**U.S. Department of Labor**

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

BRB No. 20-0178 BLA

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| BEECHER D. PLUMLEY | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| EASTERN ASSOCIATED COAL COMPANY | ) | |
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| | ) | |
| and | ) | |
| | ) | DATE ISSUED: 4/08/2022 |
| PEABODY ENERGY CORPORATION | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits in a Subsequent Claim of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

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

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Awarding Benefits in a Subsequent Claim (2017-BLA-05286) filed on May 13, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ initially found Eastern Associated Coal Company (Eastern), self-insured through its parent company, Peabody Energy Corporation (Peabody Energy), is the responsible operator liable for the payment of benefits. She found Claimant established complicated pneumoconiosis and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. She further found Claimant's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203.

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.[1] It also asserts the duties performed by the district director create an inherent conflict of interest that violates its due process. It further argues the ALJ erred in finding it liable for the payment of benefits. Claimant did not file a response. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging the Benefits Review Board to reject Employer's conflict of interest and Appointments Clause

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

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

challenges. The Director also contends the ALJ properly determined Employer is responsible for payment of benefits.[2]

Upon considering the parties' briefs on appeal, the Board determined the issue of whether Employer adequately preserved its Appointments Clause argument required additional briefing. In an Order issued on September 3, 2021, the Board requested the parties file supplemental briefs addressing whether Employer forfeited its challenge to the district director's appointment taking into consideration the requirements of 20 C.F.R. §725.463(a), the United States Court of Appeals for the Sixth Circuit's decision in *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581 (6th Cir. 2021), the ALJ's scheduling orders, and any other relevant factors and law.

In its supplemental brief, Employer argues it adequately preserved its Appointments Clause challenge by raising it in its post-hearing brief to the ALJ. In their briefs, both Claimant and Director argue Employer forfeited its challenge to the district director's appointment because it did not identify it as a contested issue before the district director and because it was a readily ascertainable issue at that time.

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.[3] 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**

Citing *Lucia v. SEC*, 585 U.S., 138 S. Ct. 2044 (2018), Employer argues that 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 2-8.

We agree with Claimant and the Director that Employer forfeited its Appointments Clause challenge. Appointments Clause issues are "non-jurisdictional" and thus 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

[2] We affirm, as unchallenged on appeal, the ALJ's finding Claimant established entitlement to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] 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. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted).

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 the responding party disagrees.'" *Davis*, 987 F.3d at 588, *quoting* 20 C.F.R. §725.419(b). The party must then request a hearing before the Office of Administrative Law Judges (OALJ) and, in doing so, specifically "highlight the 'contested issue[s] of fact or law' to be addressed at the hearing." *Davis*, 987 F.3d at 588, *quoting* 20 C.F.R. §725.451. 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). 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."[4] 20 C.F.R. §725.463(b). As the Director correctly argues, "[a]bsent application of [the] exception for [issues not readily ascertainable], the failure to contest an issue before the

[4] 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," and an ALJ 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." 20 C.F.R. §725.463(b).

district director constitutes forfeiture of the issue." Director's Brief at 6, *citing 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. Director, OWCP*, 17 BLR 1-9 (1992); *Thornton v. Director, 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); *Davis*, 987 F.3d at 588. Thus, the Board routinely declines to consider arguments not properly raised below, including untimely Appointments Clause challenges. *See, e.g.*, *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"); *Powell v. Service Employee 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 does not argue it followed the regulatory requirements at 20 C.F.R. §§725.419(b), 725.451. Indeed, it fails to 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. Despite the Briefing Order directing the parties to address those requirements, it simply ignores them. *See* Employer's Brief at 2-8; Employer's Supplemental Brief in Response to the Order of September 3, 2021. However, we will not.

The record 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 November 30, 2016, 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 28, 33, 37. Employer did not, however, specifically identify the district director's authority to process claims as a contested issue the ALJ must resolve.[5] *Id*.

[5] As the Director notes, this claim was first assigned to ALJ Theresa C. Timlin, who held a hearing on May 29, 2018. Director's Brief at 4; Director's Exhibit 38. That same day, Employer raised a constitutional challenge to her appointment, which was granted, resulting in a transfer of the claim to ALJ Harris, who held a new hearing on October 24,

Thus, unless the issue was a new one that was not "reasonably ascertainable" while the claim was before the district director, under the terms of the regulation Employer had no entitlement to have the issue considered by the ALJ. 20 C.F.R. §725.463; Director's Exhibit 38. Employer has not alleged, let alone presented evidence and argument, before us or the ALJ, that the issue is a new one that was not reasonably ascertainable by the parties at that time. Employer's Supplemental Brief in Response to the Order of September 3, 2021.

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." Employer did not argue before the ALJ and does not contest before us that it was. *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 38. Nor has it shown the regulation's terms are inapplicable or should be waived. Since it failed to comply with the regulation, Employer forfeited its challenge and is not entitled to our consideration of the issue. We therefore decline to consider it.

**Due Process Challenge**

"Out of an abundance of caution," Employer identifies a due process challenge in order to preserve the issue for appeal. Employer's Brief at 8-13. It generally asserts that the regulatory scheme, whereby the district director must determine the liability of a responsible operator and its carrier when the DOL also administers the Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing. *Id.*

Employer does not explain why a DOL representative inherently lacks authority to render an initial determination on the responsible operator in light of the fact that the Act itself imposes liability on a miner's employer(s) and contemplates Trust Fund liability only when a responsible operator cannot be assigned. 30 U.S.C. §§932, 933, 934; *see also*

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2018. Despite being aware of the substantive law underpinning its argument that the district director's appointment was also unconstitutional, Employer did not raise the issue at either of the two hearings conducted in this matter. May 29, 2018 Hearing Transcript at 6-8; October 24, 2018 Hearing Transcript. Instead, it waited until filing its post-hearing brief to raise the issue for the first time. Employer's Brief at 7-13. The ALJ did not list this issue as one for adjudication. Decision and Order at 3-4. Nor did she address it in her Decision and Order, but instead simply noted Employer raised "constitutional issues for purposes of appeal" in its post-hearing brief. *Id.* at 4 n.4.

*National Min. Ass'n v. Department of Labor*, 292 F.3d 849 (D.C. Cir. 2002) (upholding regulations that establish deadlines for an operator's submission of evidence "if they disagree with their designation [by the district director] as parties potentially liable for a miner's claim" and shift the burden of disproving liability "once an operator has been determined to be responsible for a claim").

Nor are we persuaded that the district director's ability to make an initial determination regarding the responsible operator violates Employer's due process.

Due process requires only that a party be given notice and the opportunity to respond. *See Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807 (4th Cir. 1998). The regulations provide an employer who receives a Notice of Claim ninety days to present evidence regarding its status as a potentially liable operator. 20 C.F.R. §725.408. After issuance of the SSAE, an employer has another sixty days to submit such evidence. 20 C.F.R. §725.410. An employer may also request extensions of these time limits and challenge the denial of any extension request before an ALJ, the Board, or a circuit court. 20 C.F.R. §725.423; *see, e.g., Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 497 (D.C. Cir. 2018). Moreover, an identified responsible operator may challenge its liability before an ALJ. *Arch of Kentucky, Inc. v. Director, OWCP*, 556 F.3d 472, 478 (6th Cir. 2009) ("The basic elements of procedural due process are notice and opportunity to be heard."); *see* 20 C.F.R. §725.455 ("any findings or determinations made with respect to a claim by a district director shall not be considered by the [ALJ]").

Employer has failed to identify any instance in which the district director did not give notice or allow it to respond. As it was timely put on notice of its liability, had the opportunity to submit relevant evidence to the district director and challenge its designation as the responsible operator before the ALJ, Employer has not demonstrated a due process violation.[6]

**Responsible Insurance Carrier**

We now turn to Employer's arguments on the merits of why it believes it cannot be held liable for this claim.

[6] Employer also states that it wants to "preserve" its argument that its due process rights were violated because the ALJ "cut off" discovery "prematurely." Employer's Brief at 43-45. Employer neither asks the Board to address this issue nor sets forth any argument that would permit our review. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

Eastern employed Claimant as a miner from 1970 to 1993, and it was the last potentially liable operator to do so.[7] Director's Brief at 2, *citing* Director's Exhibits 6-8. By the end of Claimant's employment, Eastern was a subsidiary of, and self-insured for black lung liabilities through, Peabody Energy. Director's Brief at 2; Employer's Brief at 20 ("Peabody Energy was previously authorized to self-insure its obligations . . . on [Claimant's] last date of exposure.").

In 2007, fourteen years after Claimant's coal mine employment ended, Peabody Energy sold Eastern to Patriot Coal Corporation (Patriot). Director's Exhibit 15 at 1, 8-57 (Separation Agreement). On March 4, 2011, the DOL authorized Patriot to self-insure "retro-active to July 1, 1973" for black lung liabilities, including for claims filed before Patriot purchased the Peabody Energy subsidiaries. Director's Exhibit 15 at 58-59 (Steven Breeskin's Letter and Decision Granting Authority to Act as a Self-Insurer).[8] 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 a letter of credit Patriot financed under Peabody Energy's self-insurance program.[9] Director's Exhibit 15 at 58 (Steven Breeskin's March 4, 2011 Letter to Patriot). In 2015, Patriot went bankrupt. Director's Brief at 2; Director's Exhibit 18.

Employer does not directly challenge Eastern's designation as the responsible operator.[10] Rather, it asserts the Trust Fund, not Peabody Energy, is responsible for the

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[7] Although Claimant's Social Security Administration records show earnings with other operators in 1993 and 2008, Director's Exhibit 6, the ALJ found Employer failed to establish that another "potentially liable operator" that is financially capable of assuming liability more recently employed Claimant for at least one year. Decision and Order at 17-18; 20 C.F.R. §725.495(c). We affirm this finding as unchallenged. *See Skrack*, 6 BLR at 1-711.

[8] Steven Breeskin is the former Director of the Division of Coal Mine Workers' Compensation (DCMWC).

[9] The monetary values are redacted. Director's Exhibit 15 at 58-59.

[10] Eastern Associated Coal, LLC (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) self-insurance coverage. 20 C.F.R. §725.494(a)-(e).

payment of benefits following Patriot's bankruptcy. Employer's Brief at 18-43. It argues the ALJ erred in finding it liable for benefits because: (1) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (2) before transferring liability to Peabody Energy, the DOL must establish it exhausted any available funds from the security Patriot gave to secure its self-insurance status; (3) the DOL released Peabody Energy from liability; and (4) the Director is equitably estopped from imposing liability on the company. *Id*. It maintains that a separation agreement – a private contract between Peabody Energy and Patriot – released it from liability and DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. *Id*.

Before the ALJ, Employer relied on a Separation Agreement between Peabody Energy and Patriot; Patriot's authorization to self-insure from the DOL; and a March 4, 2011 letter from Mr. Breeskin to Patriot.[11] Director's Exhibit 15. It also relied on deposition testimony from DOL employees, David Benedict[12] and Steven Breeskin. Employer's Exhibits 9, 10. The ALJ rejected Employer's argument that Patriot is the liable carrier and concluded Eastern and Peabody Energy were correctly designated the responsible operator and carrier, respectively. Decision and Order at 14-23.

**Letter of Credit and Indemnity Agreement**

Employer first maintains Mr. Breeskin's March 4, 2011 letter to Patriot releasing a letter of credit[13] financed under Peabody Energy's self-insurance program absolves it from

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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 23.

[11] Employer also moved to admit Employer's Exhibits 3 through 7. The ALJ excluded these exhibits because they were not submitted to the district director and Employer did not establish extraordinary circumstances for failing to do so. *See* 20 C.F.R. §725.456(b)(1); Aug. 20, 2018 Order. As this evidentiary ruling is not challenged, we affirm it. *Skrack*, 6 BLR at 1-711. The ALJ also excluded Employer's Exhibits 1 and 2, Patriot's authorization to self-insure from the DOL and Mr. Breeskin's March 4, 2011 letter to Patriot. Aug. 20, 2018 Order; Employer's Exhibits 1, 2. Employer's Exhibits 1 and 2, however, were included in Director's Exhibit 15, which the ALJ admitted into the record.

[12] David Benedict is a former DCMWC employee.

[13] Employer argues Mr. Benedict's testimony establishes the letter of credit "existed solely to secure [Patriot's] legacy liability," and was returned to Peabody Energy based on Patriot's deposit of U.S. Treasury funds with the Federal Reserve Bank. Employer's Brief at 19, 27. It asserts this testimony establishes the DOL "was aware of the legacy liabilities

potential liability under the Act. Employer's Brief at 19-27, *citing* 20 C.F.R. §§726.1, 726.101; Director's Exhibit 15. 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. Employer's Brief at 20. 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 it was releasing "the letter of credit financed under Peabody Energy's self-insurance program," Employer argues the DOL released Peabody Energy's liability. *Id.* at 22.

The ALJ properly rejected this argument. She correctly found neither the Act nor the regulations support Employer's argument that liability is created when a self-insurer posts a security, and that the subsequent release of a self-insurer's security absolves it from liability. Decision and Order at 20. As the ALJ noted, operators are authorized to self-insure if, among other requirements, they obtain security approved by the DOL. 20 C.F.R. §726.101(a), (b)(4). 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" to "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).

Thus, we agree with the Director's argument that "the security deposit is an additional obligation separate from the responsibility to pay benefits." Director's Response at 9-10. Before the ALJ, and now before the Board, Employer has failed to cite any authority expressly allowing the DOL to release a designated responsible operator from liability, notwithstanding whether the DOL released its posted security.[15] Based on the

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as identified by Patriot when it chose to grant the application for self-insurance and return Peabody [Energy]'s letter of credit." *Id.*

[14] For the same reasons, the ALJ correctly found that 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); Decision and Order at 20.

[15] Further, 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 Brief at 11. Employer specifically states Peabody Energy "was previously an entity authorized to self-insure its obligations under the Act. Its obligations were secured

foregoing, we reject Employer's argument that the DOL's release of the letter of credit to Patriot absolves Peabody Energy of liability.

Lastly, Employer contends that, in executing an Indemnity Agreement with Bank of America on March 4, 2011, the DOL terminated Peabody Energy's self-insurance status and became contractually bound to hold Peabody Energy and its surety harmless. Employer's Brief at 26-27. As the Director notes, the Indemnity Agreement was contained in Employer's Exhibit 5 which was excluded from the record. Director's Brief at 8 n.4; Aug. 20, 2018 Order. This evidence therefore cannot support Employer's argument.

Notwithstanding the exclusion of this evidence, we fail to see how the execution of the Indemnity Agreement supports Employer's contentions. The Indemnity Agreement was between DOL and Bank of America, which issued the letter of credit. Employer's Exhibit 5. In the agreement, the DOL simply requested cancellation of the letter of credit and agreed to hold Bank of America harmless under it. *Id.* The Indemnity Agreement is not a communication to Peabody Energy, nor does it mention the company. As the Director argues, the Indemnity Agreement "does not release any party from liability (aside from Bank of America), and it is not an agreement, in Employer's words, 'to hold Peabody [Energy] and its surety harmless.'" Director's Brief at 10-11, *quoting* Employer's Brief at 37. Based on the foregoing, we reject Employer's argument that the execution of the Indemnity Agreement or the DOL's release of the letter of credit absolves Peabody Energy of liability.

**20 C.F.R. § 725.495(a)(4)**

Citing 20 C.F.R. §725.495(a)(4),[16] Employer contends the Director's failure to secure proper funding from Patriot absolves Peabody Energy of liability. Employer's Brief at 27-31. This argument has no merit.

If the operator that most recently employed a miner may not be considered a potentially liable operator pursuant to 20 C.F.R. §725.494, the responsible operator shall

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via an indemnity bond and a letter of credit in the amount of $13,000,000.00." Employer's Brief at 26. 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). Employer does not cite any evidence that the DOL also released the indemnity bond that Peabody Energy posted.

[16] Under 20 C.F.R. §725.495(a)(4):

> 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,

be the potentially liable operator that next most recently employed the miner. 20 C.F.R. §725.495(a)(3). An operator is not a potentially liable operator if it is incapable of assuming its liability for the payment of benefits. 20 C.F.R. §725.494(e). If the most recent operator, however, was authorized to self-insure and no longer possesses sufficient funds to pay benefits, the next most recent employer cannot be named as the responsible operator, and liability falls on the Director as the administrator of the Trust Fund. 20 C.F.R. §725.495(a)(4).

Employer argues the Trust Fund is liable because Patriot should be considered Claimant's last employer, was authorized to self-insure, and no longer possesses sufficient funds to meet its liabilities. Employer's Brief at 27-31, *citing* 20 C.F.R. §725.495(a)(4); 20 C.F.R. §725.494(e). As the ALJ recognized, however, Claimant retired fourteen years before Patriot was created and thus never worked for Patriot. Decision and Order at 22. Thus, 20 C.F.R. §725.495(a)(4) cannot apply by its unambiguous language. The ALJ properly found Employer meets the requirements for liability under the Act: Eastern, a mine operator, employed Claimant as a miner for one year or more; Claimant was not employed by any other potentially liable operator after Eastern; and Eastern was self-insured through Peabody Energy during Claimant's employment with it at the relevant time. Decision and Order at 17-22. Employer identifies no error in these findings. *Cox v. Director*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, 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 for Claimant's benefits. Decision and Order at 22; 20 C.F.R. §§725.494(e), 725.495(a)(3).[17]

Two additional arguments – (1) the DOL violated its due process rights by not maintaining adequate records with respect to Patriot's bond, and (2) the ALJ was required to find the DOL exhausted Patriot's bond before Peabody Energy could be held liable –

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> 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.

[17] Employer also argues the Director failed to comply with its duty to monitor Patriot's financial health. Employer's Brief at 31-33. As Employer has not established that Patriot is liable in this case and relies on evidence properly excluded from the record, we need not address its argument.

are without merit for the same reasons. Employer's Brief at 13-19. As to this latter argument, the ALJ correctly determined Employer presumes Patriot is the responsible carrier in this claim. Decision and Order at 19. She permissibly determined Employer's contention is misplaced, however, because the issue before her involved the identification of Eastern as the potentially liable operator to last employ Claimant and whether it was financially capable of paying benefits through its self-insurer. 20 C.F.R. §§725.494(e), 725.495(a)(1); Decision and Order at 19. As previously indicated, the ALJ permissibly found Employer satisfied those criteria. Decision and Order at 18.

**Equitable Estoppel**

Employer argues it should be relieved of liability under the doctrine of equitable estoppel. Employer's Brief at 33-43. 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. *Premo v. U.S.*, 599 F.3d 540, 547 (6th Cir. 2010); *Reich v. Youghiogheny & Ohio Coal Co.*, 66 F.3d 111, 116 (6th Cir. 1995). Affirmative misconduct is "more than mere negligence. It is an act by the government that either intentionally or recklessly misleads. The party asserting estoppel against the government bears the burden of proving an intentional act by an agent of the government and the agent's requisite intent." *See U.S. v. Mich. Express, Inc.*, 374 F.3d 424, 427 (6th Cir. 2004); *see also Reich*, 66 F.3d at 116.

Employer again alleges that the Director released Peabody from liability "through a hold harmless agreement" and did so "without securing proper funding by Patriot." Employer's Brief at 35-39. It argues this release constitutes affirmative misconduct. *Id.* Employer, however, identifies no admissible evidence establishing the DOL released Peabody Energy from liability, or made a representation of such a release. Thus, the ALJ properly rejected this argument. Decision and Order at 23; *see Premo*, 599 F.3d at 547; *Reich*, 66 F.3d at 116.

Finally, as the Director correctly asserts, Employer does not allege the DOL acted either intentionally or recklessly. Director's Brief at 16-31; *see Mich. Express, Inc.*, 374 F.3d at 427; *Reich*, 66 F.3d at 116. The ALJ found "there is no evidence in the record whatsoever regarding the intent of the Department or those acting on its behalf." Decision and Order at 23. Employer does not challenge this finding and thus we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). In light of this finding, the ALJ rationally concluded "Employer certainly has not established that the Department intended Peabody [Energy] to rely on its actions to Peabody [Energy]'s detriment." Decision and Order at 23; *Mich. Express, Inc.*, 374 F.3d at 427; *Reich*, 66 F.3d at 116. Because Employer failed to establish the necessary elements, we affirm the ALJ's rejection of Employer's

equitable estoppel argument.[18]

For the foregoing reasons, we affirm the ALJ's determination that Employer is liable for this claim.

Accordingly, the ALJ's Decision and Order Awarding Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD

[18] Employer states it preserves its "ability to challenge" Black Lung Benefits Act (BLBA) Bulletin No. 16-01 as an invalid rule because it contradicts liability rules under the BLBA; it was issued without notice and comment; and it violates the Administrative Procedure Act. Employer's Brief at 45. BLBA Bulletin No. 16-01, which the DCMWC Director 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. Apart from one sentence summarizing its arguments, Employer has not set forth sufficient detail to permit the Board to consider the merits of the issues identified. *Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b). Whether Employer has adequately preserved the issues for appellate review is a matter for a federal circuit court to decide, should Employer appeal. *See Arch Coal, Inc. v. Acosta*, 888 F.3d 493 (D.C. Cir. 2018) (employer must exhaust its administrative remedies before seeking appellate review of BLBA Bulletin No. 16-01); *Jones Brothers v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018) ("to acknowledge an argument is not to make an argument").

Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring:

I concur with my colleagues' decisions to affirm Claimant's entitlement to benefits and the ALJ's liability determination. I write separately, however, to express my view that, even if the Director and Claimant did not properly invoke Employer's noncompliance with the BLBA's mandatory claim processing regulations, *Fort Bend County v. Davis*, 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.

Employer argues district directors are similar to the Securities and Exchange Commission ALJs the Supreme Court held in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018) are inferior officers 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 2-8. Employer also argues district directors issue binding orders and compel the production of documents by subpoena, thus "critically [shaping] the administrative record." *Id*. at 5. Finally, it alleges the district director's role as "final decision-maker" generally creates "an Appointments Clause issue." *Id*. From this, Employer concludes *Lucia* establishes district directors as inferior officers subject to the Appointments Clause, and it asserts the case must be remanded and reassigned to a properly appointed district director. *Id*. at 8.

I agree with the Director, however, that a more accurate examination of their authority reveals district directors instead perform "routine administrative functions." Director's Brief at 20. They do not have "significant adjudicative" capacity, possessing none of the four powers *Lucia* held make ALJs akin to federal district court judges. *Id*. Moreover, the regulations cabin 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 must be appointed by the head of an agency. *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).[19]

Two features determine officer status under the Appointments Clause: holding a continuing position established by law and exercising "significant authority" pursuant to it. *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 they hold continuing positions, the *Lucia* Court identified four powers agency ALJs 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. *Id.* at 2049 (citation omitted). A "point-by-point" analysis reveals district directors meaningfully possess none of these expansive adjudicatory powers. *Id.* at 2053.[20]

*First*, black lung district directors never conduct formal hearings. Thus, as the Director notes, the paramount factor the *Lucia* Court found to justify officer status, the authority to hold an adversarial hearing, "is simply missing from the district director's job duties." Director's Brief at 22-23. The remedy the *Lucia* Court fashioned for an Appointments Clause violation -- a new hearing before a properly appointed ALJ -- demonstrates the vital significance the Court ascribed this missing adjudicatory function. 138 S.Ct. at 2055. Indeed, the Court's opinion may be read to implicitly approve of this as the dividing line, as it mentions that SEC ALJs and U.S. Tax Court STJs both oversee hearings no fewer than *five* times.

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[19] Notably, the distinction in authority possessed by district directors and ALJs 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 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).

[20] The Director, Office of Workers' Compensation Programs (the Director), concedes that black lung district directors hold "a continuing office established by law," satisfying the first feature. Director's Brief at 21-22 n.12.

*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 ALJ).

*Third*, district directors do not "critically shape" the administrative record by making evidentiary rulings akin to administrative law 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, 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 Office of Administrative Law Judges (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 until 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 will not be developed until the formal ALJ hearing, 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 administrative law judge.").

*Fourth*, district directors do not enforce compliance with discovery orders like administrative law or federal district court judges. No formal discovery takes place before them, only "informal discovery proceedings." 20 C.F.R. §725.351(a)(2). And the district director's "enforcement" power in those limited proceedings is not "especially muscular" -- having nothing remotely similar to "the nuclear option" federal courts possess "to toss malefactors in jail," or "the conventional weapons" to sanction wielded by ALJs. *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 her case and is predicated on a district director first notifying the claimant and giving her an opportunity to cure the defect. 20 C.F.R. §725.409(b). Moreover, any dismissal order may be reviewed by an ALJ. 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).[21]

[21] 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 imposed by a district director is subject to review by an ALJ, 20 C.F.R. §725.413(e)(4), and the possibility parties receive medical information before the claim is

Unlike Department of Labor ALJs, the four factors 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 judges: 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. Commissioner*, 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 as among the small category of inferior officers. *Id.* at 2052 (holding no reason existed 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 the claim-processing duties of designating a responsible operator and making preliminary entitlement findings transform district directors into inferior officers similarly is without merit. Regulations control district directors' ability to issue binding decisions on those issues, subject to layers of agency 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 in front of an ALJ, appeal a final ALJ's decision to the Board, and appeal a final Board order to a U.S. court of appeals) (citations omitted).

*First*, district directors lack independent discretion in designating responsible operators given the comprehensive regulatory scheme. Evidence relevant to a responsible operator designation must be initially submitted to the district director to streamline administrative proceedings by restricting the district director's authority. 65 Fed. Reg. at 79,990. As the Director notes, "the district director gets only one chance at identifying the liable operator; the goal of the rule is to allow the district director to make the most informed choice possible, but also to limit the district director's discretion." Director's Brief at 24. If the district director chooses incorrectly, the Black Lung Disability 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

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transferred to the Office of Administrative Law Judges mandates the requirement. 20 C.F.R. §725.413(c).

of Additional Evidence with 30 additional days for submission of rebuttal evidence). These programmatic constraints show the district director lacks significant independent authority in claims processing relevant to the responsible operator designation.[22]

*Second*, the district director's ability to resolve either responsible operator status or entitlement issues with finality depends largely on the power to persuade rather than on any programmatic 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 or revision. 20 C.F.R. §725.419(d). And, most fundamentally, the district director's PDO findings do not constrain ALJ oversight in any way: *they review all issues de novo*. 20 C.F.R. §725.455(a).

Ultimately, 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. Indeed, both the Supreme Court and the United States Court of Appeals for the Ninth Circuit have recently emphasized the Secretary's control over BRB members as checking agency authority in the layers above district directors. *U.S. v. Arthrex*, 594 U.S. , 141 S. Ct. 1970 (2021). (noting BRB 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 BRB decision: "the BRB has ample control over DOL ALJs, and the President, in turn, has direct control over BRB members through the Secretary of Labor.").

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

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[22] Moreover, as the Director notes:

> The rule that prohibits ALJs from dismissing the named operator without the Director's consent, 20 C.F.R. §725.465(c), does not expand the district director's power in any way. The rule is intended to prevent a premature dismissal of the named operator; it does not give the district director "veto power over an ALJ's decision" but "simply protects the interests of [the Black Lung Disability 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)].

Director's Brief at 24 n.14.

-- subject to de novo review by an ALJ and further review by the Board and the federal courts of appeals -- independently transform them. Accordingly, whether or not the Director properly invoked Employer's noncompliance with the BLBA's mandatory claim processing regulations, *Fort Bend County v. Davis*, 139 S. Ct. 1843 (2019), I 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