ask the Board to address the issue. Employer's Brief at 37 (unpaginated). Bulletin No. 16-01, which the Director of the Division of Coal Mine Workers' Compensation (DCMWC), Office of Workers' Compensation Programs, issued on November 12, 2015, provides guidance to DCMWC staff in adjudicating claims in which a miner's last coal mine employment of at least one year occurred with one of the subsidiary companies affected by Patriot's bankruptcy.

[22] If the responsible operator that the district director designates is dismissed, the DOL has no recourse other than to transfer liability to the Black Lung Disability Trust Fund. 20 C.F.R. §725.418(d).

[23] Contrary to Employer's contention, rather than giving the Director the final say, the provision at 20 C.F.R. §725.465(b) barring the ALJ from dismissing a named

We therefore reject Employer's arguments and affirm the ALJ's finding that Employer is liable for the payment of benefits. As Employer raises no specific challenge to the ALJ's finding that Claimant established entitlement, we affirm the award of benefits.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES

ROLFE and GRESH, Administrative Appeals Judges, concurring:

We concur with our colleagues' decisions to affirm Claimant's entitlement to benefits and the ALJ's liability determination. We write separately, however, to express our view that, even if the Director, Office of Workers' Compensation Programs (the Director) and Claimant did not properly invoke Employer's noncompliance with the Black Lung Benefits Act's (BLBA) mandatory claim-processing regulations, *Fort Bend Cnty. v. Davis*, 587 U.S. , 139 S. Ct. 1843 (2019), Employer on the merits still has not established that black lung district directors are inferior officers subject to the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, under *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).

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responsible operator without the approval of the Director prevents premature dismissal of the designated operator. 65 Fed. Reg. 79,920, 80,005 (Dec. 20, 2000) (regulation "ensures that the Director, as a party to the litigation, receives a complete adjudication of his interests"). This provision in no way limits the ALJ's discretion in concluding the wrong responsible operator was designated and liability must therefore shift to the Trust Fund. *See* 20 C.F.R. §725.465(b); *Rockwood Cas. Ins. Co. v. Dir., OWCP* [*Kourianos*], 917 F.3d 1198, 1215 (10th Cir. 2019).

Appointment Clause issues do not inherently present the rare circumstances that permit the Board to sua sponte enforce mandatory issue exhaustion regulations

Our colleagues assert that Employer forfeited its Appointments Clause argument by "not list[ing] [the district director's appointment] as a contested issue in the transmission of the record from the district director to the" Office of Administrative Law Judges (OALJ). *Supra* p. 7. But that overlooks the distinction between jurisdictional requirements, which must be enforced by a reviewing tribunal on its own accord, and the mandatory issue exhaustion regulations at issue here, which a party must timely raise "to come into play." *Fort Bend Cnty.*, 139 S. Ct. at 1846 (the charge-filing precondition to suit that is set out in Title VII to the Civil Rights Act of 1964 is a non-jurisdictional issue exhaustion rule creating an affirmative defense that was forfeited when the government failed to timely assert it).

No party to this case has argued Employer did not comply with the Act's mandatory issue exhaustion regulations. By contrast, in every single ALJ Appointments Clause case our colleagues rely on -- and in every case in which the Board or a United States Court of Appeals has found Appointments Clause claims forfeited over the last several years -- the government invariably asserted a forfeiture defense. *Edd Potter Coal Co. v. Dir., OWCP* [*Salmons*], 39 F.4th 202, 212 (4th Cir. 2022); *Joseph Forrester Trucking v. Dir., OWCP* [*Davis*], 987 F.3d 581, 593 (6th Cir. 2021); *Energy W. Mining Co. v. Lyle*, 929 F.3d 1202, 1206 (10th Cir. 2019); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018); *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019); *Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 11 (2019); *see also Fleming v. USDA*, 987 F.3d 1093, 1099 (D.C. Cir. 2021) (recognizing that dismissal of a constitutional removal claim depended entirely on the government's timely assertion of an exhaustion defense). Having never mentioned it at all, the government and Claimant plainly have not "timely raised" an issue exhaustion defense here. *Fort Bend Cnty.*, 139 S. Ct. at 1846.

Nor have our colleagues persuaded us that Appointments Clause claims inherently present the "rare" circumstances in which we are permitted to enforce the issue exhaustion regulations on our own. *United States v. Oliver*, 878 F.3d 120, 130 (4th Cir. 2017). While our colleagues contend courts broadly permit such enforcement whenever the regulation at issue "implicates judicial interests and resources beyond those of the responding party," *supra* note 10, the only two (and exceptionally rare) cases they identify in which a court actually enforced such a rule both involved egregiously late-filed criminal appeals under Federal Rule of Appellate Procedure 4(b), not issue exhaustion requirements. *Id.*; *see United States v. Gaytan-Garza*, 652 F.3d 680 (6th Cir. 2011).

And such late criminal appeals are distinct because they often upend other criminal judgments and collateral appeals of the same judgment -- as the enforcing courts

themselves stressed. *Oliver*, 878 F.3d at 130 (holding that "as a general rule" courts should not sua sponte enforce criminal appeal deadlines, except in two "specific" and "rare" circumstances: when an appeal is "filed after a subsequent judgment has relied on the judgment appealed or after the defendant has pursued collateral review of the judgment."); *Gaytan-Garza*, 652 F.3d at 681 (noting that a criminal appeal filed four years after the sentence became final implicated broad societal interests in the finality of criminal sentencing). Indeed, the United States Court of Appeals for the Fourth Circuit characterized the ripple effect that consideration of such untimely criminal appeals creates in those two instances as "impact[ing] judicial interests to such an extent that not intervening *would harm the court as an institution*." *Oliver*, 878 F.3d at 130 (emphasis added). Considering an unexhausted Appointments Clause issue in an ongoing, non-final agency civil appeal -- as with other similarly unexhausted civil claims like the one at issue in *Fort Bend County* -- simply does not risk institutional harm, as more recent Supreme Court caselaw has universally confirmed under a variety of mandatory civil claims-processing rules. *See, e.g.*, *Fort Bend Cnty.*, 139 S. Ct. at 1849-50 (detailing a list of what the Supreme Court has recently held to be waivable non-jurisdictional claims-processing rules and regulations).

Instead, it has become axiomatic that Appointments Clause issues are subject "to ordinary principles of waiver and forfeiture" under the Act's issue exhaustion regulations, as our colleagues necessarily concede, and as recent black lung claim litigation explicitly confirms. *Salmons*, 39 F.4th at 207. Ever increasing (and unbroken) precedent that the Supreme Court's recent crusade "to bring some discipline" to the use of the word "jurisdiction" has created, *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011), thus makes clear we cannot sua sponte invoke an issue exhaustion defense in these circumstances. *See, e.g., United States v. Muhammed*, 16 F.4th 126, 129-30 (4th Cir. 2021) (collecting numerous cases across the circuit courts of appeals holding that administrative exhaustion regulations are non-jurisdictional and that the district court therefore erred by enforcing them sua sponte); *George v. Youngstown State Univ.*, 966 F.3d 446, 469 (6th Cir. 2020) (collecting similar 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"); *Fort Bend Cnty.*, 139 S. Ct. at 1849-50 (collecting numerous cases involving a significant array of similar civil claims-processing rules and noting the court has long held parties forfeit a defense based on them "if the party asserting the rule takes too long to raise the point.").[24]

[24] Our colleagues mischaracterize this concurrence by stating our primary rationale for reaching the Appointments Clause issue "is that the parties, as a litigation strategy, 'might prefer' to have the Board address the merits of the Appointments Clause question." *Supra* note 10. That is demonstrably false. We reach the Appointments Clause issue

While we sympathize with our colleagues' concern about the possible disruption that consideration of *any* unexhausted issue can create, it nevertheless remains indisputable that a regulation "does not become jurisdictional" merely because it promotes "important" objectives. *Fort Bend Cnty.*, 139 S. Ct. at 1851. And it remains equally indisputable that the government chose not to assert a potentially dispositive exhaustion defense here (and in the related cases) as a litigation strategy precisely because it preferred a decision on the merits -- undercutting our colleagues' concern that considering Employer's argument encourages sandbagging or raises other fairness issues. *Id.* (recognizing issue exhaustion regulations as non-jurisdictional is of limited practical effect because defendants have only to invoke a party's noncompliance to dismiss a claim).

Employer's specious district director Appointments Clause argument fundamentally differs from the ALJ Appointments Clause arguments previously raised under the Act, and the government understandably chose not to assert an issue exhaustion defense as a result. As the Supreme Court also has recently emphasized, even if we were not already bound by law under these specific circumstances, we still would be required to decide the issue as presented by the parties as a matter of limited discretion. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (as "essentially passive instruments of government," courts must "wait for cases to come to them, and when cases arise, normally decide only questions presented by the parties"); *Greenlaw v. United States*, 554 U.S. 237, 244 (2008) ("in both civil and criminal cases, in the first instance and on appeal …, we rely on the parties to frame the issues for decision and assign to the courts the role of neutral arbiter of the matters the parties present.").[25]

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because the law plainly requires it: the issue exhaustion regulations our colleagues rely on are not jurisdictional and no party has invoked them as a basis for an affirmative defense. The Supreme Court unequivocally has found it improper for tribunals to sua sponte enforce them in those circumstances, *Fort Bend Cnty. v. Davis*, 587 U.S. , 139 S. Ct. 1843, 1846 (2019), and the United States Court of Appeals for the Fourth Circuit -- after further surveying the law of its sister circuits -- has followed suit in its wake. *United States v. Muhammed*, 16 F. 4th 126, 129-30 (4th Cir. 2021).

[25] Our colleagues suggest reaching the Appointments Clause issue as the parties present it somehow means our analysis fails to appreciate the disruption that considering unexhausted claims can cause, particularly given that "the already attenuated nature of black lung claim proceedings, during which it is not uncommon for miners to die without ever seeing their claims resolved." *Supra* note 10. We entirely disagree. Resolving an identical issue of law that the parties have briefed in hundreds of similar cases in a single published decision -- rather than sua sponte injecting a factually specific affirmative defense that no party had the opportunity to address in each of the cases -- promotes

But at the end of the day, whether or not Employer forfeited its Appointments Clause argument makes no difference to the ultimate disposition of this issue because *Lucia* -- which held only that existing precedent already established some agency ALJs are inferior officers -- simply does not apply to black lung district directors as a matter of law, which allows us to decide this issue rather than remand it to the ALJ. *See Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187 (4th Cir. 2014) (no need for remand to the ALJ where "no factual issues remain to be determined"); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1117 (6th Cir. 1984) (the Board has the authority to decide substantial questions of law).

Lucia does not establish black lung district directors as inferior officers

Relying exclusively on *Lucia*, Employer contends the district director lacked the authority to identify the responsible operator and process this case because the district director is an "Inferior Officer" of the United States not properly appointed pursuant to the Appointments Clause. Employer's Brief at 37-44 (unpaginated). But Employer has fallen far short of establishing district directors have adjudicatory authority akin to the Securities and Exchange Commission (SEC) ALJs who the *Lucia* Court found to be "carbon copies" of a federal district court judge conducting a bench hearing.[26] 138 S. Ct. at 2053.

Employer argues district directors are similar to SEC ALJs because they "exercise 'significant discretion' in carrying out 'important functions' such as determining the proof allowed in the record, conducting conferences, and issuing decisions which can become final in awarding or denying benefits." Employer's Brief at 40 (unpaginated). In addition, it argues district directors issue binding orders and compel the production of documents by subpoena, thus "critically [shaping] the administrative record." *Id.* at 40-41. Finally, it alleges the district director's role as "final decision-maker" generally creates "an Appointments Clause issue." *Id.* at 41. From this, Employer concludes *Lucia* establishes

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efficiency immeasurably, as the government no doubt concluded in framing the issue. We therefore would reach the question as a matter of discretion under the party presentation principle, even if we were not already bound to do so as a matter of law given the non-jurisdictional nature of the issue exhaustion regulations that our colleagues improperly invoke to avoid addressing it. *Fort Bend Cnty.*, 139 S. Ct. at 1846.

[26] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to 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)).

district directors as inferior officers subject to the Appointments Clause and asserts the case must be remanded and reassigned to a properly appointed official. *Id.* at 42-44.[27]

We agree with the Director, however, that a more accurate examination of the authority of district directors reveals they only perform "routine administrative functions." Director's Response at 8. They do not have "significant adjudicative" capacity, as they possess none of the four powers *Lucia* held make ALJs akin to federal district court judges. *Id.*; *see also Yates v. ARMCO Steel Corp.*, 10 BLR 1-132, 135 (1987) ("It is clear that all adjudicative functions reside only in the [ALJ]; administrative and pre-hearing duties are performed by the [district director]."") (citation string omitted). Moreover, the regulations restrict their ability to identify a responsible operator and determine entitlement -- subject to de novo appellate review -- eliminating any remaining Appointments Clause issues. Like the vast majority of federal employees, district directors thus are not members of the very small subset of inferior officers who the head of an agency must appoint. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 506 n.9 (2010) (noting that in 1879 about 90% of federal employees were lesser functionaries and the percentage of those functionaries has dramatically increased over time).[28]

Two features determine officer status under the Appointments Clause: holding a continuing position established by law and exercising "significant authority" pursuant to

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[27] At times Employer also includes claims examiners as inferior officers in its argument. Employer's Brief at 2, 37-40, 43-44 (unpaginated). This assertion changes nothing: the *Lucia* court went to great pains to expressly limit its holding to ALJs who are "carbon copies" of SEC judges with their "equivalent duties and powers" in "conducting adversarial inquiries." *Lucia*, 138 S. Ct. at 2053 (citing *Freytag*, 501 U.S. at 882). Employer simply has not -- and cannot -- establish that either position it identifies holds such authority. *Id.*

[28] Notably, the distinction in authority that district directors and ALJs possess is by design. When Congress incorporated the administrative scheme of the Longshore and Harbor Workers' Compensation Act into the Act, it split the powers of the then deputy commissioner, vesting the claim-processing and administrative responsibilities in newly created officials now known as district directors and adjudication authority in ALJs. 30 U.S.C. §932(a); 33 U.S.C. §919(d), as incorporated. The formal adjudicative authority that the *Lucia* Court found dispositive of the Appointments Clause issue -- convening adversarial hearings, finding facts, and issuing binding decisions on claims -- was absorbed by ALJs. *See, e.g.*, *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090 (9th Cir. 2000), *cert. denied*, 531 U.S. 956 (2000); *Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986).

that law. *Lucia*, 138 S. Ct. at 2051 (citing *United States v. Germaine*, 99 U.S. 508, 511-12 (1879)); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)). After noting agency ALJs hold continuing positions, the *Lucia* Court identified four powers that they possess establishing significant authority comparable to "a federal district judge conducting a bench trial": 1) to conduct trials and regulate hearings; 2) to take testimony and administer oaths; 3) to rule on the admissibility of evidence; and 4) to enforce compliance with discovery orders. *Lucia*, 138 S. Ct. at 2053 (citation omitted). A "point for point" analysis reveals district directors meaningfully possess none of these expansive adjudicatory powers. *Id.*

First, black lung district directors never conduct formal hearings. Thus, the paramount factor that the *Lucia* Court found to justify officer status, the authority to hold a hearing, is missing from the district director's arsenal of functions and powers. The Court's opinion may be read to implicitly approve of this as the dividing line, as it mentions no fewer than five times that SEC ALJs and United States Tax Court "special trial judges" (STJs) both oversee hearings. Indeed, the remedy that the *Lucia* Court fashioned for an Appointments Clause violation -- a new hearing before a properly appointed ALJ -- demonstrates the vital significance that the Court ascribed to this missing adjudicatory function. 138 S. Ct. at 2055.

Second, district directors do not "take testimony," examine witnesses at hearings, or take pre-hearing depositions -- because they do not conduct hearings at all. Similarly, unlike ALJs, district directors do not "administer oaths." *See, e.g.*, 20 C.F.R. §725.351(a), (b) (differentiating between authorities of district directors and ALJs).

Third, district directors do not "critically shape" the administrative record by making evidentiary rulings akin to ALJs or federal district court judges. Although they may compile routine documents and forms at the outset of a case, the "official" (and final) record is created at the formal hearing before an ALJ, after significant additional discovery subject to an ALJ's continuing oversight. 20 C.F.R. §725.421(b) (specifying documents that must be transmitted to the OALJ and noting they "shall be placed in the record at the hearing subject to the objection of any party"). Fundamentally, parties are not required to submit medical evidence to the district director; they may submit it to the ALJ at least twenty days before a formal hearing. *Id.*; 20 C.F.R. §725.456(b)(2). Thus, in most cases, the basic record relevant to a claimant's entitlement to benefits will not be developed until the formal hearing before an ALJ, long after the district director has transferred the case to the OALJ. 20 C.F.R. §§725.456(b)(3), 725.457; 65 Fed. Reg. 79,920, 79,991 (Dec. 20, 2000) ("[T]he Department expects that parties generally will not undertake the development of medical evidence until the case is pending before the [ALJ].").

Fourth, district directors do not enforce compliance with discovery orders like ALJs or federal district court judges. No formal discovery takes place before district directors,

only "informal discovery proceedings." 20 C.F.R. §725.351(a)(2). And the district directors' "enforcement" power in those limited proceedings is not "especially muscular" -- having nothing remotely similar to "the nuclear option" that federal courts possess "to toss malefactors in jail," or "the conventional weapons" that ALJs wield to sanction. *Lucia*, 138 S. Ct. at 2054. Instead, where a claimant fails to prosecute a claim, the only (and necessary) remedy is a simple denial by reason of abandonment. 20 C.F.R. §725.409. But even then dismissal is limited to four specific circumstances in which a claimant refuses to go forward with the case and is predicated on a district director first notifying the claimant and providing an opportunity to cure the defect. 20 C.F.R. §725.409(b). Moreover, an ALJ may review any dismissal order. 20 C.F.R. §725.409(c). No similar provisions penalize a responsible coal mine operator for like conduct. A district director may only certify the facts to a federal district court. 20 C.F.R. §725.351(c).[29]

Unlike Department of Labor (DOL) ALJs, the four factors that the *Lucia* Court identified under the "unadorned authority test" (taken "straight from *Freytag's* list") thus establish district directors are not "near-carbon copies" of SEC ALJs: their "point for point" application does not come close to establishing "equivalent duties and powers" in "conducting adversarial inquiries." *Lucia*, 138 S. Ct. at 2053 (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). DOL ALJs possess nearly identical authority as SEC ALJs. By design, district directors do not. On their face, *Lucia* and *Freytag* therefore do not establish district directors are among the small category of inferior officers under existing law. *Id.* at 2052 (no reason exists to go beyond *Freytag's* "unadorned authority test" to determine officer status because SEC ALJs hold formal authority nearly identical to *Freytag's* STJs).

Employer's remaining argument that the initial claims-processing duties of designating a responsible operator and making preliminary entitlement findings transform district directors into inferior officers similarly is without merit. Employer's Brief at 41-43 (unpaginated). Regulations control district directors' ability to issue binding decisions on those issues, subject to layers of agency and judicial review, further restricting their authority far below that of ALJs conducting adversarial hearings. *See, e.g.*, *Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 497 (D.C. Cir. 2018) (noting responsible operators may contest their designation before the district director, request de novo review at a formal hearing

[29] The district director can sanction in one narrow circumstance: when a party fails to comply with the medical information disclosure requirements. 20 C.F.R. §725.413(e). But any sanction that a district director imposes is subject to an ALJ's de novo review, 20 C.F.R. §725.413(e)(4), and the possibility that parties receive medical information before the claim is transferred to the OALJ mandates this requirement. 20 C.F.R. §725.413(c).

before an ALJ, appeal an ALJ's final decision to the Board, and appeal a final Board order to a United States Court of Appeals) (citations omitted).

First, district directors lack independent discretion in designating a responsible operator given the comprehensive regulatory scheme. In order to streamline administrative proceedings by restricting the district director's authority, evidence relevant to a responsible operator designation must be initially submitted to the district director. 65 Fed. Reg. at 79,990. The district director gets one chance at identifying the liable operator and "where the district director's designation of the responsible operator proves to be incorrect," the Black Lung Disability Trust Fund (the Trust Fund) must pay any benefits awarded in the claim. *Id*.

Moreover, specific rules govern which operators may be considered as potentially liable and ultimately designated as the responsible operator. 20 C.F.R. §§725.494, 725.495. The program rules require that various types of liability evidence must be submitted at specific times and during a defined period. *See, e.g.*, 20 C.F.R. §725.408(b) (evidence relating to status as a potentially liable operator must be submitted within 90 days after receiving the Notice of Claim); 20 C.F.R. §725.410 (evidence that another operator may be liable must be submitted within 60 days of the Schedule for the Submission of Additional Evidence with 30 additional days for submission of rebuttal evidence). These programmatic constraints show district directors lack significant independent authority (or indeed much discretion at all) in their initial claims-processing duties relevant to the responsible operator designation.[30]

Second, the district director's ability to resolve either responsible operator designation or entitlement issues with finality depends largely on the power to persuade rather than on any raw authority. The district director issues a Proposed Decision and Order (PDO) purporting to resolve all claim issues, but that decision does not become effective if any party timely requests a hearing before an ALJ or revision, and it cannot cover the evidence developed after the case is transferred to the OALJ when a party does request a hearing, which is typically the majority of the evidence in the case. 20 C.F.R.

[30] Moreover, the rule that prohibits ALJs from dismissing the designated responsible operator without the Director's consent, 20 C.F.R. §725.465(b), does not expand the district director's power in any way. The rule is intended to prevent a premature dismissal of the designated responsible operator; it does not give the district director "veto power over an ALJ's decision" but "simply protects the interests of the Trust Fund, and ensures that the Director, as a party to the litigation, receives a complete adjudication of his interests." 65 Fed. Reg. 79,920, 80,005 (Dec. 20, 2000).

§725.419(d). Most fundamentally, the district director's PDO findings do not constrain ALJs' oversight in any way: *ALJs review all issues de novo*. 20 C.F.R. §725.455(a).

Administratively, district directors are nestled under at least two levels of internal inferior officers that aggrieved parties may appeal to *by right* in an agency further controlled by the Secretary of Labor (the Secretary). Indeed, both the Supreme Court and the United States Court of Appeals for the Ninth Circuit have recently emphasized the Secretary's control over Benefits Review Board members as checking agency authority in the layers above district directors. *United States v. Arthrex, Inc.*, 594 U.S. , 141 S. Ct. 1970, 1984 (2021) (noting the Board's members "serve at the pleasure of the appointing department head"); *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1135 (9th Cir. 2021) (explaining the Secretary's ultimate authority over every Board decision: "the [Board] has ample control over DOL ALJs, and the President, in turn, has direct control over [Board] members through the Secretary").

District directors do not have formal adjudicative authority anywhere near that of DOL or SEC ALJs (by design) under *Lucia's* significant authority test. 138 S. Ct. at 2053. Absent a party's acceptance, they lack any formal legal authority to alter any private right or obligation. *Lucia* therefore does not dictate they qualify as inferior officers. *Id.* Moreover, Employer has not demonstrated how district directors' claims-processing duties -- subject to de novo review by an ALJ and further review by the Board and the federal courts of appeals -- independently transforms them. Accordingly, whether or not the Director properly invoked Employer's noncompliance with the BLBA's mandatory claim processing regulations, *Fort Bend Cnty.*, 139 S. Ct. at 1846, we would find district directors are not inferior officers but "part of the broad swath of 'lesser functionaries' in the Government's workforce." *Lucia*, 138 S. Ct. at 2051 (citation omitted).

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge
Administrative Appeals Judge